

(1997) 10 BOM CK 0057

In the Bombay High Court

Case No : Criminal Appeal No. 498 of 1994

Edozie Boniface Umeora

APPELLANT

Vs

Shri B.S. Rawat, Asstt. Collector

RESPONDENT

Date of Decision : 13-10-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235

Customs Act, 1962 — Section 135

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 32

Citation : (1998) BomCR(Cri) 672

Hon'ble Judges : Vishnu Sahai, J;T.K. Chandrashekhara Das, J

Bench : Division Bench

Advocate : Miss Amrolia, for the Appellant; Prakash Thakur and S.G. Deshmukh, Assistant Public Prosecutor, for the Respondent

Judgement

T.K. Chandrashekhara Das, J.—The appellant challenges in this appeal the judgment and order dated 27th June 1994, passed by the Special Judge, (N.D.P.S. Act), for Greater Bombay, in N.D.P.S. Case No. 85 of 1989 convicting and sentencing him to suffer (1) R.I. for 10 years and to pay a fine of Rs. 1.25 lakhs and in default to suffer R.I. for 3 years u/s 21 of the N.D.P.S. Act, (2) u/s 28 of the N.D.P.S. Act he was sentenced to suffer R.I. for 10 years and to pay a fine of Rs. 1 lakh, in default to suffer R.I. for 3 years, and (3) u/s 135(i)(a) of the Customs Act he was sentenced to suffer R.I. for 3 years and to pay a fine of Rs. 5,000/-, in default to suffer further R.I. for 6 months. Substantive sentences were ordered to run concurrently.

2. According to the prosecution when the appellant, a Nigerian national, was about to board an Ethiopian Airlines Flight No. ET-611 for Adis Ababa on 13-9-1988 at about 1.30 a.m. he was intercepted at the Sahar International Air Port, Bombay, after having checked in his baggage. He was intercepted after he had cleared the customs formalities at the customs counter. On interrogation the appellant replied that he was carrying on one piece of checked in baggage and when he was asked whether he had concealed any contraband in the checked in

baggage he declined. Immediately, two panchas were called from the counter of Air India. In the presence of panchas accused was again questioned as to whether he had concealed any contraband articles in the checked in baggage. Though the accused denied the Intelligence Officer Shri Mahendrakumar, who was then at that time along with P.W. 1 Balchand Subhag Ram withdrew the checked in baggage of the accused from the conveyor belt and kept the same in the Customs Examination Counter. The accused identified the said baggage in the presence of panchas. The baggage identification tag was tagged to the zipper bag. The number on the baggage identification bag was verified with the baggage claim tag of the boarding pass and both the numbers tallied each other. There was no lock to the zipper bag identified by the accused as his own. P.W. 1 Balchand opened the said bag in the presence of the panchas and it was found containing imitation jewelry, some empty capsules of cylindrical shape and bangles in it. The bangles were tagged with adhesive tapes. After lifting the package it was found unusually heavy. The bangles were having hollow portion. After the packing was opened P.W. 1 and other officers and panchas who were present there found polythene bags in the hollow portion of the composite pack of the bangles. In all 21 polythene packets were recovered. All these polythene bags were opened and found containing brownish colour powder in it. Small quantity from each packets were drawn and when tested with the help of U.N. Kit, the test answered positive for the presence of heroin. The powder from all the packets were emptied into one big polythene bag and was weighing 5 kgs. 200 gms.

3. Three sample of 15 gms. each of the said powder, before all packets were emptied into one bag as stated earlier, was collected as samples in small envelopes and the same was sealed on the overlapping portion with P.O. Seal No. 16. The remaining contraband collected in the big bag was put in a cardboard carton and the same was also sealed and the particulars of the seizure and the file number were put on it. The packing, labelling, sealing and sampling took place in the presence of the panchas and the accused and their signatures were put on the labels and on the paper envelopes. The zipper bag, its contents used for concealment of the drugs, i.e. bangles and adhesive tape in the polythene bags were collected, taken charge of and put in the zipper bag and seized under a panchanama and the same was also sealed and the panchas put their signatures on the label tied to the zipper bag. Then the samples were sent for chemical analysis. The report of the chemical analyzer is at Exhibit 27. The chemical analyser's report showed that the samples in the form of brown coloured powder, a preparation containing morphine. On verification the sample was found to contain more than 0.21 morphine whereas drug morphine actual being was 11.3%. Hence as per the said report of the chemical analyzer it was covered by section 2(XVI)(e) of Narcotics Drugs and Psychotropic Substances Act, 1985. On completion of the investigation the accused was chargesheeted and tried.

4. The appellant pleaded not guilty to the charges levelled against him. In all

prosecution examined 6 witnesses and no evidence has been lead on the side of the appellant. The learned trial Judge believed the evidence adduced by the prosecution and convicted and sentenced the appellant as set out herein above. Hence this appeal.

5. We have heard Counsel for the appellant and Counsel for the respondents. After hearing the arguments advanced by the respective Counsels and examining the judgment and order and the evidence on record we do not find any merit in this appeal. The learned Counsel for the appellant though did not attack the search on any legal ground has urged that there is a serious discrepancy spoken by the witnesses during the search which factually affect the prosecution case. She submitted that the prosecution witnesses have not adduced before the Court the nexus between the contraband baggage and the appellant. She pointed out that when P.W. 1 Balchand was called on to the customs counter the contraband bag was lying there and it was open. Relying on this statement of P.W. 1 the learned Counsel for the appellant strenuously argued that the prosecution has not established the eventuality between the contraband bag and the appellant. We do not think that this contention is now available to the appellant. Even though P.W. 1 has committed some discrepancies in his evidence to connect the bag with the appellant, P.W. 2 Bhaginath has categorically stated that he has verified the number on the identification tag and that on the baggage claim tag and found that the numbers tallied each other. The claim tag was pasted on the Boarding Card. This is a clinching evidence which establishes the nexus between the appellant and the bag and any discrepancy if any at all committed by the panchas with regard to the ownership of the bag can be discarded.

6. Counsel for the appellant next submitted that when P.W. 2 panch went to the Customs office at the instance of P.W. 1 the zipper bag was lying there and it was open. The suggestion tried to be made out by the Counsel for the appellant is that on the same day there was another recovery of the contraband articles and therefore there is a possibility of planting the drugs in the bag of the appellant. We do not consider this argument to be worth consideration. In the absence of any mala fide intention proved against the P.W. 1 we do not think that this argument could be available for the appellant. P.W. 1 has meticulously spoken before the Court the manner and the circumstances under which the search was conducted. He was an officer on duty of the Customs Department at the counter and while on duty he has verified the baggage of the appellant. Therefore, any discrepancy of panch mentioning about the bag being found in an open condition, in view of the other material and cogent evidence available in this case we do not find that the contention of the appellant could be acceptable in that respect.

7. As stated above the samples which were taken from the contraband bag was tested by D. Mohankumar P.W. 5, Chemical Analyzer whose certificate is at Exhibit 25. P.W. 5 in his examination in chief stated that on 14-9-1988 he received one sample in his laboratory bearing P.O. Seats No. P.P. 16 and it was registered in the laboratory as tab No. 315 seizure/14-9-88 marked on it, which

according to him is the entry made by the receiving clerk in the laboratory. He has stated that the sample bags were received in sealed condition and the seals were in tact. He kept the sample in his custody under lock and key. He took out the sample for actual analysis on 30-9-1988. He applied all the necessary tests and came to the conclusion that the sample powder was a preparation of Morphine. He also did the quantitative test of the percentage of the morphine and found that the same contained more than 11.3% morphine covered u/s 2(XVI)(e) of Chapter I of the N.D.P.S. Act. He stated that all the tests applied and observations made were noted in his notebook, Exhibit 26.

8. In our view the evidence of P.W. 5 coupled with the report of the analysis and also the evidence of P.W. 1 undoubtedly establish the guilt of the appellant in this case. We do not find any reason to interfere with the findings of the Court below in finding the appellant is guilty.

9. The learned Counsel for the appellant lastly argued that the sentence in default of payment of fine imposed by the Court below against the appellant was shockingly disproportionate and therefore not legally justified. As we noted above the appellant was awarded substantial sentence on three counts. He was sentenced to suffer (1) R.I. for 10 years and to pay a fine of Rs. 1.25 lakhs and in default to suffer R.I. for 3 years u/s 21 of the N.D.P.S. Act, (2) u/s 28 of the N.D.P.S. Act he was sentenced to suffer R.I. for 10 years and to pay a fine of Rs. 1 lakh, in default to suffer R.I. for 3 years, and (3) u/s 135(i)(a) of the Customs Act he was sentenced to suffer R.I. for 3 years and to pay a fine of Rs. 5,000/-, in default to suffer further R.I. for 6 months. Though the substantive sentences of imprisonment were ordered to run concurrently the sentences in default of payment fine are to be served consecutively. The learned Counsel for the appellant submitted that the sentences in default of payment of fine awarded by the Court below is definitely on the higher side. We also hold the same view and it requires some reduction. Therefore the interest of justice will be met if we reduce the sentence in default to one year from three years in respect of counts 1 and 2 and 6 months to 3 months in respect of count No. 3.

10. In the result this appeal is partly allowed. The conviction ordered by the Court below stands confirmed. The sentences awarded by the Court below is modified in the following manner:

The appellant is sentenced to suffer (1) R.I. for 10 years and to pay a fine of Rs. 1.25 lakhs and in default to suffer R.I. for 1 year u/s 21 of the N.D.P.S. Act, (2) u/s 28 of the N.D.P.S. Act he is sentenced to suffer R.I. for 10 years and to pay a fine of Rs. 1 lakh, in default to suffer R.I. for 1 year, and (3) u/s 135(i)(a) of the Customs Act he was sentenced to suffer R.I. for 3 years and to pay a fine of Rs. 5,000/-, in default to suffer further R.I. for 1 month. Substantive sentences are to be run concurrently.

11. Before parting with this judgement we have to consider the request made by the Counsel for the appellant that the appellant is entitled for the remission of

the sentences as provided under the Criminal Procedure Code. She submits that since the offence was committed on 13-9-1988, long before coming into force of section 32-A of the N.D.P.S. Act the bar provided under the section shall not be made applicable to the appellant. We find considerable force in the contention put forward by the Counsel for the appellant. But this Court has no jurisdiction to grant remission under the provisions of the Criminal Procedure Code. In the circumstances of the case we trust and hope that the appropriate authority will consider the application that may be made by the appellant, and pass appropriate order, de hors section 32-A of the N.D.P.S. Act.

We place on record and do appreciate the valuable assistance rendered by the Counsel for the appellant in this case as well as Counsel for respondents in disposing off this appeal.

12. Appeal Partly allowed.