

CASE NO.:
Appeal (crl.) 1042 of 2001

PETITIONER:
Narcotics Control Bureau, Mumbai

RESPONDENT:
Vs.
Abdullah Hussain Juma & Anr.

DATE OF JUDGMENT: 30/07/2003

BENCH:
N.Santosh Hegde & B.P.Singh.

JUDGMENT:

J U D G M E N T

SANTOSH HEGDE, J.

This appeal arises from the judgment of High Court of Judicature at Bombay made in Criminal Appeal No.213 of 1997 dated 4.12.2000 whereby the High Court allowed the appeal of the respondent filed against the judgment of the learned Special Judge, N.D.P.S., Greater Bombay, made in NDPS Special Case No.95 of 1994.

Brief facts necessary for the disposal of this appeal are as follows :

On receipt of certain secret information that some passengers travelling by the Ethiopian Airlines on 8.3.1994 were suspected to be carrying some contraband with them, the concerned Customs Officers detained 9 suspects after they had completed their immigration formalities. On a personal search made by the said Officers as also a search of the checked-in baggages of the said passengers at the airport, nothing incriminating was found. Since the Officers suspected that narcotic drugs may have been concealed in the body cavities of the said passengers, they were asked by the Officers whether they were willing to be examined by a doctor and on their agreeing to the said proposal, the said passengers were brought to the office of the Narcotics Control Bureau (NCB) at Ballard Pier, and thereafter were taken to J.J. Hospital where the doctors were told that the said passengers were brought to the hospital for radiological examination as the Officers suspected the said passengers to be carrying narcotics concealed in their body cavities. On such radiological examination, it was revealed that the passengers' bodies did contain certain foreign substances, therefore, they were then brought again to the office of the NCB where they were arrested and the grounds of arrest were made known to them. They were also produced before the Special Judge and a remand was obtained. Thereafter they were again taken to J.J. Hospital where they were admitted in Ward No.19 for further examination.

It is further the case of the prosecution that so far as the present respondent is concerned, during his stay in the hospital between 8th and 16th March, 1994, he purged 41 capsules made of black insulation tape inside which small polythene bags were found containing certain powder. One such capsule so purged by the respondent was opened for testing with the help of field testing kit which, according to the prosecution, proved positive for heroin. On further examination, it was found that each of such packet contained 5 grams of heroin, therefore, all the remaining packets were put into

a larger polythene bag and sealed in the presence of the Panchas. The prosecution further avers that on the samples being sent to the Deputy Chemist Laboratory, New Customs House, Mumbai, the Chemical Examiner found that the capsules contained Dyacetyl Morphin i.e. heroin. Thereafter, a complaint was filed in the Court of the Special Judge against the said passengers including the respondents herein and charges under Section 8 (c) read with Section 21, Sections 28 and 23 of the NDPS Act (for short 'the Act') were framed against the accused. The trial court, as stated above, came to the conclusion that the prosecution had established its case against the accused and sentenced them including the respondents herein to undergo RI for a term of 3 years and also to pay a fine of Rs.1 lakh; in default of which to further undergo 6 months' simple imprisonment. On appeal, as stated above, the High Court disagreed with the trial court and set aside the conviction and sentence imposed on the accused.

It is the case of the prosecution that since other accused apart from the respondent herein, had left the country by the time the appeal was preferred, this appeal is confined only to the respondent herein who could not go out of the country for various reasons. In the impugned order, the learned Judge of the High Court came to the conclusion that the prosecution had failed to comply with the mandatory requirement of Section 50 of the Act by not informing the accused of his right to be searched by a Gazetted Officer or a Magistrate. The High Court also accepted the contention of the respondent herein that since a copy of the seizure Panchnama was not given to the accused, there was violation of the requirement of Section 100(7) of the Cr.P.C. It also came to the conclusion that since the accused was not given a copy of the inventory maintained by the J.J. Hospital in regard to the contraband capsules allegedly collected by the prosecution after the same were purged by the accused, there was infraction of sub-sections (6) and (7) of Section 100 Cr.P.C. The High Court also accepted the argument advanced on behalf of the accused that though the sample of the contraband was taken by the prosecution on 6.3.1994, the same was not sent to the laboratory for chemical analysis till 21.3.1994 during which time the Investigating Officer had the seal used on the sample bags with him, therefore, there was a possibility of the samples sent to the laboratory being tampered with. Further, the High Court came to the conclusion that the prosecution has failed to establish that the 41 capsules containing contraband were actually seized from the respondent-accused herein because nobody who was involved in the process of collecting such capsules after the same were purged by the respondent-herein and responsible for handing over the same to the Investigating Officer was examined. Thus the prosecution has failed to establish beyond reasonable doubt that the capsules containing the contraband sent to the chemical examiner were in fact purged by the respondent herein so as to establish the fact that this respondent-accused actually had concealed the said 41 capsules in his body cavity. It is on the basis of these findings that the High Court allowed the appeal, setting aside the conviction and sentence imposed by the trial court on the respondent-accused.

Mr. P.P. Malhotra, learned senior counsel for the appellant, strenuously contended that the finding of the High Court that there has been a violation of Section 50 of the Act is wholly erroneous since the said Section did not apply to the facts of the case. He contended that the need to inform an accused of his right of being searched by a Gazetted Officer or by a Magistrate arises only when a personal search of the accused is made by such concerned Officer. He contended that Section 50 did not apply to cases where a doctor who is not one of the persons mentioned either in Section 42 or Section 50 of the Act is undertaking a physical examination of the person of the accused. He also contended that the other findings of

the High Court in regard to non-supply of seizure Panchnama, delay in sending the sample for chemical examination are the irregularities of such nature which would not vitiate the seizure actually made by the prosecution. He submitted that the prosecution having examined the doctor of the J.J. Hospital who in his evidence having clearly stated that an inventory was maintained in regard to recovery made pursuant to the the daily purging by the respondent-accused and the capsules so collected having been kept separately which were later put in a sealed bag in the presence of Panchas would clearly show that the contraband in question was in fact purged by the respondent-accused and the same was subsequently collected and seized in accordance with law. Therefore, the High Court was in error in finding fault with the seizure of the contraband from the respondent-accused.

Mr. Bimal Roy Jad, learned counsel appearing for the respondent, while supporting the judgment of the High Court, contended that whether the search is made by a doctor or a Police Officer, the mandatory requirement of Section 50 has to be complied with which not having been done in the instant case, the seizure made by the accused becomes illegal, hence, no conviction could be based thereon. He also supported the judgment of the High Court on other grounds on which the learned Judge had found that the prosecution had failed to establish the charges levelled against the respondent.

As seen above, though the High Court has given a number of reasons for allowing the appeal filed by the respondent-accused before it, on the facts and circumstances of this case, we find it not necessary to go into all the points urged before us because we are in agreement with the finding of the learned Judge of the High Court on the question that the prosecution has failed to establish that the 41 satchets recovered by it are really the ones which were allegedly purged by this respondent-accused. While discussing this fact, we have to bear in mind that there were 9 accused persons who were intercepted at the airport by the NCB Officers on 8.3.1994. All these 9 persons were brought to the hospital and subjected to radiological test and were suspected of having concealed certain foreign substance in their body cavity. Evidence of Dr. Algotar, PW-3, shows that all these accused persons were kept in the hospital because it was thought that they would in due course of time, purge foreign substance from their bodies. He also states in his evidence that arrangements were made by the hospital authorities in regard to each of these accused persons to facilitate them to purge the foreign substance from their body cavities and these persons were kept under observation. He also stated that each of these accused persons was provided with a toilet pan and every time the accused persons purged the sachets, they were collected, cleaned by the sweeper of the hospital and handed over to the Resident Doctor. It is thereafter according to this witness the sachets purged by each of these accused persons were collected, sealed and sent for chemical examination. But we notice from the evidence of PW-3 that he was not personally present when these sachets were recovered after they were purged by the concerned accused nor when the sachets after collection and cleaning, were handed-over to the Resident Doctor, therefore, this witness is not competent to say that the 41 sachets collected from the respondents-accused are the very same sachets which he had purged and not those which the other accused might have purged. The appropriate person who could have spoken about this fact of purging by the respondent-accused, was the sweeper who collected the said sachets. He has not been examined nor the Resident Doctor to whom these sachets were given after cleaning every time the same were purged was also not examined by the prosecution nor is there any material to show that as and when these sachets were purged, they were kept separately from the other

sachets which were also similarly purged by other accused persons. Therefore, there is a serious doubt as to the identity of the sachets actually purged by the respondent-accused. Learned counsel for the appellant, however, contended that it is seen from the evidence of PW-3 that a proper inventory was maintained by the hospital as and when sachets were recovered from the respondent-accused but, as noticed by the High Court, it is seen that the so-called inventory maintained by the hospital is not signed or attested by any of the officials of the hospital nor any person who really maintained the said inventory, has been examined in this regard. Even the Panch witness PW-4, who had signed the Panchnama for the recovery of the alleged sachets from the respondent accused, has not fully supported the prosecution case. In this background, we agree with the High Court that the prosecution has not established beyond reasonable doubt that the sachets which were collected on various dates between 16th and 20th March, 1994, as a matter of fact, were purged by the respondent-accused and not by anybody else. In such factual background, we feel that the High Court was justified in coming to the conclusion that the prosecution has failed to establish the recovery of these sachets from the respondent-accused beyond all reasonable doubt. In our opinion, this ground alone is sufficient to sustain the judgment of the High Court, hence, it is not necessary for us to consider the correctness of the legal argument as to the applicability of Section 50 of the Act in regard to a search made by a doctor. We leave this question open and in view of the fact that we are in agreement with the finding of the High Court on a question of fact namely the prosecution has failed to establish beyond all reasonable doubt that the sachets sent to the Chemical Examiner are the very same sachets recovered from the respondent. We think this appeal has to fail and the same is dismissed. The bailbonds of the respondent stand discharged.