

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1199 OF 2010

YASIHEY YOBIN & ANR.

... APPELLANTS

VERSUS

THE DEPARTMENT OF CUSTOMS,
SHILLONG

... RESPONDENT

O R D E R

1. This appeal is directed against the judgment and order passed by the High Court of Judicature of Guwahati at Shillong Bench in Criminal Appeal No. 5 (SH) of 2006, dated 06.09.2007. By the impugned judgment and order, the High Court has affirmed the judgment and order passed by the Special Court (NDPS) in Criminal (NDPS) No.26 of 2003.

2. The factual matrix of the case in brief is :

The Inspector of Customs working in the office of the Commissioner of Custom NER, Shillong, PW 11, received information from the Special Operation Team of Meghalaya Police that Yasihey Yobin - A1 has stored huge quantity of heroin in his residence. On receipt of such information, PW4- Inspector of customs PW2- Inspector and PW7- Superintendent of Police conducted search of the premises of A1 in the presence of two other independent witnesses. In the course of search, the heroin though not recovered from A1 but was recovered from accused No. 2- Lisihey Ngwazah(A2) at the instance of A1, when A1 instructed his wife to contact A2 asking him

to get the bag containing heroine. It is when A2 turned up with the bag that the said bag containing contraband heroin was searched and seized from A2 by the Custom Officials. Thereafter, necessary steps were taken to send the duly sealed samples for chemical examination to the Forensic Science Laboratory and the reports tested positive for heroin.

3. The appellants were thereafter put to trial before the Special Court, NDPS. The Trial Court after appreciating the evidence on record has come to the conclusion that both the accused persons were in conscious possession of the said contraband substance and therefore convicted the appellants under Sections 8(C) and 21(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the Act' for short). Accordingly, Appellant No. 1 was convicted with rigorous imprisonment of 13 years along with a fine of Rs.1 lakh and in default, to undergo further imprisonment. The Appellant No. 2 was convicted with rigorous imprisonment of 10 years along with a fine of Rs.1 lakh and in default, to undergo further imprisonment.

4. Being aggrieved by the judgment and order passed by the Trial Court, the appellants had filed appeals before the High Court. The High Court vide its impugned judgment and order affirmed the conviction and sentence so passed by the Trial Court. It is the correctness or otherwise of the judgment and order passed by the High Court is called in question by the appellants in this appeal.

5. Shri Altaf Ahmad, learned senior counsel appearing for the

accused Nos.1 and 2 would strenuously contend that there is breach of Sections 50 and 42 of the Act while search and seizure of contraband substance by the Customs Officer and, therefore, the judgment and order passed by the Trial Court and so confirmed by the High Court requires to be taken exception to by this Court and in aid of his submission has also taken us through some of the decisions of this Court.

6. *Per Contra*, Shri P.P.Malhotra, learned Additional Solicitor General ably supports the judgment and order passed by the Trial Court and confirmed by the High Court.

7. At this stage, we intend to clarify that certain observations made by the High Court is not the correct legal position but that will not impair the complexion of this appeal.

8. Shri Altaf Ahmad, would submit that there was no recovery of the contraband goods by the Customs Officer from the possession of the accused no.1 and secondly, that when accused no.2 was searched the officers of the department had not complied with the provisions of Section 50 of the Act.

9. The Trial Court and the High Court while answering the aforesaid issues have concurrently come to the conclusion that accused No.2 was not searched by the custom officers but it was only the bag in possession of A2 containing contraband which was searched and seized. The language employed "any person" under Section 50 of the Act would naturally mean a human being or a living individual

unit and not an artificial person. It would not bring within its ambit any non-living creature viz.; bags, containers, briefcase or any such other article. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be a part of the body of a human being. The scope and ambit of Section 50 was examined in considerable detail in the case of *State of Haryana v. Suresh*, AIR 2007 SC 2245 and in a three judges bench decision in *State of Himachal Pradesh v. Pawan Kumar*, 2005 4 SCC 350, wherein it is observed that when a person is not searched, only the bag, container or the suitcase is searched, the provisions of Section 50, cannot be pressed into service. The items like bag, briefcase, or any such article or container, etc. are not a part of a human being as it would not normally move along with the body of the human being unless some extra or special effort is made. Either they have to be carried in hand or hung on the shoulder or back or placed on the head. In common parlance it could be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. but it is not possible to include these articles within the ambit of the word "person" defined in Section 50 of the Act.

10. This position in law is settled by the Constitution Bench in the case of *State of Punjab v Baldev singh*, AIR 1999 SC 2378 and in *Megh Singh v State of Punjab*, 2003 8 SCC 666, where application of Section 50 is only in case of search of a person as contrasted to search of premises, vehicles or articles. But in cases where the line of separation is thin and fine between search of a person and

an artificial object, the test of inextricable connection is to be applied and then conclusion is to be reached as to whether the search was that of a person or not. The above test has been noticed in the case of *Namdi Francis Nwazor v. Union of India and Anr.*, (1998) 8 SCC 534, wherein it is held that if the search is of a bag which is inextricably connected with the person, Section 50 of the Act will apply, and if it is not so connected, the provisions will not apply. It is when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating articles are found therefrom it cannot attract the requirements of Section 50 of the Act for the simple reason that the bag was not found on the accused person. In the instant case, the bag is brought by A2 and the contents of the bag are taken out by him and given for search which is thereafter seized by the officials after having found contraband substance. In such a case the inextricable connection between the search of a person and the bag cannot be established but rather it is only the search of the bag and therefore the search and seizure conducted by the gazetted officer need not comply with the requirements under Section 50 of the Act.

11. Shri Altaf Ahmad, would further contend that when the Custom Officers had searched and seized the contraband in the residence of the accused no.1, the Officers had not complied with the requirements of Section 42 of the Act.

12. The first impression of ours was that Shri Altaf Ahmad may

be justified in canvassing the above proposition. But, on a deeper consideration and after looking into the decision of this Court in the case of *Union of India v. Satrohan*, (2008) 8 SCC 313, we see no merit in the contention canvassed. In the aforesaid decision it is stated as under :

"It can, thus, be seen that Sections 42 and 43 do not require an officer to be a gazetted officer whereas Section 41(2) requires an officer to be so. A gazetted officer has been differently dealt with and more trust has been reposed in him can also be seen from Section 50 of the NDPS Act which gives a right to a person about to be searched to ask for being searched in the presence of a gazetted officer. The High Court is, thus, right in coming to the conclusion that since the gazetted officer himself conducted the search, arrested the accused and seized the contraband, he was acting under Section 41 and, therefore, it was not necessary to comply with Section 42. The decision in *State of Punjab V. Balbir Singh* (1994)3 SCC 299, *Abdul Rashid Ibrahim Mansure Vs. State of Gujarat* (2000) 2 SCC 513 and *Beckodan Abdul Rahiman Vs. State of Kerala* (2002) 4 SCC 299 on the aspect under consideration or neither relevant nor applicable."

13. A perusal of Section 42 contemplates two situations. It contemplates entry into and search of any building, conveyance or enclosed place in anytime between sunrise and sunset by an officer authorized under the Act with a reason to believe that any narcotic substance or any other controlled substance is kept or concealed in such premises and secondly, if the search is made between the sunset and sunrise, the requirement of the proviso to Section 42 is to be complied with under which the officer authorized under the Act is to record the grounds of his belief. But if the search is made by an officer authorized under Section 41(2) of the Act then the said officer is said to be acting under Section 41(2) and therefore compliance under Section 42 is not necessary at all. This principle is re-

iterated in the case of *M. Prabhulal v. The Assistant Director, Directorate of Revenue Intelligence*, (2003) 8 SCC 449 and in *Mohd. Hussain Farah v. Union of India & Anr.*, 2001 1 SCC 329, wherein it is observed that a gazetted officer is an empowered officer and so when a search is carried out in his presence and under his supervision, the provision of Section 42 has no application.

14. In view of the observation and the law laid down by this court, since the search is conducted and the contraband is seized by a gazetted officer from the residential premises of A1, the proviso to Section 42(1) of the Act is not attracted.

15. Before concluding, Shri Altaf Ahmad, would submit that there are serious discrepancies in the investigation done by the Customs Officers while conducting the search and seizure of the contraband from the possession of the Accused no.2 in the house of Accused No.1. In our opinion, the so-called contradictions pointed out by the learned senior counsel are not fatal to the proceedings.

16. Shri Altaf Ahmad, would submit that the Trial Court in course of its order has observed that Accused No. 1 is old and is suffering from several ailments and therefore requests for modification of the sentence ordered by the Trial Court and so confirmed by the High Court. We see merit in the submission made by the learned senior counsel. Keeping this aspect in view, we modify the sentence of Accused No.1 from 13 years to 10 years. However,

insofar as the conviction of Accused No.2 is concerned, we are not inclined to grant any remission and accordingly confirm the judgment and order passed by the Trial Court and so confirmed by the High Court and maintain the fine imposed on him. We further direct that the appellants will surrender after six weeks to serve out the remaining period of sentence. Their bail bonds stands cancelled.

17. The Criminal Appeal is disposed of accordingly.

Ordered accordingly.

.....J.
(H.L. DATTU)

.....J.
(DIPAK MISRA)

NEW DELHI;
FEBRUARY 20, 2013.

JUDGMENT