2024 INSC 351

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO(S). 2044 OF 2010

FIRDOSKHAN KHURSHIDKHAN ....APPELLANT(S)

VERSUS

THE STATE OF GUJARAT & ANR. ....RESPONDENT(S)

WITH

CRIMINAL APPEAL NO(S). 2045 OF 2010

J U D G M E N T

Mehta, J.

1. These two appeals arise out of a common judgment dated 30th November, 2009 rendered by the Division Bench of the High Court of Gujarat whereby Criminal Appeal Nos. 1865 of 2006 and 1866 of 2006 preferred by the appellants herein i.e. Anwarkhan Jahilkhan Pathan and Firdoskhan Khurshidkhan Pathan, respectively were dismissed. By way of the said appeals, the appellants herein had assailed the judgment dated 6th June, 2006 passed by the learned Additional Sessions Judge, Fast Track Court, Nadiad(hereinafter being referred to as the 'trial Court') in

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Special Case(NDPS) No. 5 of 2003 convicting the appellants for the offences punishable under Section 21 read with Section 8(c) and Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985(hereinafter being referred to as 'NDPS Act') and sentencing them to undergo rigorous imprisonment for ten years and fine of Rs. 1 lakh each in default of payment of fine to undergo simple imprisonment for two years.

Brief facts: -

2. Shri Deepak Pareek(PW-2) posted as Intelligence Officer in the Narcotic Control Bureau(hereinafter being referred to as 'NCB'), Ahmedabad received a secret information at his office in the morning of 30th January, 2003. The informer divulged that two persons would be delivering contraband/illicit substance at the ST Bus Stand, Kheda between 4:30 pm and 5:00 pm. The secret information also contained the description of features of the suspects and the clothes which they would be probably wearing. The information also provided that the contraband substance had been received from one Adilkhan and that the miscreants would be delivering it to a third person. Deepak Pareek(PW-2) jotted down the secret information, translated and converted it into a

typewritten script and forwarded a copy thereof to his immediate superior officer.

3. Two *panchas* i.e. Manubhai(PW-1) and Amit R. Dantani were summoned to the NCB office, Ahmedabad where a preliminary *panchnama* taking their consent to participate in the proceedings was drawn. Deepak Pareek(PW-2) accompanied with other NCB officials and the *panchas* proceeded to ST Bus Stand, Kheda. The raiding party was divided into two groups. Upon reaching the bus stand at around 4:30 pm, they saw two persons, whose description was matching with the secret information, sitting near the public urinals of the bus stand. The officials observed that a bag was being held by one of the two suspects who handed the same over to the other and proceeded towards the exit gate of the bus stand. One group of the raiding team cornered the person who was holding the bag whereas, the second group followed the other person who was seen proceeding towards the exit gate of the bus stand. The first group after disclosing their identity to the suspect who was holding the bag, made enquiry about his identity and he gave out his name to be Anwarkhan(A-1). The second suspect, however, escaped from the spot and could not be apprehended by the group of officials who went in his pursuit. The bag held by

Anwarkhan(A-1) was opened and two polythene bags containing suspected contraband material were found therein. The contraband substance was weighed at the bus stand and gross weight of the two polythene bags came out to be 2kg and 30 grams. As the spot where the suspect and the contraband were found was a busy public place, the NCB officers in order to avoid security issues thought it fit to move to the PWD Guest House adjacent to the bus stand for carrying out the seizure, sampling and sealing procedure. Accordingly, the team members along with the *panchas*, the suspect and the packet of contraband, moved to the PWD Guest House. Three samples were collected from each polythene bag and were sealed under the signatures of the *panchas* and the Intelligence Officer(PW-2) of the NCB. The second/final part of the *panchnama* was drawn up and completed at the PWD Guest House, Kheda. Summon under Section 67 of the NDPS Act was issued to Anwarkhan(A-1) by Deepak Pareek(PW-2) which was duly received by him. Statement of Anwarkhan(A-1) was recorded under Section 67 of the NDPS Act by Deepak Pareek(PW-2) and thereafter, he was arrested.

4. Further, investigation was assigned to Intelligence Officer Vikram Ratnu(PW-3). During investigation, information was

received that the second suspect who had escaped from the ST Bus Stand had been tracked down by the Madya Pradesh Police. The Intelligence Officer Deepak Pareek(PW-2) claims to have proceeded to Shah Jahan Pur Police Station, Madhya Pradesh where the second suspect was found and identified to be Firdoskhan(A-2) who volunteered to come down to the Office of NCB, Ahmedabad for participating in investigation. Accordingly, Firdoskhan(A-2) was brought to NCB Office, Ahmedabad by Deepak Pareek(PW-2) on 9th February, 2003 where summon under Section 67 of the NDPS Act was served to him. Deepak Pareek(PW-2) recorded the statement of Firdoskhan(A-2) under Section 67 of the NDPS Act during the intervening night of 9th and 10th February, 2003 whereafter, Firdoskhan(A-2) was also arrested in the present case.

5. One part of samples was forwarded to the FSL and second part of samples was forwarded to the Central Revenues Control Laboratory, New Delhi(hereinafter being referred to 'CRCL'). After analysis, a report was received to the effect that the samples gave positive test for presence of ingredients of brown sugar/heroin and Diacetyl Morphine contents were found therein.

6. A complaint came to be filed by Intelligence Officer, Vikram Ratnu(PW-3) against both the accused in the Court of learned

Sessions Judge, Nadiad. The case was transferred to the Court of learned Additional Sessions Judge, Fast Track Court, Nadiad for trial.

7. Charges were framed against both the accused for the offences mentioned above who abjured their guilt and claimed trial. The prosecution examined 4 witnesses and exhibited 38 documents to prove its case. The accused were questioned under Section 313 of the Code of Criminal Procedure, 1973(hereinafter being referred to as 'CrPC') upon which, they denied the allegations as appearing against them in the prosecution evidence and claimed to be innocent. After deliberating upon the submissions advanced on behalf of the parties and upon analysing the evidence available on record, the trial Court vide judgment dated 6th June, 2006 proceeded to convict and sentence the appellants in the manner stated above.

8. The appeals preferred by the appellants were rejected by the High Court of Gujarat vide impugned judgment dated 30th November, 2009.

9. Since both the appeals arise out of a common judgment, they have been heard analogously and are being decided together.

Submissions on behalf of the appellants: -

10. Shri. T.N. Singh, learned counsel representing the appellants vehemently contended that the conviction of the appellants as recorded by the trial Court and affirmed by the High Court is totally unjustified and contrary to facts and law. He advanced the following pertinent submissions craving acquittal for both the appellants: -

(i) That the requirements of mandatory procedure contained in Section 42 of the NDPS Act were not complied with by the Seizure Officer because copy of the secret information was not forwarded to the superior officer as mandated by Section 42(2) of the NDPS Act.

(ii) That the option to be searched before a Magistrate or a Gazetted Officer was also not given to Anwarkhan(A-1) and hence, it is a clear case of violation of the mandate of Section 50 of the NDPS Act which vitiates the conviction of the appellants.

(iii) That no independent *panch* witness was associated in the search and seizure proceedings and hence, the entire case of the prosecution regarding the seizure becomes doubtful.

(iv) That the *panch* witness Manubhai(PW-1) was serving in the Income Tax Department and one of the NCB officials being a part of raiding team was previously serving in the same Department and hence, it is clearly established that the *panch* witness Manubhai(PW-1) was an interested witness.

(v) That Firdoskhan(A-2) was neither arrested at the spot nor his name was recorded in the seizure memo. The witness Vikram Ratnu(PW-3) identified the accused Firdoskhan(A-2) for the first time in the Court without any Test Identification Parade being held and thus, the identification of Firdoskhan in the Court by PW-3 cannot be treated to be reliable.

(vi) That the witness Vikram Ratnu(PW-3) at para 20 of the deposition admitted that the contraband articles were found in Ahmedabad unattended and hence it is clearly a case of the narcotic drugs being planted upon the accused.

(vii) That the statements of the accused appellants recorded by NCB officials under Section 67 of the NDPS Act which have been heavily relied upon as incriminating evidence by the trial Court as well as the High Court have to be omitted

from consideration. In this regard, he placed reliance on the judgment rendered by this Court in the case of ***Tofan Singh v. State of Tamil Nadu***[1]**.**

11. On these counts, learned counsel for the appellants urged that the appellants deserve to be acquitted of all the charges.

Submissions on behalf of Respondents: -

12. *Per contra*, learned counsel appearing for the respondent NCB fervently opposed the submissions advanced by the learned counsel for the appellants. It was contended that the *panch* witness Manubhai(PW-1) was serving in the Income Tax Department and hence, he cannot be termed to be a partisan or a stock witness. Manubhai(PW-1) has fully supported the prosecution case in his testimony. The evidence of the Intelligence Officers, namely, Deepak Pareek(PW-2) and Vikram Ratnu(PW-3) is also trustworthy and reliable. They had no cause or motive to falsely implicate the accused appellants in a case involving recovery of huge quantity of narcotic drug heroin. The evidence of Deepak Pareek(PW-2) and Vikram Ratnu(PW-3) is unimpeachable. They identified the accused Anwarkhan(A-1) and proved the seizure of the contraband narcotic drug from the bag being held by

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him. Vikram Ratnu(PW-3) also identified Firdoskhan(A-2) as the second man who had escaped from the spot.

13. Learned counsel for the respondents further contended that the discrepancy sought to be exploited by the learned counsel for the appellant in the statement of Vikram Ratnu(PW-3) wherein it is mentioned that the contraband articles were found in Ahmedabad unattended, was explained by the witness in his further examination wherein, he stated that it was not true that the *mudammal* was found lying abandoned. Thus, as per the learned counsel, the prosecution has proved its case against both the accused beyond all manner of doubt and that the conviction of the accused as recorded by the trial Court and affirmed by the High Court does not warrant any interference by this Court.

14. On these grounds, learned counsel for the respondents implored the Court to dismiss both the appeals.

15. We have given our thoughtful consideration to the submissions advanced at bar and have gone through the impugned judgment. We have also thoroughly re-appreciated the evidence available on record.

16. At the outset, we may note that the contention of learned counsel for the appellants that the search and seizure was

undertaken without associating an independent witness is untenable on the face of record. Manubhai(PW-1), the *panch* witness associated in the search and seizure proceedings was serving in the Income Tax Department and hence by no stretch of imagination, can it be accepted that the witness was a stock witness of the NCB or was an interested witness. Manubhai(PW-1) in his sworn testimony proved the recovery *panchnama*(Exhibit P-30) and also fully supported the prosecution case regarding the search and seizure of contraband effected from Anwarkhan(A-1). Nothing significant could be elicited by the defence in the prolonged cross-examination undertaken from Manubhai(PW-1) and hence, we have no hesitation in holding that the evidence of Manubhai(PW-1) being the *panch* witness associated in the search and seizure effected from Anwarkhan(A-1) is reliable and trustworthy. Thus, it is well established that independent *panch* witness was associated in the search and seizure procedure.

17. It was the fervent contention of learned counsel for the appellants that the search and seizure proceedings are vitiated on account of non-compliance of the mandatory procedure provided under Section 42 of the NDPS Act. The said contention is on the face of record, misplaced. The secret information which was

received by Deepak Pareek(PW-2) was to the effect that two suspects would be bringing contraband substance at the ST Bus Stand, Kheda which is a public place.

18. Section 42 of the NDPS Act deals with search and seizure from a building, conveyance or enclosed place. When the search and seizure is effected from a public place, the provisions of Section 43 of the NDPS Act would apply and hence, there is no merit in the contention of learned counsel for the appellants that non-compliance of the requirement of Section 42(2) vitiates the search and seizure. Hence, the said contention is noted to be rejected.

19. So far as the contention of learned counsel for the appellants that the search and seizure proceedings are vitiated on account of the non-compliance of Section 50 of the NDPS Act is concerned, the same is also noted to be rejected because admittedly, the seizure in this case was not effected during personal search of the appellant Anwar Khan(A-1). Admittedly, the contraband was being carried in a polythene bag held by the appellant Anwar Khan(A-1) in his hand and hence, there was no requirement for the Seizure Officer to have acted under the provisions of Section 50 of the NDPS Act before conducting the search and seizure proceedings.

20. We have minutely gone through the testimony of four prosecution witnesses and find that the seizure of contraband narcotic drug, i.e., heroin/brown sugar weighing 2 kg and 30 grams from the bag being held by Firdoskhan(A-2) has been well established by these witnesses in their sworn testimony and is corroborated by contemporaneous documents which were exhibited by them and so also the material exhibits. The witnesses Deepak Pareek(PW-2), Vikram Ratnu(PW-3) and Jan Mohammed(PW-4) have faithfully deposed about the whole process beginning from the receipt of the secret information, summoning of the *panchas*, raid at the ST Bus Stand, Kheda followed by the search of Anwarkhan(A-1), the seizure effected from him and the *panchnama* proceedings at the PWD Guest House followed by the transmission of the sample packets to the FSL and CRCL in sealed condition. The complete chain of evidence required to prove the safe custody of the samples in a sealed condition has been proved in the testimony of the three officials of NCB. The CRCL report(Exhibit-62) admissible under Section 293 CrPC concludes that sample packets A2 and B2 gave positive tests for presence of 8.4% and 7.9% of Diacetyl Morphine, respectively. Thus, the fact regarding the seizure of contraband narcotic drug, i.e.,

heroin/brown sugar weighing 2 kgs and 30 grams from the possession of Anwarkhan(A-1) has been duly established by the prosecution beyond all manner of doubt. The link evidence required to prove the sanctity of the sampling and transmission of the samples to the Chemical Analyst is also sacrosanct. The search and seizure procedure is free from all doubts.

21. Learned counsel for the appellants harped upon a discrepancy as appearing in the statement of Vikram Ratnu(PW-3) wherein he stated that the contraband was found lying abandoned at Ahmedabad. This discrepancy was explained by the witness in his examination-in-chief at a later point of time. The witness clearly stated that the *mudammal* was not found in an abandoned condition and we have no reason to disbelieve the explanation so offered by the witness.

22. In these circumstances, we are of the view that the prosecution has duly proved the guilt of Anwarkhan(A-1) beyond all manner of doubt by leading convincing and satisfactory evidence.

23. Now, coming to the case of appellant Firdoskhan(A-2) in Criminal Appeal No. 2044 of 2010.

24. It is not in dispute that the appellant Firdoskhan(A-2) was not apprehended on the spot or at the time of seizure. On a perusal of the *panchnama*(Exhibit-30), it is evident that Firdoskhan is not named therein. We find that even though Anwarkhan(A-1) was present with the raiding team from 4.30 p.m onwards, no effort was made by any of the NCB officials to make an inquiry from him regarding the identity of his companion who allegedly fled away from the spot.

25. The name of Firdoskhan(A-2) cropped up for the first time in the statement of Anwarkhan(A-1) recorded under Section 67 of the NDPS Act. However, we are duly satisfied that the sequence in which the said statement came to be recorded completely discredits the reliability thereof. Anwarkhan(A-1) was apprehended at the bus stand with the packet of narcotic drug at around 4:30 p.m. His signatures had been taken on the *panchnama*(Exhibit-30) prepared at 9:00 p.m. and thus, it does not stand to reason that the Intelligence Officer would defer arresting Anwarkhan(A-1) to a later point of time because, as per the arrest memo(Exhibit-43) his arrest is shown at 11:45 p.m. It seems that this deferment in formal arrest of Anwarkhan(A-1) was only shown in papers so that the Intelligence Officer could record

the statement of Anwarkhan(A-1) under Section 67 of the NDPS Act and avoid the same being hit by the rigours of Article 20(3) of the Constitution of India.

26. The admissibility of a confessional statement of the accused recorded under Section 67 of the NDPS Act was examined by this Court in the case of ***Tofan Singh****(supra)* and it was laid down that such confessional statements are not admissible in evidence.

27. Hence, the statement(Exhibit-42) of Anwarkhan(A-1) wherein he allegedly identified the appellant Firdoskhan(A-2) as the person who had escaped from the spot cannot be read in evidence against the appellant Firdoskhan(A-2) because the manner in which the said statement was recorded leaves much to be desired and creates a grave doubt on the sanctity thereof, in addition to the same having rendered inadmissible by virtue of ***Tofan Singh****(supra)*.

28. The prosecution witness Deepak Pareek(PW-2) claimed that Firdoskhan(A-2) was apprehended from Shah Jahan Pur Police Station, Madhya Pradesh. However, no document pertaining to the apprehension/detention of appellant Firdoskhan(A-2) at the Shah Jahan Pur Police Station was placed on record by the prosecution. Thus, the very manner in which the said accused was apprehended and brought to the NCB Office at Ahmedabad in

the purported exercise of recording his statement under Section 67 of the NDPS Act is full of doubt and creates grave suspicion. Even otherwise, the confession of the accused recorded under Section 67 of the NDPS Act cannot be admitted in evidence as a confession as had been held in the case of ***Tofan Singh****(supra)*. Hence the confessional statement(Exhibit-42) does not lend any succour to the prosecution in its quest to prove the charges against the accused Firdoskhan(A-2).

29. The witness Vikram Ratnu(PW-3) identified Firdoskhan(A-2) as the person who had escaped from the spot, when he testified on oath. However, we feel that the first time identification of Firdoskhan(A-2) by Vikram Ratnu(PW-3) is not trustworthy and reliable.

30. We may observe that as per the case set out in the complaint and the evidence of the NCB officials, the team of narcotic officers/officials was divided into two groups. However, it is not clear from the evidence of any of the four prosecution witnesses as to what was the composition of these two groups. Neither the *panch* witness Manubhai(PW-1) nor the Intelligence Officer Deepak Pareek(PW-2) identified Firdoskhan(A-2) as the accused who had escaped from the bus stand. In this background, we feel that the

first time identification of Firdoskhan(A-2) by Vikram Ratnu(PW-3) during his evidence in the Court recorded on 14th February, 2005 i.e. more than two years from the date of incident, is dubitable. The evidence of Vikram Ratnu(PW-3) to the extent he claimed to have identified Firdoskhan(A-2) is neither reliable nor it gets corroborated by any other independent evidence and hence, his evidence deserves to be discarded to this extent.

31. There is no dispute that no contraband substance was recovered from the possession of appellant Firdoskhan(A-2).

32. Resultantly, the conviction of Firdoskhan(A-2) as recorded by the trial Court and affirmed by the High Court cannot be sustained and he deserves to be acquitted by giving him the benefit of doubt.

33. As a consequence of the above discussion, the following order is passed: -

(a) Criminal Appeal No. 2045 of 2010 filed by appellant Anwarkhan(A-1) lacks merit and is hereby dismissed. He is on bail. His bail bonds are cancelled. He shall surrender before the trial Court within 30 days to serve the remaining part of sentence failing which the trial Court shall take steps to apprehend the accused and make him serve out the remaining sentence.

(b) Criminal Appeal No. 2044 of 2010 preferred by appellant Firdoskhan(A-2) is allowed. His conviction as recorded by the trial Court vide judgment dated 6th June, 2006 and affirmed by the High Court vide judgment dated 30th November, 2009 is quashed and set aside. He is acquitted of all the charges. He is on bail and need not surrender. His bail bonds stand discharged.

34. Pending application(s), if any, shall stand disposed of.

.....J.
(SANDEEP MEHTA)

.....J.
(PRASANNA BHALACHANDRA VARALE)

New Delhi;
April 30, 2024