

**(2007) 05 AHC CK 0192**

**In the Allahabad High Court**

**Case No :** Criminal Appeal Nos. 6636 with 6570 of 2006, 6570, 6775, 7046 of 2005, Crl. Appeal (Defective) No. 16 and 499 of 2007

Ratan Kumar Vishwas; Akhilesh Kumar Bajpai; Virendra Kumar; Jitendra Singh; Shambhu Prasad; Lalji Yadav

**APPELLANT**

**Vs**

Narcotic Control Bureau, Zonal Unit, Varanasi; Union of India; State of U.P.;

**RESPONDENT**

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**Date of Decision :** 15-05-2007

**Acts Referred:**

Evidence Act, 1872 — Section 25

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 27A, 29, 67

**Citation :** (2007) 05 AHC CK 0192

**Hon'ble Judges :** M.K.Mittal, J

**Final Decision :** Dismissed

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**Judgement**

M.K. Mittal, J.—Criminal Appeal No. 6636 of 2006 and 6570 of 2006 have been filed by Ratan Kumar Vishwas and Akhilesh Kumar Bajpai respectively against their conviction order passed under Section 27A and 29 of Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as Act) where under they have been sentenced to undergo rigorous imprisonment upto fourteen years and fine of Rs. two lacs has also been imposed on them with default stipulation. Criminal Appeal No. 6775 of 2006 and 7046 of 2006 have been filed by Virendra Kumar and Jitendra Singh, respectively against their conviction order passed under Section 29 of the Act where under they have been sentenced to undergo rigorous imprisonment for ten years and fine of Rs. one lac has been imposed on them with default stipulation. Criminal Appeal (defective) No. 16 of 2007 and Criminal Appeal (defective) No. 499 of 2007 have been filed by Shambhu Prasad and Lalji Yadav respectively against their conviction under Section 23 of the Act wherein they have been sentenced to undergo rigorous imprisonment for ten years and fine of Rs. one lac has been imposed on them with default stipulation. All these appeals have been filed against the judgment and order dated 7102006 passed by Additional Sessions Judge, F.T.C. No. 1, Kanpur Nagar in Special

Sessions Trial No. 149 of 2004. Since these appeal arise out of the same judgment, the prayer for bail as made by that se appellants for release during the pendency of their appeals is being decided by a common order.

2. I have heard Sri J.S. Sengar learned Counsel for appellants Ratan Kumar Vishwas and Jitendra Singh and Sri N.K. Singh learned Counsel for appellant Virendra Kumar and Lalji Yadav, Sri G.C. Saxena, learned Counsel for appellant Akhilesh Kumar Bajpai and Sushsri Amna Mumtaz, learned Counsel for appellant Shambhu Prasad and Sri S.K. Singh, learned Special Public Prosecutor for N.C.B. and have perused the trial Court record.

3. Brief facts of the case are that a secret and reliable information on 532004 was received by the complainant an officer of the N.C.B., Varanasi that huge quantity of Charas was being brought from Nepal to Kanpur in Truck No. UHN 9137 and same was standing at Kanodia Auto Centre, Lucknow Kanpur bypass road and it belonged to Akhilesh Kumar Bajpai son of Sri Kant Bajpai resident of 127/333, Nirala Nagar, Kanpur Nagar. This information was reduced in writing and thereafter Intelligence Officers, U.K. Singh and K.K. Mishra alongwith S. Rallabhandi, S.K. Singh and R.K. Gupta, all Intelligence Officers, Ramnath, sepoy with driver Vijendra Kumar, proceeded from camp office, Gujani in departmental vehicle number U.P. 65 S6951 and U.P. 65V7826 and reached near the Kanodia Auto Centre at about 9 p.m. Two persons standing near by were called and they disclosed their names as Rajendra Prasad and Ramjee Singh. After explaining the purpose they were requested to be present during search and they agreed. At 9.05 p.m. a team reached near the above truck and three persons were found sitting inside the truck and on enquiry they disclosed their names as Bhola Prasad, Shambhu Prasad (appellant) and Lalji Yadav (appellant). On asking Bhola Prasad disclosed that he was driver of the Truck and Lalji was cleaner and Shambhu Prasad was owner of the Truck and told that on reaching the petrol pump at Kanpur, he had to contact Akhilesh Kumar Bajpai on phone number 0512 2616517. These officers gave their introduction to these three persons and asked them in writing if they desired their vehicle to be searched in presence of a Gazetted Officer or a Magistrate which was their legal right. But they declined in writing and offered that the search be made by them. At this the officers of the N.C.B. searched the vehicle in accordance with law and in the presence of two witnesses and they found black colour plates wrapped in polythene kept in plastic bags in specially made secret cavity behind the cabin of the Truck. On testing with the test kit possessed by the N.C.B. Officers, the recovered black colour plates were found to be Charas. The recovered Charas was seized alongwith vehicle. However, due to darkness and unavailability of weighing facility and for security reasons, the vehicle and the arrested persons were taken to the Customs and Central Excise Office, Kanpur Nagar where they reached at about 10.45 p.m. The recovered 14 plastic bags were weighed and the gross weight was 252.500 Kilograms and the net weight was 250.400 Kilograms. The two samples of 25 grams each were drawn from all the 14 bags and were marked and kept in separate sealed envelopes. All the packets of samples were signed by

the accused persons and the witnesses and the officers of the N.C.B. The accused Bhola Prasad, Shambhu Prasad admitted that they had to take that Charas to Akhilesh Kumar Bajpai. They also told that accused Govind Singh of Nepal State with the help of accused Kamal had arranged for Charas and the vehicle and that accused Jitendra Kumar and Virendra Kumar had visited Veerganj in Nepal few days earlier to meet Govind and to finalise the deal for Charas.

4. At that time, the recovery memo was also prepared which was duly signed by the accused, witnesses and the officers of the N.C.B. Thereafter the officers of the N.C.B., independent witnesses Sri S. R. Agarwal, Superintendent, Kailash Chandra, Inspector of Customs and Central Excise and police force of Kidwai Nagar reached the house of Akhilesh Kumar Bajpai in Nirala Nagar at about 12.30 p.m. on 632004. A person opened the door and disclosed his name as Akhilesh Kumar Bajpai (appellant). The officers gave their introduction and also apprised him the purpose of visit and asked him in writing if he desired his house to be searched in presence of Gazetted Officer or a Magistrate which was his right. But he declined in writing and offered search to be made by them. House was searched in accordance with law and in presence of the independent witnesses. During search of the house Jitendra Singh, (appellant), Virendra Kumar (appellant) and Govind Singh were found to be present there. These three persons were separately given in writing if they wanted to be searched before a Gazetted Officer or a Magistrate as it was their right but they declined. On search of Virendra Kumar some papers were recovered.

5. Akhilesh Kumar Bajpai told that this Charas was arranged by him to be sold through Ratan Kumar Vishwas (appellant) of Bharthana, District Etawah. He had given Rs. 20,000/ to Jitendra Kumar and Virendra Kumar to be given to Kamal of Veerganj, Nepal, through Govind. Recovery memo was prepared at the house of Akhilesh Kumar Bajpai and was signed by the witnesses and the officers present as well as the accused persons.

6. The statements of the accused persons under Section 67 of the Act were recorded and they made their voluntary statement giving details about their involvement in the trade of Charas. The seized Charas was sent to C.R.C.L., New Delhi for chemical analysis through letter dated 632004 alongwith test memo affixing specimen of the seal. The Chemical Examiner gave his report dated 2552004 and confirmed that the content of the samples was Charas. A detailed report about search and seizure was submitted to the superior officer on 632004. The Charas and the truck were deposited in the office of the Customs and Central Excise, Sarvodaya Nagar, Kanpur.

7. On 1932004 the follow up action was conducted at the residential premises of Ratan Kumar Vishwas 42, Sarojni Road, Bharthana, District Etawah. But he was found absconding and statement of his son was recorded under Section 67 of the Act and he disclosed the phone number as 05680225182 which was installed in his house in the name of his father. The summon for appearance of Ratan Kumar

Vishwas was also served on him. The copy of the guest register of the City Hotel and Babarchi Hotel, Veerganj, Nepal were obtained which were attested by the First Secretary, High Commission, Nepal and it showed that Govind had stayed there on 21/2/2004. Call details of the phone of Akhilesh Kumar Bajpai installed at his house were obtained from the Mahanagar Telephone Exchange. Detail of the visitors registers from Manager, Mahalaxmi lodge was also obtained and it confirmed that Govind and Shambhu Prasad had stayed in the Lodge from 29/2/2004 to 5/3/2004. Voluntary statement of Ratan Kumar Vishwas was recorded under Section 67 of the Act on 19/4/2004 and he admitted his involvement in illicit trade of Charas and that he was also aware of the consignment of the Charas Transported by vehicle No. UHN 9137, which was seized by N.C.B., Varanasi on 5/3/2004 at Kanodia Auto Centre. He was also aware of the fact that Akhilesh Kumar Bajpai was bringing the consignment of Charas for sale in Rajasthan through him. Akhilesh Kumar Bajpai used to contact him on his phone No. 05680225182 through his phone number 05122616517. He also disclosed that he had given Rs. 1.5 lacs to Diwakar resident of Kidwai Nagar for becoming a partner in the trade of Charas and Diwakar purchased a Truck for supply of Charas from Nepal to Indore and Rajasthan. Ratan Kumar Vishwas was arrested on 19/4/2004.

8. Criminal history of Akhilesh Kumar Bajpai was obtained from S.S.P., Kanpur Nagar and it showed that he was chargesheeted in Case Crime No. 1068 of 1996 under Sections 18/20 of the Act for having been found in possession of 56.500 Kilograms of Charas.

9. The complainant S.K. Singh, Intelligence Officer, N.C.B., Varanasi filed complaint in the Court of Special Judge, N.D.P.S. Act, Kanpur. The charges were framed against the accused persons. In support of its case prosecution examined Kaushal Kant Mishra, P.W.1, Umesh Kumar, P.W.2, Sanjeev Kumar Singh, the complainant, P.W.3, the Intelligence Officers of N.C.B. and also filed documents. The accused examined Virendra Kumar, (accused) D.W.1, Smt. Surajmukhi, mother of Virendra Kumar D.W.2 and Rajesh Kumar Vishwas son of accused Ratan Kumar Vishwas, D.W.3.

10. Learned Counsel for the applicants have contended that they have been falsely implicated in this matter and that they were not involved in illicit transportation of Charas from Nepal or its sale. Learned Counsel for the appellants have also contended that the alleged statements as recorded under Section 67 of the Act are not voluntarily statements and are not admissible in view of Section 25 of the Indian Evidence Act. It has also been argued on their behalf that according to prosecution case there were two independent witnesses but they have not been examined and that the statement of the coaccused is not admissible as against the other accused. Against it, learned Counsel for the N.C.B. has contended that appellants were deeply involved in trafficking and sale of the Charas from Nepal and they made voluntarily statements which were recorded under Section 67 of the Act and the same are admissible and are not

hit by Section 25 of the Indian Evidence Act as the officers of the N.C.B. are not police officers within the meaning of Section 25 of the Indian Evidence Act. He has also contended that in support of the prosecution case three officers of the Intelligence department who were present at the time of the alleged recovery of the contraband materials and arrest of the accused persons have stated the prosecution case on oath and there is nothing in their statements to make them unreliable. He has also contended that the nonexamination of the independent witnesses is not material and the accused have not been prejudiced. He has further contended that statement of co accused is admissible against the other accused and it is settled legal position. He has further contended that the accused Akhilesh Kumar Bajpai has criminal history and he was earlier challaned under the provisions of the Act and 56.500 kilograms of Charas was recovered from him and that matter is still pending.

11. As far as the question of admissibility of the statement under Section 67 of the Act is concerned, it is settled position that this statement is admissible if it has been given voluntarily, i.e., it was not given under any duress, compulsion or promise. In the instant case, the accused appellants Ratan Kumar Vishwas, Virendra Kumar, Jitendra Singh and Akhilesh Kumar Bajpai themselves wrote their statements under Section 67 of the Act. Statement of Shambhu Prasad has been recorded by one Sri R.K. Gupta and the statement of Lalji has been recorded by Sri S. Rallabhandi, the officers of the department. The witnesses have duly proved these statements. The appellants did not raise any objection regarding the recording of these statements at the initial stage. First opportunity for the accused persons to point out that the statements were not given voluntarily was when they were produced before the remand Magistrate. But the accused did not raise any objection at that occasion. It appears that only for the defence purpose and on legal advice they started saying that the statements were not given voluntarily.

12. Learned Counsel for the appellants has contended that it was for the Magistrate to have asked the accused persons if they had given statements voluntarily but this contention is not tenable and cannot be accepted as it was for the accused persons to have pointed out if they were put under any compulsion, coercion or promise to give any statements. It is not the case of the accused that they were not produced before the remand Magistrate.

13. Learned Counsel for the accused appellant Ratan Kumar Vishwas has contended that he does not know English and he was made to copy the written statement. But the perusal of the statement of Ratan Kumar Vishwas shows that it has been written by him in a normal way and he is in the habit of writing capital letters while beginning a new word in a sentence. The endorsement made by the accused on the notice given under Section 50 of the Act (paper No. 72 of the trial Court record) is in similar style. On this basis it cannot be said that he does not know English.

14. It is settled position that the officers of the Intelligence department or the

N.C.B. are not police officers within the meaning of Section 25 of Indian Evidence Act. In this connection, learned Counsel for N.C.B. has cited the case of *M. Prabhulal v. The Assistant Director, Directorate of Revenue Intelligence*, 2003(2) JIC 1009 (SC) : 2003(47) ACC 1151 (SC), wherein it has been held that the confessional statements of the accused appellants recorded by officers of the department of Revenue Intelligence are admissible in evidence because such officers are not police officers within the meaning of Section 25 of the Indian Evidence Act.

15. In the case of *Rajkumar Agarwal v. Union of India*, 1990(1) JIC 539 (SC) : 1990 (27) ACC 443 (SC), it has been held that the statements recorded by the officers of the Revenue Intelligence are not hit by the provisions of Section 25 of the Indian Evidence Act and can be read in evidence.

16. In the case of *Union of India v. Munna and Anr.*, 2005(1) JIC 154 (SC) : 2004 Cri LJ 4183 (SC), it has been held by the Hon''ble Apex Court that the admission of the accused made before the customs authorities is not hit by Section 25 or 26 of the Indian Evidence Act. Learned Counsel for the appellants have not cited any law to the contrary.

17. The statements as given by the appellants have been corroborated by the other evidence and there is no reason to discard those statements. These confessional statements show deep involvement and complicity of the accused persons in the offence as allegedly committed by them.

18. The call details of the telephone of Akhilesh Kumar Bajpai as given in paper 54 show that Akhilesh Kumar Bajpai had called on phone of Ratan Kumar Vishwas on 2822004 and 2922004 at 19.31 hours and 5.46 hours respectively. The call details as given in paper 67 shows that Akhilesh Kumar Bajpai had called on the phone of Ratan Kumar Vishwas on 332004 (18.39 hours), 532004 (13.26 hours), 532004 (18.30 hours) and 532004 (20.39 hours). The call details have been proved by the witnesses. The telephone numbers of these two accused are not disputed. It shows that they were familiar from prior to the instant recovery and the contention of the learned Counsel for the accused that they were strangers to each other is not tenable.

19. As far as the question of non examination of two independent witnesses is concerned, the same is not material in the instant case and on that basis the recovery cannot be doubted. There is sufficient evidence against the appellants and the contention of the learned Counsel for the appellants to the contrary cannot be accepted.

20. As far as the question of admissibility of the statements of coaccused against other accused is concerned in the case of *Naresh J. Sukhawani v. Union of India*, 1996 SCC (Cri) 76, the Hon''ble Apex Court has held that the statement made by one coaccused is substantive piece of evidence against another person. This principle has been further reiterated in the case of *K.I. Pavunny v. Assistant Collector, HQ, Central Excise Collectorate, Cochin*, 1998(1) JIC 587 (SC) : 1997

(34) ACC 512 (SC).

21. Learned Counsel for the appellants has cited the case of Manoj Kumar Gupta v. State N.C.T. of Delhi, 2003 CrL LJ 2353, Delhi High Court and case of Monish H. Bhalla v. Satya Parkash Bahl alias S.P. Bahl alias S.P. and Ors., 2005 CrL LJ 1827, Bombay High Court and has contended that the accused cannot be held guilty on the basis of the statements of the coaccused. But in view of the law as laid down by the Hon"ble Apex Court, this contention cannot be accepted.

22. Learned Counsel for the appellants have also referred the case of Ritesh Chakarvarti v. State of M.P., 2007(1) JIC 1 (SC) : 2006(56) ACC 788 (SC) and the case of State of West Bengal and Ors. v. Babu Chakraborty, 2005(1) JIC 229 (SC). But the facts under those cases were different and the appellants cannot get any help out of them.

23. Considering the facts and circumstances but without prejudice to the merits of the case, and considering the serious nature of the offence appellants are not entitled to be released on bail at this stage and their prayer for bail is liable to be rejected and is hereby rejected.