

**(2009) 12 DEL CK 0042**

**In the Delhi High Court**

**Case No : Criminal Appeal No. 202 of 2003**

Karma Phuntsok and Others

APPELLANT

Vs

N.C.B.

RESPONDENT

**Date of Decision : 09-12-2009**

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 313, 428

Evidence Act, 1872 — Section 25

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20, 29, 35, 50, 54

**Citation : (2009) 12 DEL CK 0042**

**Hon'ble Judges : A.K. Pathak, J**

**Bench : Single Bench**

**Advocate : Neelam Grover, for the Appellant; Nemo, for the Respondent**

**Final Decision : Dismissed**

## **Judgement**

A.K. Pathak, J.—Appellant No. 2, namely, Narendra Bodh along with other appellants and one Wu Yen La was convicted u/s 29 read with Section 20(b)(ii) (c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short hereinafter referred to as "Act") for having entered into a conspiracy, to illegally acquire, possess and transport 51.8 kgs of hashish. So far as Wu Yen La is concerned, he was also convicted u/s 20(b)(ii)(c) of the Act. Appellant No. 2 was sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs. 1,00,000/- and in default of payment of fine, to further undergo SI for six months. Benefit u/s 428 Cr.P.C. was also given. Appellant Nos. 1, 3, 4 and Wu Yen La were also sentenced, details whereof need not to be referred herein, as present appeal survives only in respect of appellant No. 2.

2. Appeal qua the appellant Nos. 1, 3 and 4 was dismissed for non-prosecution on 6th November, 2006.

3. Brief facts of the case are that Shri D.C. Mishra, Superintendent, Narcotics Control Bureau, Delhi (for short hereinafter referred to as "NCB") received a

secret information on 19th December, 1997 that some persons having features of hill area, would be coming to New Delhi Railway Station to receive two persons, coming from Calcutta by the Poorva Express Train at about 8:00 am, carrying drugs. This information was reduced in writing and put up before Zonal Director of NCB, namely, Shri Mukesh Khullar. Thereafter, a team headed by PW-2 Shri D.C. Mishra was formed and reached New Delhi Railway Station towards Ajmeri Gate side. Team was divided in two parts for keeping surveillance in the parking area on both the sides of the Railway Station.

4. At about 8:30 am some persons, having features of hill area, arrived in two cars, which were parked in the parking area towards Ajmeri Gate side. Thereafter, the persons sitting in the car went inside the Railway Station. At about 9:00 am they came out along with two more persons, out of whom one was female. Luggage was put in white Maruti Van bearing No. DL 8CC 4970. Two persons sat in green colour Cielo car and three male and one female occupied the aforementioned Maruti Van. At that stage, officials of NCB intercepted them.

5. Names of the occupants sitting in Maruti Van were disclosed as Narendra Bodh, Wu Yen La, Tuan Hsiao Ling, Karma Phuntsok. The names of persons sitting in Cielo car were disclosed as Tenpa Dhargyal and Sharap Gyaltzen. Notice u/s 50 of the Act was jointly served on all the accused persons as well as on Ms. Tuan Hsiao Ling. They were asked, whether they desired their search and the search of their luggage, to be conducted before a Gazetted Officer or a Magistrate. Accused persons answered that they could be searched by anyone. Nothing incriminating was recovered from their personal search. Nothing was recovered from the Cielo car.

6. There were five luggage pieces in Maruti Van in which accused Narendra Bodh along with Wu Yen La, Karma Phuntsok and Ms. Ling were sitting. Out of these five luggage pieces, nothing was recovered from three luggage pieces, however, on examination of the other two suitcases i.e. red and green colour respectively, two packets each wrapped in white foam sheets and pasted with brown coloured tape, were recovered. All the four packets were opened and it was found to be containing black coloured substance in stick, cylindrical, tablet and other shapes, wrapped in polythene. Small quantity of the recovered substance from all the four packets was tested with the Drug Testing Kit which tested positive for charas. Recovered substance was weighed separately and the total weight came out to be 51.8 kgs. Two sets of samples were drawn and sealed with the seal of NCB. Recovered quantity of contraband was also sealed with the seal of NCB.

7. Panchnama was prepared at the spot and signed by the members of the team and two independent public witnesses. Statement of appellant No. 2 as well as of the co-accused were recorded u/s 67 of the Act. Accused were arrested. Report u/s 57 of the Act was sent to superior officers of NCB. In their statement u/s 67 of the Act, appellant No. 2 as well as other accused disclosed that they knew each other and were acting in concert with each other. The manner in which hashish was procured was also disclosed by them. According to them hashish was to be

sent to France through accused Wu Yen La. So far as Ms. Ling was concerned, NCB officials did not find any incriminating material against her as they were satisfied that she was having no knowledge about the accused being in possession of the contraband or of their intention to send it to abroad. Samples, which were deposited in Malkhana, were sent to CRCL for chemical analysis and its report was obtained. After completion of investigation, complaint was filed in the Court.

8. Charge u/s 29 read with 20(b)(ii)(c) of the Act was framed against appellant No. 2 on 1st May, 1998. Charges against other accused were also framed on the same day. Appellant No. 2 and his co-accused pleaded not guilty.

9. Prosecution examined fourteen witnesses to support their case. Shri D.N. Tyagi, Intelligence Officer, NCB was examined as PW1; Shri D.C. Mishra, Superintendent, NCB was examined as PW 2. PW3 Bobby is the independent panch witness. PW4 N. Mohanta, investigating officer, had deposed about the investigations carried out by him, as also about seizure of Ceilo Car. PW5 R.K. Kanwar had recorded statement of accused Tempa Dhargyal. PW8 Pramjeet, Senior Station Master had provided photocopy of reservation chart of Poorva Express to the NCB officials. PW9, S.P. Tripathi, had recorded statement of accused Karma Phuntsok. PW12, Vinod Kumar, Manager of Baljit Lodge, had produced the guest register pertaining to the relevant period. PW14 Harpreet, produced guest register, evidencing that co-accused Karma had stayed in Lytton hotel, Calcutta.

10. After prosecution concluded evidence, statements of appellant No. 2 and other accused were recorded u/s 313 Cr.P.C. on 23rd July, 2002. Entire incriminating material, which had come on record against appellant No. 2, was put to him. Appellant denied his complicity in the crime and claimed himself to be innocent. He stated that he had been falsely implicated. However, Appellant No. 2 did not lead any evidence in his defence.

11. I have perused the statement of material witnesses and find that they had fully supported the prosecution case, which has already been stated in brief, in the preceding paragraphs here in above. PW2 i.e D.C. Mishra was posted as Superintendent, NCB and was heading the raiding team. He has categorically deposed that on 19th December, 1997 he received information at his residence that some persons having features of hill area would be coming to New Delhi Railway Station on 20th December, 1997 to receive two persons, arriving from Calcutta by Poorva Express Train, carrying hashish with them. Information was reduced in writing (Ex. PW2/A) and was placed before PW10 Mukesh Khullar. On 20th December, 1997, he reached office at 6:15 am and constituted a raiding team. At about 7:00 am he along with other officials reached New Delhi Railway Station. Team was divided in two parts. Surveillance was kept on both sides of the Railway Station i.e. Paharganj side and Ajmeri Gate side. He was towards Ajmeri Gate parking area. He noticed two cars coming in the parking wherein persons having features of hill area were sitting. At that stage, he called his

other team members, who were present towards Paharganj side, to come Ajmeri Gate side parking. Persons sitting in the car went inside the Railway Station and after some time they came out along with two more persons out of whom, one was female. They were having some luggage with them which was kept in Maruti Van. Two persons, who had arrived by the train, sat in the Maruti Van along with two accused. Remaining two accused sat in green colour Cielo car. At that stage accused were intercepted. Names of persons sitting in Maruti Van was disclosed as Karma Phuntsok, Narendra Bodh (appellant No. 2), Wu Yen La and Tuan Hsiao Ling.

12. Notice u/s 50 of the Act, prepared by Shri D.N. Tyagi, PW1, was jointly served on all the accused. By this notice they were given option to get their search conducted in presence of Magistrate or Gazetted Officer. Nothing objectionable was recovered from personal search of the appellant No. 2. NCB officials also offered their search before starting search of the luggage. Nothing was recovered from the luggage kept in Cielo car. From the two suitcases kept in the Maruti Van, four packets each wrapped with brown colour tape were recovered. Two packets from each suitcase were recovered. On opening the packets, black coloured semi solid substance was recovered. It was in different shapes and sizes. On testing with Drug Testing Kit, it tested positive for hashish. Total weight of the recovered substances was found to be 51.8 kgs. Two samples each weighing 25 grams from the four packets were drawn and kept in separate envelopes and sealed. A paper slip, duly signed by all the accused two independent witnesses and NCB officials was pasted on the sealed envelopes. Remaining hashish was packed in their original packets and sealed. The above said suitcases were also seized. PW1 D.N. Tyagi prepared test memo in triplicate at the spot. Case property was deposited in Malkhana and necessary entries in the register were made. Relevant pages of the register containing entries were proved as Ex. PW2/H. Appellant No. 2 and other accused were arrested. Samples were forwarded to CRCL on 22nd December, 1997 for chemical analyses. Maruti Van as well as Cielo Car were also seized vide seizure memos Ex. PW2/E and PW2/F respectively. Relevant document, regarding sending of the sample to CRCL, was proved as Ex. PW2/C. Case property was exhibited as Ex. P1 to P33.

13. Testimony of PW1 was found to be trustworthy by the learned Special Judge, NDPS. No discrepancy in his testimony could be pointed out by the learned Counsel, during the course of arguments. I have perused his deposition and I also find it trustworthy and reliable. In my opinion, his testimony being trustworthy has rightly been occupied by the learned trial Judge. His testimony has been fully corroborated by the PW1 D.N. Tyagi, who was also one of the member of the raiding team.

14. PW10 Mukesh Khullar, Zonal Director, NCB, also corroborated PW1 and PW2. He deposed that on 19th December, 1997, PW2 D.C. Mishra informed him regarding the secret information and discussed the plan for conducting the raid at New Delhi Railway Station. PW10 has proved the above information as Ex.

PW2/A. He further deposed that NCB seal was handed over by him to PW1 D.N. Tyagi, Investigating Officer of the case, in the morning of 20th December, 1997 and seal was returned to him in the evening of 20th December, 1997.

15. PW1 D.N. Tyagi has categorically deposed that after issuing a notice to appellant No. 2 (Narendra Bodh) he recorded his statement u/s 67 of the NDPS Act on 20th December, 1997. Appellant voluntarily made the statement and admitted the recovery of contraband as also his involvement in procuring and transporting the same. Statement has been proved by him as Ex. PW1/O. PW1 also deposed that the appellant had identified photographs of other accused in his statement Ex. PW1/P. From the statement of PW1, I am satisfied that appellant No. 2 had made statement Ex. PW1/O voluntarily and without any pressure or coercion.

16. PW6 A. Alam, Assistant Chemical Examiner, CRCL, New Delhi deposed that on 22nd December, 1997 he received four samples in sealed condition from NCB. PW7 Dr. Y.K.S. Rathore, Chemical Examiner Grade I, CRCL supported this version of PW6 A. Alam. According to PW7, on chromatographic examination, each of the sample was found to be charas. Thus, it can be safely concluded that the contraband recovered was charas.

17. From the testimony of aforesaid witnesses, it is clear that the prosecution had succeeded in proving that appellant was sitting in white colour Maruti Van along with co accused Wu Yen La and Karma Phuntsok and on search of luggage lying in the same Van, 51.8 kg of charas was recovered. Appellant had failed to give any explanation of his being in company of other accused and as to how the contraband was present in the van. On the contrary, statement Ex. PW1/O shows that appellant had carried the contraband from Manali to Delhi where it was packed in two suit cases and thereafter taken to Calcutta and handed over to Wu Yen La for onward transmission to France. For some reasons, Wu Yen La could not do so and brought the suitcases containing contraband from Calcutta to Delhi by Poorva Express where appellant No. 2 along with co-accused had gone to receive him. After receiving Wu Yen La and Ms. Ling appellant along with other co-accused came in the parking lot and thereafter, sat in the Maruti Van when they were apprehended by the officials of NCB. Statement of appellant No. 2 recorded u/s 67 of NDPS Act, indicated that he had conspired with his co-accused in procuring, packaging and transporting of the contraband. In my view, learned trial court, on the basis of alone evidence had rightly convicted appellant No. 2 u/s 29 read with Section 20(b)(ii)(c) of NDPS Act.

18. Learned Counsel for appellant No. 2 has contended that the statement u/s 67 of the NDPS Act, recorded on 20th December, 1997, was not voluntary and it was extracted by the officials of the NCB by exercising third degree methods. Statement was made by the appellant on the dictation of NCB officials. Statement was extracted by extending threats. Since the statement was not voluntary, appellant had retracted from the same on 20th January, 1998, while he was in jail. Appellant had retracted from his statement within a short period of

four weeks. Learned trial court has erred in placing reliance on the retracted statement of the appellant. No other evidence was available on record to corroborate the retracted statement of the appellant. As per the learned trial court, retracted statement of the appellant could not have been made basis for his conviction without corroboration from other independent evidence indicating the culpability of the appellant in the crime. Reliance has been placed on Francis Stanly @ Stalin v. Intelligence Officer, Narcotic Control Bureau reported in 2007 1 AD (S.C.). She further contended that reliance placed by the trial court on the statements u/s 67 of the NDPS Act of the co-accused thereby implicating the appellant, is misplaced. Statement of co-accused u/s 67 of the NDPS Act is not a substantive piece of evidence and could not have been made a ground for holding the appellant guilty more so, when there was no other evidence available on record showing the involvement of the appellant. Reliance has been placed on Monish H. Bhalla Vs. Satya Parkash Bahl alias S.P. Bahl alias S.P. and Others, .

19. I do not find any force in the above contentions of the learned Counsel for the appellant. PW1 D.N. Tyagi, had recorded the statement Ex. PW1/O. He had categorically deposed that in pursuance of the summons Ex. PW1/G appellant Narender Bodh tendered his voluntary statement Ex. PW1/O u/s 67 of the NDPS Act running into four pages in his own handwriting. Appellant No. 2 had also appended his signatures on his statement u/s 67 of the Act. Signatures of the appellant had been identified by him at appoint A. PW1 has further deposed that during the course of rendering of statement, appellant No. 2 was shown photographs of all the five accused and he identified the same and appended his signatures on all the photographs in token of their identification. His statement in this behalf is Ex. PW1/P. His testimony on this point has remained unshaken in his cross examination. No material discrepancy in his statement could be pointed out by the learned Counsel for the appellant. Appellant No. 2 has neither disputed his handwriting nor his signatures on Ex. PW1/O and Ex. PW1/P. There is no reason to disbelieve PW1 that the appellant had voluntarily tendered his statement in his own handwriting. Even otherwise, retraction made by the appellant, on the face of it, appears to be an afterthought and based on legal advice. Legal terminology has been used in the application dated 23rd January, 1998 filed before the learned Metropolitan Magistrate. That apart, statement of the appellant was recorded by PW1 on 20th December, 1997; thereafter, appellant was produced before the learned Metropolitan Magistrate on 21st December, 1997. Appellant did not make any grievance, when he was produced before the Metropolitan Magistrate on 21st December, 1997, that he was tortured or was forced to give any such incriminating statements. Learned Metropolitan Magistrate has specifically mentioned that all the five accused persons were produced before him at his residence by the Investigating Officer and none of them stated that they had received any injury or that they were beaten. On the contrary, they stated that they were not interested in their medical examination. Had the statement u/s 67 of the NDPS Act been extracted by the NCB officials from the appellant by torturing or applying undue force upon them, they would

have certainly brought this fact to the notice of concerned Metropolitan Magistrate on 21st December, 1997 itself. This clearly shows that the statement Ex. PW1/O of appellant No. 2 was made by him voluntarily. In my view, learned trial court has rightly placed reliance on this statement while convicting the appellant.

20. Apart from this, I find that the statement Ex. PW1/O is duly corroborated from the independent evidence i.e. appellant No. 2 being in company of co-accused in the same car from which contraband was recovered. It is not a case where charas from the possession of co-accused was recovered and on their interrogation the name of the appellant No. 2 surfaced during the investigation, pursuant thereof he was arrested and his statement was recorded. In such a situation, in absence of any other independent evidence, it could have been pleaded that such a statement required corroboration from other independent evidence. In this case appellant No. 2 was apprehended at the spot. He was sitting in the same vehicle from which contraband was recovered. He was in company with co-accused. This fact itself lends credence to his statement Ex. PW1/O. It is well settled that the statement u/s 67 of the Act recorded by a competent officer is not hit by Section 25 of the Evidence Act.

21. Francis Stanly @ Stalin's case (supra) is of no help to the appellant. In para 17 of the judgment it has been specifically mentioned that the said case was not to be used as a precedent for other cases. In the facts involved in the said case conviction of the appellant was set aside by giving benefit of reasonable doubt to him.

22. Facts of the present case are more or less similar to the facts involved in the judgment rendered by the Supreme Court titled Madan Lal and Another Vs. State of Himachal Pradesh, . In the said case Assistant Superintendent of Police, Sunder Lal received a secret telephonic message on 5th October, 1999 that charas was being transported in a blue colour Maruti Esteem bearing No. CHO-TE-2764. He reduced this information in writing and gave directions to the SHO, Police Station, Solan to send the information to the Superintendent of Police and thereafter proceeded towards the spot. He formed a raiding party and stopped the Maruti Esteem car. On personal search of the accused persons nothing incriminating was recovered, however, on search of the car a black colour bag containing 820 gm charas was found. Car along with the documents and keys was seized. All the occupants of the car were convicted u/s 20 of the NDPS Act. In the above facts Supreme Court held as under:

In fact the evidence clearly establishes that they knew about transportation of charas, and each had a role in the transportation and possession with conscious knowledge of what they are doing. The accused-appellant Manjit Singh does not stand on a different footing merely because he was a driver of the vehicle. The logic applicable to other accused- appellants also applies to Manjit Singh.

23. In this case appellant Narender Bodh was occupant of the Maruti Van from

which hashish was recovered. In this scenario, his statement Ex. PW1/O that he conspired in procuring and transporting the hashish has to be relied. Appellant No. 2 cannot claim himself to be innocent. He cannot claim ignorance about the procurement and transportation of the contraband after being found in company of co-accused and having failed to render any plausible explanation in this regard.

24. Learned Counsel for the appellant has next contended that the notice u/s 50 of the NDPS Act was given to all the accused persons jointly, by way of formality. Non-compliance of Section 50 is fatal and the appellant is liable to be acquitted. I do not find any force in this contention of the appellant either. Bare reading of Section 50 shows that it only applies in the cases of personal search of a person. It would not extend to search of a vehicle or a container or a bag or premises. The language employed in Section 50 makes it clear that the search has to be in relation to a person as contrasted to search of premises/vehicle/articles. Also refer to Constitution Bench judgment titled State of Punjab Vs. Baldev Singh, etc. etc., wherein it was observed as under:

Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted.

25. In this case contraband was recovered from the vehicle, therefore, Section 50 of the NDPS Act would not be attracted.

26. Appellant No. 2 was in the company of co-accused in Maruti Van from where contraband was recovered. Accordingly, a presumption can be drawn against him u/s 35 and 54 of the Act of his involvement, more so when appellant had failed to rebut the same. It was for him to explain by plausible and acceptable defence to demonstrate that he was not in any manner involved in procurement, packaging, transportation and that he had nothing to do with the contraband recovered from the luggage found in Maruti Van wherein he was found sitting.

27. Learned trial court has awarded minimum sentence as prescribed u/s 20 of the Act. I do not find any justification to vary the same.

28. In the light of the above discussions appeal is dismissed.