
(2018) 12 RAJ CK 0270

In the Rajasthan High Court

Case No : Criminal Appeal No. 856 Of 2006, 675 Of 2007, 7892 Of 2013

Ajijur Rahman And Ors

APPELLANT

Vs

State Of Rajasthan And Ors

RESPONDENT

Date of Decision : 06-12-2018

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 8, 21(B), 22(c), 35, 41(2), 42, 44, 52, 52(2), 53(2), 55, 57, 67
Evidence Act, 1872 — Section 24, 25, 26, 27
Code Of Criminal Procedure, 1973 — Section 437A

Citation : (2018) 12 RAJ CK 0270

Hon'ble Judges : Prakash Gupta, J

Bench : Singal Bench

Advocate : Vinay Pal Yadav, Tej Prakash Sharma, Vinay Pal Yadav

Judgement

1. Criminal Appeal No.892/2013 has been preferred by Ajijur Rahman aggrieved by judgment and order dated 23.8.2013 passed by Special Judge, NSPS cases, Ajmer in NDPS Case No.01/2004 whereby appellant has been convicted for offence under Section 8/22 (C) and Section 8/21 (B) of NDPS Act and has been sentenced to 10 years rigorous imprisonment and fine of Rs.1 lac and on non-payment of fine to further undergo two years rigorous imprisonment, for offence under Section 8/22 (C) of NDPS Act and has been sentenced to five years rigorous imprisonment and fine of Rs.1 lac and on non-payment of fine to further undergo two years rigorous imprisonment for offence under Section 8/21 (B) of NDPS Act. It was also ordered that both sentences will run concurrently.

2. Criminal Appeal No.856/2006 has been preferred by Roop Kumar Substain Pilley, Shri Peeramani Pilley, Kumar Naini Tambi and Smt.Basanti Pilley aggrieved by judgment and order dated 16.6.2006 passed by Special Judge, NDPS cases, Ajmer in NDPS Case No.01/2004 whereby Roop Kumar Substain Pilley, Shri Peeramani Pilley, Kumar Naini Tambi and Smt.Basanti Pilley have been convicted for offence under Section 8/21 of NDPS Act and all have been sentenced to 15 years rigorous imprisonment and fine of Rs.1 lac and on non-payment of fine to

further undergo six months additional rigorous imprisonment.

3. Learned Court below has acquitted accused-Ratannam Krishnamurti Chillapa and Radhey Shyam aggrieved by which Union of India has preferred Criminal Appeal No.675/2007.

4. As all the appeals pertain to NDPS Case No.01/2004, the same are being decided by this common judgement and order.

5. In brief the factual matrix of the case are that Mahendra Singh-PW1 received a secret information on 12.07.2003 upon which house of Ajijur Rehman was searched and contraband recovered. Statement of Ajijur Rehman was recorded and on the basis of his statement that he had sold 5 Kg of heroin on 11.7.2003 to Roop Kumar and his associates and that they would be going from Ajmer to Mumbai via Pushkar in Fiat Car No.MRH- 6103. A team was constituted on 13.7.2013, a Fiat Car bearing Registration No.MRH-6103 was stopped, it was brought to the Base-Camp and on search 5 kg.125 gms. of heroin was found beneath the back seat.

6. Statement of the accused were recorded under Section 67 of the Act. After recording of the statement of all the appellants, they were arrested, information of which was sent to the Senior Officers.

7. Narcotics Control Bureau after investigation submitted charge-sheet against the appellants. Appellant-Ajijur Rehman remained absconding, at the time of disposal of the case on 16.6.2006 the Court below acquitted Ratannam Krishnamurti Chillapa and Radhey Shyam for offence under Section 8/21 of NDPS Act but convicted the appellants No.1 to 4 of Criminal Appeal No.856/2006. Aggrieved by which appellants have preferred Criminal Appeal No.856/2006 and against acquittal Union of India has preferred appeal No.675/2007.

8. Appellant-Ajijur Rehman was thereafter arrested and he stands convicted and sentenced vide judgment and order dated 23.8.2013 aggrieved by which he has preferred Criminal Appeal No.892/2013.

9. It is contended by the counsel for the appellants that there are numerous lapses on the part of prosecution. As per notification dated 17.11.1993 secret information is required to be sent to Deputy Director within 24 hours, but the same was not sent. It is also contended that owner of the house was not produced by the prosecution and was produced in defence as DW2 by the appellants. Address in Ex.P1 is mentioned as C-3, Panchsheel Nagar, Maakadwadi Road, Near Stephen School, Ajmer which is a wrong address. The correct number of house is S-3.

10. It is also contended that Mahendra Singh PW1 has stated in his evidence that he found a lady during search and seizure procedure, she was neither produced as a witness nor examined nor was searched. It is argued that the contraband was not in exclusive possession of the appellant. Reliance in this respect has been placed on State of Punjab Vs. Malkait Singh (2009 (12) SCC 303), Om

Prakash alias Baba (2009 (10) 632), State of Punjab Vs. Balkar Singh & anr. (2004 (3) SCC 582), Avtar Singh & ors. Vs. State of Punjab (2002 (7) SCC 419).

11. It is also contended that notice Ex.D5 was given to the Collector by the Zonal Director for providing independent witness for search. It is contended that the letter was received by the Collector's office on 14.7.2003. The independent witness thus was not provided by the Collector as claimed by the prosecution. It is also contended that independent witness Suresh Kumar Sindhi- PW3 and Chitrang Singh-PW4 did not identify the accused in Court.

12. It is also contended that the Court below has erred in placing reliance on the statement recorded under Section 67 of NDPS Act.

The statements were recorded after arrest, notice was given for appearing before the officer at 11.45 p.m. on 12.7.2003 but the statement was recorded prior to that time at 11.15 p.m. as per Ex.P22. It is contended that the statements were recorded while the accused was in custody and such statement cannot be read against the accused. Reliance in this regard is placed on Arun Kanungo Vs. D.Pakynitein (2009 Cr.L.J. 3972).

13. Yet another discrepancy pointed out is that the samples which were drawn has a variance in weight with the samples which were received by FSL. As per seizure memo 5 gm, sample from smack and 10 gm from Diazepam was taken, whereas as per Ex.P84 the sample which was received weighed 2.9 gm. and 2.6 gm for smack and as per Ex.P.86 the sample weighed 7.7 gm. and 8.4 g.m. for diazepam. In this regard reliance has been placed on Rajesh Jagdamba Avasthi Vs. State of Goa (2005 (9) SCC 773 & Pappu son of Shri Gulab Chand vs. State of Rajasthan through PP (2006 (3) WLC Raj.609).

14. It is also contended that the contraband remained with the Seizure Officer from 12.7.2003 to 15.7.2003 which is evident from statement of PW6 Malkhana Incharge and Ex.P77. There is every likelihood of sample being tampered by the Seizure Officer as there was no justification for keeping the contraband and the samples in his custody for three days.

15. Appellants Smt.Basanti Pilley and Peeramani Pilley had expired during pendency of appeal. Appeal of Peeramani Pilley was abeted vide order dated 2.12.2014. Since appellant-Smt.Basanti Pilley has also expired, her appeal stands abeted.

16. Learned counsel appearing for NCB has opposed the appeals. His contention is that there is presumption under Section 35 of the Act and when there is transportation of heroin with conscious mind and full knowledge, accused is required to discharge the burden of proof to rebut the presumption under Section 35 of the Act. Reliance has been placed on Karnail Singh Vs. State (2004) Crimes 53 (SC).

17. It is contended that the standing orders and instructions issued by the Central Government requiring a particular procedure to be followed for drawing

of samples are merely intended to guide officers to see that a fair procedure was adopted by officer incharge of investigation and the same cannot thus be considered to be binding and accused cannot be acquitted on account of lapses in following the instructions. Reliance in this regard has been placed on State of Punjab Vs. Makhan Chand (2004) (2) Supreme 497.

18. It is also contended that provision of Sections 52, 55 and 57 of the Act are directory and not mandatory and when the provisions are substantially complied with conviction calls for no interference. In this regard reliance has been placed on Babubhai Odhavji Patel Vs. State of Gujarat (2005 (7) Supreme 691).

19. It is further contended that a small contradiction here and there about the timings of preparation of Test report, could not make the testimonies of the witnesses doubtful and minor discrepancies are very natural to occur in testimony of witnesses.

In this regard reliance has been placed on Sidhhiqua Vs. NCB (2007 CrL.J.1471).

20. With regard to variance in weight of the samples, counsel has placed reliance on Shankar Lal Vs. State of Rajasthan (2002 (1) R.C.C.83) and Bhanwar Singh Vs. Union of India (2006) CrL.J.3585).

21. It is also contended that an accused can be convicted solely on the statement recorded under Section 67 of the Act. In this regard reliance has been placed on Husen Bhenu Malad Vs. State of Gujarat (2003) Cri.L.J. 5070.

22. I have considered the contentions of counsel for the parties and have perused the record and the judgment and order passed by the Court below.

23. I deem it proper to first deal with the earlier judgment and order dated 16.6.2006 vide which appellants of Criminal Appeal No.856/2006 have been convicted and sentenced.

24. As per prosecution version, Ajijur Rehman in his statement under Section 67 of the Act, gave information that he has sold 5 kg. of heroin to Roop Kumar and his associates who had come from Mumbai in a Fiat Car. As per Ex.P22 statement of Ajijur Rehman started at 23.15 hours on 12.7.2003 and continued till 1.15 a.m. on 13.7.2003. After giving him rest his statement continued on next date i.e. 13.7.2003 at 7.30 a.m. and continued till 12.30 a.m.

25. A team was constituted on 13.7.2003 and at 00.15 the team proceeded to seize the vehicle. As per Ex.P1 the initial secret information was received at 12.00 in the afternoon of 12.7.2003 that some persons have proceeded from Mumbai to receive heroin from Ajijur Rehman. In the said information there was nothing with regard to delivery of heroin to the passengers of Fiat Car. The information which was received with regard to heroin being supplied to Roop Kumar and the passengers of the vehicle was not recorded but the office order drawn for constituting the team dated 13.7.2003. Ex.P-28 mentions that as per Ajijur Rehman's statement the persons to whom he sold 5 kg. of heroin are likely

to leave towards Pushkar, on the basis of this office order dated 13.7.2003, Ex.P-28, a team was constituted and the vehicle was nabbed. Now coming back to the statement of Ajijur Rehman Ex.P-22 which was recorded at 23.15 hours and continued at 01.30 a.m. on 13.7.2003 it is revealed that he did not make any mention of supplying 5 kg. of heroin to Roop Kumar or passengers of the vehicle. His statement again started on next day i.e.13.7.2003 at 7.30 a.m. after giving period of rest and in that statement he mentions that he has supplied 5 kg. of heroin to Roop Kumar Substain and his associates. There is no mention about any information with regard to supplying of 5 kg. of heroin to Roop Kumar Substain in the statement recorded on 12.7.2003.

Hence, the office order wherein it is mentioned that information has been received from Ajijur Rehman appears to be cooked up by NCB team.

26. Yet another glaring fact is that none of the witness has stated the time when the car was nabbed, they have merely mentioned that the team proceeded from the NCB Camp at Ajmer towards Beawar and the car was nabbed at the distance of 48 kms. As per the statement they proceeded towards Beawar they found a car coming towards Beawar and the Car was stopped. It is not the case of the prosecution that they were on the highway and were stopping cars to verify the Registration Number of the vehicle. If the prosecution version is to be believed, it implies that they were following the vehicle and for nabbing the vehicle which is ahead of the team, the same is possible only when the pursuing vehicle drives at a speed much more than the vehicle running ahead. If the vehicle is nabbed at a distance of 48 kms., the team must have reached the place where the vehicle was stopped within maximum 30 minutes. This Court is trying to pin point the time when the vehicle was nabbed as there is no evidence with regard to the time when the vehicle was stopped and seized. As per a reasonable time schedule the vehicle was nabbed before 1.00 a.m. on 13.7.2003.

27. The vehicle was brought to the Base-Camp at 6.30 a.m.

There is no explanation as to why it took more than five hours to bring the vehicle from the place where the vehicle was nabbed to the Base Camp which was at a distance of 48 kms. Prosecution witnesses have admitted that they maintained movement register but the same was not produced before the Court for establishing the movement of the raiding party. PW2-Takhat Singh has admitted in his cross-examination that no site plan was prepared of the place where vehicle was stopped. Witness also stated that he did not take any steps to make any independent witness. The witness has also stated in his cross examination that none of the appellant is owner of the vehicle. Hence, the prosecution story that the vehicle was nabbed from the Highway is doubtful.

28. The office order Ex.P-28 is dated 13.7.2003 and in the order itself it is mentioned that the team was directed to move latest by 00.30 hours on 13.7.2003, it is evident that this office order was issued somewhere between 00.00 hours and 00.15 hours on 13.7.2003 as the team proceeded at 00.15

hours. By that time there was no statement of Ajijur Rehman with regard to supplying the illicit heroin to passengers of the vehicle. Office order dated 13.7.2003 also appears to be made up.

29. As per Section 57 of the Act whenever any person makes any arrest or seizure under this Act he shall within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his official superior. As per sub-section (3) of Section 52 of the Act, every person arrested and article seized under sub-section (2) of Section 41, Section 42 or Section 44 shall be forwarded without unnecessary delay to the officer-in-charge of the nearest police station, or the officer empowered under Section 53 of the Act. The seized articles were never forwarded to the officers empowered under Section 53 of the Act. Both Sections 42 and 53 used the terminology "shall" and the Act being very stringent, the provisions ought to be followed strictly.

30. Takhat Singh has further admitted that when the articles were deposited with the 'Malkhana' Incharge the sample seal was not mentioned in it and that he even did not sign the Malkhana register while depositing it in the 'Malkhana'.

31. Now coming to the case of Ajijur Rehman it has come out in the evidence that the house was searched and the contraband was seized on 12.7.2003. Appellant-Ajijur Rehman was given notice for recording of evidence and he was directed to appear before the Officer at 11.45 p.m. on 12.7.2003 but from the statement recorded under Section 67 of the Act it is revealed that his statement was recorded at 11.30 p.m. on 12.7.2003. His statement after giving him rest continued on the next day and was recorded from 7.30 to 12.15 p.m. As to whether appellant was in custody and his statement would be hit by Section 25 of the Evidence Act, prosecution has contended that the accused was not in custody. Ex.P-24 is the intimation sent to Smt.Haleena Fatima wife of Ajijur Rehman regarding intimation of his arrest. This document is exhibited by PW1. As per statement of PW1- Mahendra Kumar, Ajijur Rehman was arrested at 12.30 a.m. on 13.7.2003 vide Ex.P-23 information of arrest was sent to his wife vide Ex.P-24. It is pertinent to note that the information with regard to arrest was given at 10.16 a.m. on 13.7.2003, whereas arrest is shown at 12.30 p.m. Statement of Ajijur Rehman continued till 12.15 p.m. as per Ex.P-22. The fact that information regarding arrest was sent at 10.16 a.m. clearly goes to show that the statements of Ajijur Rehman was recorded while he was in custody. Hence, the contention of the counsel for N.C.B. that on the basis of statement recorded under Section 67 of the Act the accused can be convicted can not be accepted. It is established from the documents that the statements were recorded when Ajijur Rehman was in custody. Hence, his statement would thus be hit by Section 25 of the Evidence Act.

32. In "Kanhaiyalal Vs. Union of India," AIR 2008 SC 1044, Apex Court held that the provisions relating to statements made during inquiry under the NDPS Act attract the provisions of the Evidence Act. It was further held that when a person is called upon to provide any information at the stage of inquiry, person

concerned is not an accused but on the basis of the statement made by him, he could be made an accused subsequently. What is important is whether the statement made by the person concerned is made during inquiry prior to his arrest or after he had been formally charged with the offence and made an accused in respect thereof. As long as such statement was made by the accused at a time when he was not under arrest, the bar under Sections 24 to 27 of the Evidence Act would not operate, it is only after a person is placed in the position of an accused that the bar imposed under the Evidence Act will come into play. Further, the Apex Court in "Noor Aga Vs. State of Punjab & Anr." (2008) 16 SCC 417, held that the Act is a complete Code by itself, the Custom Officers who have been clothed with the powers of Police Officer by reason of special statute in terms of Sub-Section (2) of Section 53 of NDPS Act be deemed to be Police Officer and for the said purposes, Section 25 of Evidence Act shall be applicable.

33. Now coming to the question of contraband not being deposited within reasonable time and the fact that there was difference in weight in the samples which were drawn and the samples which were received at FSL, the samples in this case were drawn on 12.7.2003 with regard to contraband seized from the premises of Ajijur Rehman and on 13.7.2003 with regard to Heroin which was recovered from the Car at the NCB Camp.

34. The fact that the seals were not deposited with the 'Malkhana' creates doubt on the genuinity of the seizure.

35. The samples which were taken from the house of appellant- Ajijur Rehman were sent to FSL the samples were weighing 5 gms. each, the samples received in the Laboratory weighed 5 gm, 5.5 gm, 7.2 gm, 4.9 gm and 4.8 gm. Out of the samples drawn from the Car two samples of 10 gms of Methaqualone/ Diazepam were sent by Test memo Ex.P-86, the weight as received at Laboratory was 7.7 and 8.4 gms. Sealed envelop containing samples of Methaqualone/ Diazepam weighing 10 gms. got reduced to 7.3 gms when it reached the Laboratory. Thus, there was increase and decrease in the weight of the samples.

Prosecution has failed to adduce any evidence to justify the change in weight including reduction and increase in weight of the samples. Reduction and increase in weight creates doubt in the proceedings conducted by the Officers of NCB. Learned Court below has mentioned that there was reduction in weight by only .1 gm., which fact is contrary to record. The Court below has failed to refer to the Ex.P-74 and Ex.P-84 where increase and reduction in weight by more than 2 gms. is specifically mentioned. Chances of changing the samples cannot be ruled out as the samples were dispatched on 15.7.2003 but were received in the Laboratory on 17.7.2003. There is no evidence that the samples were kept in safe custody for these two days. The chances of seals being used by the Investigating Officer cannot be ruled out as the seals were kept by the Investigating Officer and were not destroyed or deposited with the Malkhana.

36. The contention of counsel for the appellants that the contraband remained

with the Seizure Officer from 12th to 15th July, 2003 as is evident from Ex.P-86 Malkhana Register and Ex.P- 87, goes to the root of the matter. There appears to be no justification for keeping the contraband and the samples in custody of the Seizing Officer for three days. The chances of samples being tampered by the Seizure Officer cannot be ruled out more particularly when there is variance in the weight between the samples drawn and the sample received at the FSL.

37. Panchnama Ex.P-48 was prepared from 7.00 to 12.00 a.m.

As per Panchnama which was prepared prior to arrest, information was given by Roop Kumar that the vehicle is containing Heroin and he personally opened the seat cover and handed over the packets containing Heroin. All the other persons were also interrogated by the Seizing Officer and samples were drawn after seizure of the contraband. Roop Kumar Substain and the persons who are shown to be in the Car were apprehended on night of 12.7.2003. They were brought with the vehicle to the NCB Camp. They remained in the NCB Camp till their formal arrest. The appellants were not persons as contemplated in Section 67 of the Act but were accused. Hence, giving of notice under Section 67 of the Act, then recording of statement and then formal arrest are all eye wash and an attempt to take the benefit of Section 67 of the Act for bringing home the conviction. Hence, they are deemed to be in custody and Section 25 of the Evidence Act would be attracted.

38. Yet another infirmity which is evident from the perusal of the record is that the seals with which samples and articles were sealed were not deposited in the Malkhana. PW1-Mahendra Singh and PW2-Takhat Singh have not given any evidence with regard to the deposit of seal in the Malkhana. Placing of seal on the sample has a very important role in cases under NDPS Act. If seal has remained with the Investigating Officer chances of misuse of seal cannot be ruled out. The factum of increase and decrease in weight of sample coupled with the fact that the seals were not deposited create doubt in the prosecution case, benefit of which would go to the accused.

39. Narcotic Control Bureau is constituted for controlling drug trafficking and the Officers posted therein are presumed to know the law and to apply the law strictly. Sending intimation of arrest to relative of the accused and preparing the arrest memo thereafter with the purpose of showing that the statements under Section 67 of the NDPS Act were recorded prior to arrest, preparing of office order mentioning therein that Ajijur Rehman has given statement with regard to selling of heroin to Roop Kumar and his associates is not tallying with the statements of Ajijur Rehman. Fact of selling heroin to Roop Kumar appears for the first time in the statements recorded between 7.30 a.m. to 12.30 p.m. when Ajijur Rehman was in custody on 13.7.2003 constituting a team between 00.00 to 00.15 a.m. on 13.7.2003 is thus based on factually incorrect ground, the fact that statement of Ajijur Rehman was recorded while he was in custody as is evident from the intimation sent to his wife after his arrest, fact that the samples remained with the Seizure Officer for three days, fact that there was reduction

and increase in weight of samples within few days of the seizure, fact that the seals were not deposited in Malkhana, all pin point to the faulty investigation conducted by NCB. In addition there is non-compliance of provisions of NDPS Act, in totality, prosecution has not been able to prove the offence beyond reasonable doubt and accordingly the judgments and orders deserve to be and are quashed and set set aside.

40. In the result, Criminal Appeal No.892/2013 and Criminal Appeal No.856/2006 are allowed. The judgments and orders 23.8.2013 and dated 16.6.2006 are quashed and set aside. Appellant-Ajijur Rehman son of Fajlur Rehman is in custody, he be released forthwith if not wanted in any other case.

Appellants-Roop Kumar Substain and Kumar Naini Tambi are on bail, their bail bonds are cancelled.

41. Criminal Appeal No.675/2007 filed by Union of India is dismissed.

42. Appellants are directed to furnish personal bond in the sum of Rs.20,000/- and a surety bond in the like amount in accordance with Section 437-A of Cr.P.C. before the Registrar (Judicial) within two weeks from the date of release to the effect that in the event of filing of Special Leave Petition against these judgments or on grant of leave, the appellants on receipt of notice thereof, shall appear before the Hon'ble Apex Court. The bail bond will be effective for a period of six months.

43. Copy of this judgment be placed in the connected files.

44. Record of the trial Court be returned forthwith.