

CASE NO.:
Appeal (crl.) 103 of 2003

PETITIONER:
Saikou Jabbi

RESPONDENT:
State of Maharashtra

DATE OF JUDGMENT: 03/12/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J

The appellant, a Gambian national, was apprehended around mid-night of 17.9.1993 at the Sahara Airport Bombay for carrying heroin in his baggage in ET Flight No. 661. Ashok Thaker, (PW-1) an intelligence officer attached to the Narcotic Bureau screened the baggage and seizure was made of the heroine weighing about 1 kg. which was concealed in a suitcase. After recording the statement accused was taken for alleged contravention of various provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short the 'Act') and also under the Customs Act, 1962 (in short the 'Customs Act'). He was charged for offence punishable under Sections 21, 23, 28 and 29 of the Act and also Sections 135(1)(a)(ii) of the Customs Act. Accused pleaded innocence. He was tried in the Court of Special Judge for Greater Bombay who found that there was non-compliance with the requirement of Section 50 of the Act as he was not made aware of his right to be searched before a gazetted officer or a Magistrate before the search was conducted. It was also held that the requirement of Section 42(2) to submit the gist of information to higher officer immediately was also not established. The accused was acquitted of all the charges. The prosecuting agency filed an appeal before the Bombay High Court which by the impugned judgment held the accused guilty for offences punishable under Section 8(c) read with Section 21 of the Act for which custodial sentence of 10 years imprisonment and fine of Rs.1 lakh for default stipulation was awarded. Further for offence relatable to Sections 28 read with Section 23 of the Act a similar sentence was awarded. Though he was convicted under Section 135(1)(a)(ii) of the Customs Act, but no separate sentence was awarded. The High Court held that Section 50 was not attracted to the facts of the case. Similarly, it was held that there was compliance of requirements of Section 42(2) of the Act.

Said judgment of the High Court is under challenge in this appeal.

In support of the appeal, learned counsel appearing for the appellant submitted that the trial Court was justified in holding that the accusations were not established against the appellant. Unfortunately, the High Court had on an erroneous reading of Sections 42 and 50 came to hold that there was compliance with the requirements of the said provisions. The seized articles were sent for chemical examination on 23.9.1993. This was in violation of Section 55 of the Act.

Learned counsel for the respondent-State submitted that the High Court was justified in its conclusion and correct interpretation of the relevant provisions of the Act have been made. Further, the plea that there was any prejudice to the accused on account of delayed dispatch was not taken before the courts below. In any event, the investigating

officer categorically stated that the seized articles were kept in safe custody. There was not even any material brought on record to doubt the statement.

Before dealing with rival submissions, it is appropriate to take note of the factual background noticed by the trial Court and the High Court.

During the night between 17.9.1993 and 18.9.1993 PW-1 attached to Narcotic Control Bureau (in short 'NCB') Office, received information that the accused, a Gambian national, was likely to smuggle heroin in his baggage by ET flight 661, scheduled to arrive at 0645 hours that night. He received the information when he was at the airport. He reduced the same to writing (Exh. 16-A) and placed it before his immediate superior Assistant Director, Mr. S.C. Rohatgi, who was present at the Airport. Mr. Rohatgi perused it and put his signature and asked the officer to act upon the said information. At the Airport, he called two panchas and kept a watch at the X-ray machine counter. One Mr. Karanjla, who was a security officer, was Screen Machine Operator at the relevant time. When the accused placed three baggages for screening, the security officer gave signal to PW-1. On the monitor of the screening machine PW-1 noticed green dense patches/spot when a blue coloured caravan make zipper suitcase was put. All the 3 baggages of the accused were placed on the screening machine. PW-1 as well as the security officer suspected concealment of contraband in blue coloured suitcase. The three baggages of the accused were therefore, kept separately near the counter. PW-1 the intelligence officer, who was also an empowered officer disclosed his identity to the accused and his intention to search his baggages. This officer along with the accused, panchas and 3 baggages of the accused went to the Air Traffic Room of Air India for the purpose of search of those baggages. In that room PW-1 took charge of the travel document of the accused consisting of his passport, ticket etc. Accused opened blue coloured suitcase with his keys. The same was filled with old and new garments and one bed sheet. Two polythene bags containing brown powder were found in the folds of bed sheet. Small quantity of the brown powder was taken out for the purpose of testing which, when tested on testing kit, answered positive for heroin. Both the polythene bags were emptied in one big polythene bag. The total quantity of powder found in the said bags weighed 990 grams. Three samples were drawn in separate small polythene bags. Those bags were sealed by heating and were put in separate paper bags which were closed. All these samples packets were sealed with office seal bearing No.03-NCB in the presence of panchas whose signatures were obtained after putting particulars and marked S-1, S-2 and S-3. Sample packets were also signed by PW-1 as well as the accused. The remaining quantity of powder was separately sealed with the seal of N.C.B. and the signatures of the panchas and the accused were taken on the labels. The seizure panchnama (Exh. 17) was prepared. The panchnama was signed by both the panchas as well as PW-1. One copy of the said panchnama was handed over to the accused which he acknowledged by putting his signature on the seizure panchnama. The blue suitcase, the contraband and the bed sheet were seized. Other two suitcases were returned to the accused. The travel documents and foreign currency worth 201 US \$ and 700 Francs recovered in personal search of the accused were also seized under the panchnama.

Thereafter, the accused along with the contraband and samples was brought to the N.C.B. Office. A note about the interception, search and seizure was prepared by the officer, (Exh. 17-A). The same was placed before his superior officer Mr. S.C. Rohatgi along with seizure panchnama and the muddemal property. Summons were served to the accused under Section 67 of the Act and his statement was recorded by PW.1 on 18.9.1993 in which the accused admitted the recovery of 990 grams of heroin from his suit case. The same was marked as (Exh.18). His further statement was recorded on 19.9.1993 as per (Exh.19). The accused was arrested on 19.9.1993.

On 23.9.1993, sample packet marked as S-1 was handed over to the Dy. Chief of the Laboratory and Chemical Analyst's Report from the Laboratory dated 26.10.1993 was received (as per Exh.21), according to which the sample was of heroin (diacetylmorphine). After the investigation was completed complaint was filed. The Special Judge framed charges against the accused under Section 8(c) read with Sections 21, 23, 28 and 29 of the Act and under Section 135(1)(a)(ii) of the Customs Act. Separate charge under Section 8(c) of the Act read with Section 21 of the Act was also framed against the accused. As the accused pleaded not guilty, prosecution led evidence of two witnesses. PW-1, as noted above Ashok Thaker, who had received the information, conducted the search and also investigated the case. The other witness examined was panch PW-2 Ankush Yerunkar, who was panch to the search and seizure of the contraband from the accused. He fully supported the prosecution case. The prosecution has also produced on record the relevant documents like copy of the information reduced to writing, Seizure panchnama, Chemical Analyst's Report etc.

The first aspect which needs to be considered is whether there was any non-compliance of Sections 42 and 50 of the Act as pleaded. So far as these two provisions are concerned, they read as follows:

"Section 42: Power of entry, search, seizure and arrest without warrant or authorization:

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset, -

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence

of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act.

Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment or evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

Section 50: Conditions under which search of persons shall be conducted-

(1) When any officer duly authorized under Section 42 is about to search any person under the provisions of Section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorized under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973(2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within

seventy-two hours send a copy thereof to his immediate official superior."

Now comes the question whether there was non-compliance of Section 50 of the Act.

A bare reading of Section 50 shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. (See *Kalema Tumba v. State of Maharashtra and Anr.* (JT 1999 (8) SC 293), *The State of Punjab v. Baldev Singh* (JT 1999 (4) SC 595), *Gurbax Singh v. State of Haryana* (2001(3) SCC 28). The language of Section 50 is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in *Baldev Singh's* case (supra). Above being the position, the contention regarding non-compliance of Section 50 of the Act is also without any substance.

In the case at hand the contraband articles were suspected to be hidden in the blue suitcase of the accused, and was not in his physical possession. The suitcase was put on the screening machine. This cannot be equated to be a recovery made from the person of the accused by a personal search.

In *Birakishore Kar v. State of Orissa* (2001 (9) SCC 541) it was held that when there was a recovery from a plastic bag belonging to the accused on which he was found sitting on railway compartment, Section 50 was not applicable. *Baldev's* case (supra) was referred to hold that Section 50 in case of search comes into play only in case of search by a person as distinguished from search from any premises etc. The position was also highlighted recently in *Madan Lal & Anr. v. State of Himachal Pradesh* (2003 AIR SCW 3969). Above being the position the High Court was justified in holding that Section 50 had no application.

So far as compliance with Section 42(2) is concerned, the statement of PW-1 to the effect that he had informed his superior remained unshaken and there was even no cross-examination to point out any falsity in the said statement. The note of intelligence information was placed on record vide Exh. 16-A to substantiate the testimony of PW-1. That being so the High Court was justified in holding that the provisions of Section 42(2) had been complied with.

Coming to the plea regarding non-compliance of Section 55 of the Act, as rightly submitted by learned counsel for the respondent-State, there was not even any argument advanced on that score before the trial Court and the High Court. Even otherwise also the evidence of the investigating officer about safe custody of the contraband articles have not been challenged or shaken in the cross-examination. That being the position we are not inclined to accept the plea that there was non-compliance with the requirements of Section 55 of the Act.

Looked at from any angle, the appeal is sans merit, deserves dismissal, which we direct.