

Mohd. Hussain Farah

Vs

Union of India and Another

Criminal Appeal No. 500 of 1997

(G.T. Nanavati, S.N. Phukan JJ)

24.08.1999

JUDGMENT

NANAVATI J.:-

1. The appellant was tried by the Court of the Additional Sessions/Special Judge for Greater Bombay in NDPS Case No. 1232 of 1988, for committing offences punishable under Sections 21,23,29 and 30 read with Section 8(c) of the NDPS Act and Section 135 of the Customs Act. The learned Special Judge believed the prosecution evidence and held that the accused did possess 3.8 kg of heroin in contravention of the provisions of the NDPS Act and was thus guilty of the offence punishable under Section 21 read with Section 8(c) of the Act. The other charges of conspiracy and abatement were held not proved, and, therefore the learned Judge acquitted him of those offences. The charges under Section 30 of the NDPS Act and Section 135 of the Customs Act were also held not proved. Feeling aggrieved by the order of conviction and sentence imposed upon him, the appellant has filed this appeal.
2. The trial court after appreciating the evidence of S.M. Sawant (PW 1) who was then working as an Intelligence Officer in the Office of the Directorate of Revenue at Bombay and that of Krishan Kumar (PW 2) who was then working as Assistant Director of DRI at Bombay, held that their evidence was trustworthy and can safely be relied upon as it was also corroborated by the evidence of PW 2 Anthony Fernandes, who was the manager of the hotel in which the appellant had stayed. The trial court further held that the evidence of these three witnesses clearly establishes that from Room No. 201, which was occupied by the appellant, 2 packets containing 3.8 kg of heroin were found. The evidence of PW 3 further discloses that the appellant was the only person staying in that room and that on search by the officers, PW 1 and PW 2, 2 packets of heroin, 2 passports, one in the name of Djama and the other in the name of Abdul Rehman but bearing the photographs of the appellant and one packet with a false bottom were found from that room. The trial court further held that their evidence further establishes that 2700 US dollars were also found from that room. The trial court held that the evidence of PW 4 Dominic, who acted as a panch witness, was also reliable and that the evidence and the panchnama, Ex. 40 do corroborate the evidence of PW 1 and PW 2. The trial court disbelieved the defence of the appellant that he was not staying in the hotel from which the said articles were found and that he was picked up by the officers while he was near his lawyer's office and then taken to the hotel.
3. The High Court on reappreciating the evidence of these witnesses agreed with the finding that their evidence is trustworthy and that their evidence is sufficient to establish that it was the appellant who was in possession of those articles.

4. It was contended by the learned counsel for the appellant that the evidence regarding the appellant having entered the hotel at about 6.30 p.m. and that he was followed thereafter by the officers of DRI is not believable as PW 3 Anthony Fernandes had stated in his earlier statement recorded by the DRI officers that the appellant was in his room No. 201 and as there was a phone call from outside, he was called from his room and while he was talking on the telephone, two persons had come from outside. In this deposition before the Court, this witness had clearly stated that he was not really in the hotel at that time and that he was called from the other hotel which belonged to the same owner and which was at distance of 5 to 7 minutes' walk. As a Manager he was looking after both the hotels. It appears that because the appellant was seen with a telephone in his hand he had inferred that he was called from his room. The fact remains that the evidence of PW 1 and PW 2 and PW 3 is consistent on the point that while the appellant was near the reception centre and had the telephone receiver in his hand, two officers of DRI had gone there, that they had tried to apprehend the appellant and at that time there was some scuffle and the appellant had tried to run away. Therefore, in our opinion, even if there is some inconsistency in the evidence on this point, it cannot lead to an inference that the three witnesses had not deposed correctly about the manner in which, the time at which and the place from where the appellant was apprehended by the DRI officers.

5. It was next contended by the learned counsel for the appellant that admittedly in this case, search of the room was made at 9.30 p.m. and that it had continued up to 2.00 a.m. and thus there was a clear breach of Section 42 of the Act as the officer had not recorded any grounds as required by that provision. In our opinion, this contention is misconceived. The only information which the DRI officers had at that time was that the appellant who was involved in an earlier case under the Act and who had jumped bail was staying in Embassy Hotel under a false name. It was really for that reason surveillance was kept by the DRI officers and only after his identity was confirmed that they had tried to apprehend him. The officers did not have any information to the effect that he has kept or concealed in Room No. 201 of that hotel any narcotic drug or psychotropic substance. It was under these circumstances that the room was searched with a view to find out whether there was any incriminating article in that room. It was not put to PW 2 that they had not recorded these reasons or that they did not have the necessary authorisation for the purpose of carrying out the search. No such point was taken before the trial court. This point was taken for the first time before the High Court. It has been found by the High Court that the search was carried out by the officers referred to under Section 41 and, The High court has further found that PW 2 was an empowered officer and since the search was carried out in his presence and under his supervision, the proviso to Section 42 had no application. For all these reasons we do not find any substance in this contention.

6. It was lastly urged by the learned counsel that there was delay in forwarding the sample to the Magistrate. Sub-section (2) of Section 52 provides that every person arrested and article seized under warrant issued under sub-section (2) of Section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued. We do not think that this provision has any application at all. Moreover, no material was brought on record to show that there was in fact any delay. As we do not find any substance in any of the contentions raised by the learned counsel for the appellant, this appeal is dismissed.