

(2008) 11 SC CK 0144

In the Supreme Court Of India

Case No : Criminal Appeal No. 1754 of 2008 (Arising out of SLP (Criminal) No. 1777 of 2008)

Ratan Kumar Vishwas

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 07-11-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 389
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 19, 24, 27A, 29, 32A

Citation : (2009) 1 ACR 135 : AIR 2009 SC 581 : (2009) 1 PLJR 115 : (2009) 1 SCC 482

Hon'ble Judges : D. K. Jain, J;C. K. Thakker, J;Arijit Pasayat, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Arijit Pasayat, J.—Leave granted.

2. Challenge in this appeal is to the Judgment of a learned Single Judge of the Allahabad High Court dismissing the application filed by the appellant for suspension of sentence and grant of bail. Appellant-Ratan Kumar Vishwas has filed an Appeal No. 6636 of 2006 questioning his conviction the offence punishable under Sections 27A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the Act'). He was sentenced to undergo rigorous imprisonment for 14 years and to pay a fine of rupees two lacs with default stipulation. Learned Additional Sessions Judge, Fast Track Court No. 1, Kanpur Nagar has found the appellant guilty and convicted and sentenced him as aforesaid.

3. Brief facts of the case as projected by prosecution are that a secret and reliable information on 5.3.2004 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 Srikant Bajpai, resident of 127/333, Nirala Nagar, Kanpur Nagar. This information was reduced to writing and thereafter Intelligence Officers, U.K. Singh and K.K. Mishra along with S. Rallabhandi, S.K. Singh and R.K. Gupta, also Intelligence Officers, Ramnath, sepoy with driver Vijendra Kumar, proceeded from camp office, Gujani in departmental vehicle number U.P. 65-S-6951 and U.P 65-V-7826 and reached near the Kanodia Auto Centre at about 9 p.m. Two persons standing nearby were called and they disclosed their names as Rajendra Prasad and Ramjee Singh. After explaining the purpose for which they were requested to be present i.e. during search, 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 and Lalji Yadav. 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 contract Akhilesh Kumar Bajpai on phone number 0512-2616517. These officers gave their identity 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 along with 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. They recovered 14 plastic bags which were weighed and the gross weight was 252.500 Kgs. and the net weight was 250.400 Kgs. 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 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 a.m. on 6.3.2004. A person opened the door and disclosed this name as Akhilesh Kumar Bajpai. 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, Virendra Kumar 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 appellant-Ratan Kumar Vishwas 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 as well as the accused persons.

6. The statements of the accused persons u/s 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., New Delhi for chemical analysis through letter dated 6.3.2004 along with test memo affixing specimen of the seal. The Chemical Examiner gave his report dated 25.5.2004 and confirmed that the content of the samples was Charas. A detailed report about search and seizure was submitted to the superior officer on 6.3.2004. The Charas and the truck were deposited in the office of the Customs and Central Excise, Sarvodaya Nagar, Kanpur.

7. On 19.3.2004 the follow up action was conducted at the residential premises of Ratan Kumar Vishwas at 42, Sarojni Road, Bharthana, District Etawah. But he was found absconding and statement of his son was recorded u/s 67 of the Act and he disclosed the phone number as 05680-225182 which was installed in his house in the name of his father. The summons for appearance of Ratan Kumar Vishwas was also served on him. The copies 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 Mahanagar Telephone Exchange. Details of the visitors registers from Manager, Mahalaxmi Lodge were also obtained and they 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 u/s 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 and that he was also aware of the consignment of the Charas transported by vehicle No. UHN 9137, which was seized by N.B.G., 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. 05680-225182 through his phone No. 0512- 2616517. 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. After completion of investigation charge sheet was filed. As accused persons abjured guilt trial was held.

9. To further the prosecution version, witnesses were examined while one Rajesh Kumar was examined as DW-3. As noted above, conviction was recorded and appeal has been filed before the High Court.

10. In respect of the prayer for suspension of sentence and grant of bail the preliminary stand was that the conviction is based on inadmissible evidence. It was submitted that the appellant was not the owner and he was neither the purchaser nor the seller and there was no recovery from him. His conviction was based only on the statement of co-accused. The High Court found that this was not a case where the prayer for suspension of sentence is to be accepted. Accordingly, the prayer was rejected.

11. In support of the appeal, the stand taken before the High Court was reiterated. Additionally, it was submitted that the statement purportedly was made on 19.4.2004 in respect of alleged incident dated 5.3.2004. On 22.4.2004 a telegram was sent by DW-3 alleging that the appellant was tortured and false confessional statement was recorded.

12. Learned counsel for the appellant has further submitted that the rigors of Section 37 of the Act cannot be applied to the present case after Section 32A of the Act was held to be ultra vires by this Court.

13. In response, learned counsel for the respondent submitted that the conviction is based on the evidence of PWs 1, 2 and 3 in addition to the statement u/s 67 of the Act. It is pointed out that the appellant was found absconding and, therefore, the statement of his son was recorded u/s 67 of the Act. The telephone records were also verified and it was noted that the involvement of the appellant was sufficiently established.

14. It is to be noted that in *Dadu @ Tulsidas Vs. State of Maharashtra*, it was held that Section 32A was ultra vires to the extent it took away the powers relating to Section 389 of the Code of Criminal Procedure, 1973 (in short 'the Code') In *Dadu's case* (supra) it was held as follows :

29. Under the circumstances the writ petitions are disposed of by holding that :

(1) Section 32A does not in any way affect the powers of the authorities to grant parole.

(2) It is unconstitutional to the extent it takes away the right of the court to suspend the sentence of a convict under the Act.

(3) Nevertheless, a sentence awarded under the Act can be suspended by the appellate court only and strictly subject to the conditions spelt out in Section 37 of the Act, as dealt with in this judgment.

15. In the said case it was clearly observed that a sentence awarded under the Act can be suspended by the Appellate Court only and strictly subject to the conditions as spelt out in Section 37 of the Act.

16. To deal with the menace of dangerous drugs flooding the market, Parliament has provided that a person accused of offence under the Act should not be released on bail during trial unless the mandatory conditions provided u/s 37 that there are reasonable grounds for holding that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail are satisfied. So far as the first condition is concerned, apparently the accused has been found guilty and has been convicted. Section 37 of the Act reads as follows :

Offences to be cognizable and non-bailable- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences u/s 19 or Section 24 or Section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in Clause (b) of Sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on grant of bail.

17. The High Court has dealt with the factual position in great detail to conclude that the parameters of Section 37 are not fulfilled to warrant grant of bail by suspension of sentence. We find no reason to interfere in the matter.

The High Court is requested to dispose of the Criminal Appeal pending before it expeditiously.

18. Learned Counsel for the appellant submitted that the appellant is ailing and needs treatment. It is open to him to move the appropriate authorities for providing such medical treatment as is needed.

19. The appeal fails and is dismissed.