
(2003) 06 MAD CK 0081
In the Madras High Court
Case No : C.A. No. 355 of 2000

Mastan Gouse Mohideen

APPELLANT

Vs

Government of India

RESPONDENT

Date of Decision : 25-06-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374

Citation : (2003) 06 MAD CK 0081

Hon'ble Judges : M. Chockalingam, J

Bench : Single Bench

Advocate : R.C. Paul Kanagaraj, for the Appellant; P.N. Prakash, Special Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

M. Chockalingam, J.—The appellant/A-1 herein who stood charged and tried along with another under S. 8(c) r/w 21 and 29 of N.D.P.S. Act, was found guilty by the Court below and convicted under S. 8(c) r/w 21 of N.D.P.S. Act and sentenced to undergo R.I. for 10 years and to pay a fine of Rs. 1.00 lakh and in default to undergo one year R.I. while the second accused was acquitted.

2. The facts which led the lower Court to frame the charges under the provisions of the NDPS Act can shortly be stated as follows:

(a) The complainant is the Assistant Commissioner of Customs. The first accused Mastan Gouse Mohideen was the holder of the Indian Passport and bound for Colombo by Indian Airlines Flight No. IC 573 on 16.10.1997. When he was intercepted by the Intelligence Officer, Air Intelligence Unit, Anna International Airport, Chennai, after clearance through emigration and customs, a suspicion arose whether he might be carrying the prohibited items with him. In the presence of two witnesses his baggages were examined by the Superintendent of Customs. From his bagage 24 plastic containers with labels "Regaul Liquid Blue" was recovered. On detailed examination, they were found to contain 8007 grams

of narcotic substance. The appellant/A-1 volunteered to give a statement as to his role in the commission of the offence. He was arrested at about 8.00 hours on 17.10.97 and produced before the Additional Chief Metropolitan Magistrate, Economic Offence-I, Madras. A departmental custody was sought for and the same was ordered. The Department was directed to produce the appellant/A-1 on or before 20.10.1997. In his further statement, A-1 has stated that 12 plastic containers containing narcotic substance were given to him by Mallika and 12 plastic containers containing narcotic substance were given by Selvam and Vasu and that one Michael has assisted by arranging the travel documents. On getting all the informations regarding those persons and on his identification, the second accused in the case was located. His house was searched on 18.10.97 under a search warrant. At that time, the second accused was not present. The passport size photograph of the second accused was seized under a mahazar and nothing incriminating was found in his house. As per the directions, the second accused appeared before the Superintendent of Customs on 18.10.97 at about 5.30 P.M., and he gave a voluntary statement. In his statement, it was categorically admitted that he has arranged for the travel documents at the instance of Mallika and that he requested the Customs Officer that he would appear the next day, and his request was accepted. A summon under S. 67 of the NDPS Act was issued on 18.10.97 to appear before the Customs Authorities. Accordingly he appeared on 19.10.97. On 19.10.97, the first accused identified the second accused who arranged travel tickets. The further voluntary statement of the first accused was recorded. Both the accused were produced before the Magistrate for the purpose of remand.

(b) The samples that were taken at the time of the seizure, were sent for chemical analysis laboratory, attached to the Customs House, through Court, and the report confirmed that it was a manufactured drug covered under the provisions of the NDPS Act, 1985. The seized contraband samples and the material objects were deposited at the Airport Warehouse of the Customs Department, and they were produced before the remanding Magistrate. The properties were kept in the safe custody of the Customs Warehouse and produced before the Court after ensuring the receipt of records from the Court on 22.10.97. The complainant in compliance of the orders of the Court deposited the properties in the safe custody of the Airport Warehouse, which godown was a designated godown. After the chemical analysis, the remnant sample was submitted to the Court and was also returned to the complainant for safe custody. In the course of investigation it was found that during October 1997 at Chennai, A-1 and A-2 and others known to them, but unknown to the complainant entered into a criminal conspiracy to produce, purchase, possess, conceal, transport and export about 8007 grams of heroin to Srilanka, which was actually seized on 16.10.1997 as stated above at the Airport, and A-1 and A-2 have committed an offence of conspiracy in violation of S. 8(c) of the Act punishable under S. 29 of the NDPS Act. Pursuant to the conspiracy, in the course of transaction, A-1 has concealed 24 packets of heroin in 24 plastic

containers with the labels "Regaul Liquid Blue" along with other goods and has transported the same from Tirusulam Railway Station to Anna International Airport, and they have committed the offence punishable under S. 8(c) r/w 21 of NDPS Act. The complaint was lodged before the Court.

3. After following the procedural formalities, the prosecution was asked to adduce evidence. In order to prove the case, the prosecution has examined P.Ws.1 to 8 and marked Exs.P1 to P37 and M.Os.1 to 8. When the accused 1 and 2 were questioned as to the incriminating circumstances found in the evidence, they have flatly denied the same. No defence witnesses were examined. The Court found the appellant/A-1 guilty under the above stated provisions of the Act and sentenced him as stated supra, while acquitted A-1. Aggrieved appellant/A-1 has brought forth this appeal.

4. Arguing for the appellant, the learned Counsel would submit that the lower Court should have rejected the case of the prosecution in view of the violation of the mandatory provisions enshrined under S. 50 of the N.D.P.S. Act; that according to the evidence of P.W.1, the appellant/accused opted for the search before a gazetted Officer, and so, he was taken before P.W.6 Mr. Gunalan, the immediate Superior, who was a gazetted Officer, whereas P.W.6 has clearly stated in his evidence that at the time of informing the right under S. 50(1) of the NDPS Act, he was present; that he was throughout present during the search and seizure; that the option opted by the appellant/accused was not duly complete, and as such, the respondent violated S. 50(1) of the Act; that the seizure Officer did not record the reasonable belief as contemplated under S. 42(1) of the Act, and the same was not sent to his Official superior under the said provisions; that the prosecution has not established that the checked in baggages were carried and possessed by the appellant; and that there were material contradictions found in the evidence of the witnesses relied on by the prosecution. Added further the learned Counsel that under S. 50 of the Act, the accused should be informed of his right to exercise his option whether he was to be searched before a gazetted Officer or a Magistrate, but in the instant case, the appellant was not informed that he has got a right to do so; that apart from that P.W.1 has stated three options that the accused was entitled to be searched before a gazetted Officer or Magistrate or before the Superintendent of Customs, who was also a gazetted Officer, and under the circumstances, it cannot be stated that the mandatory provision of S. 50 of the Act was strictly complied with; that the appellant was not taken to an independent gazetted Officer; that the witnesses who have attested the mahazer were not independent witnesses, but they were employed in the Airport; that the statement of the appellant was written by his brother; that from the available evidence, it could be seen that the appellant could well write, and if so, the prosecution was unable to explain why the statement of the appellant was written by his brother; that there is no evidence to show how the brother of the accused appeared before the Officials, and in view of the violations of mandatory provisions and also in view of the above circumstances, the lower Court should have rejected the case of the prosecution.

In support of his contention, the learned Counsel for the appellant relied on the following decisions: (1) 2000 SCC 1228 (K. MONAHAN VS. STATE OF KERALA); (2) 2001 (1) CRIMES 540-ORISSA HIGH COURT (DWARIKA @ TARINI PATRA AND ANOTHER VS. STATE OF ORISSA) and (3) 2002(2) CRIMES 375 (BECKODAN ABDUL RAHIMAN VS. STATE OF KERALA).

5. Countering to the above contentions, the learned Special Public Prosecutor would submit that S. 50 of the NDPS Act has no application to the present facts of the case; that S. 50 of the Act would be attracted in a case where the search arose pursuant to an information, but in the instant case, on suspicion the appellant was intercepted by the Customs Officials; that apart from that search of a person was different from the search of the baggages held by him, and in the instant case, what was done was the search of the baggages; that all the attesting witnesses were employed in the Indian Airlines; that they have nothing to do with the Customs Department, and hence, it cannot be stated that they were not independent witnesses; that the house of the accused was searched at 5.30 P.M. on the very day, and Ex.P27 search mahazar was prepared, wherein the brother of the appellant/accused has signed; that P.W.3 has well spoken to the above facts; that in the instant case, the case of the prosecution for conspiracy has failed; that great significance cannot be attached to the statement of the appellant, which was written by his brother, since the possession and recovery of the contraband has been clearly proved by satisfactory evidence; that the appellant has failed to prove that he had no mental state to commit the offence charged against him; that the prosecution has proved by its case, and hence, the judgment of the lower Court has got to be sustained. In support of his contention, the learned Special Public Prosecutor relied on the decision of the Apex Court reported in Kalema Tumba Vs. State of Maharashtra and Another, .

6. After careful consideration of the rival submissions and scrutiny of the available materials, the Court is unable to notice any substance in this appeal.

7. P.W.1, Intelligence Officer, Anna International Airport, Madras, when he was on duty, entertained a suspicion on the appellant/A-1 who had completed the customs checking and security and intercepted him. The appellant was found trembling which increased his measure of suspicion. After informing him whether he desired to be produced before a gazetted Officer or a Magistrate for conducting search, the accused answered that he could be searched in the presence of the gazetted Officer present. The appellant was taken before P.W.6 Gunalan, Superintendent of Customs, a gazetted Officer in whose presence the search was made. The search was conducted in the presence of two witnesses who were employed in Indian Airlines and Saudi Airlines respectively. At the time of search, 12 Regaul Blue plastic bottles were found, and on examination, those bottles were found to contain solid instead of liquid. When those plastic containers were opened, they contained brown colour powder in all 12 Regaul Blue bottles. On the basis of the three luggage tags in the possession of the

accused, P.W.1 sent for the 3 checked in baggages of the appellant, and after ascertaining them that they were the baggages of the appellant, they were searched and he found another 12 Regaul Blue plastic bottles, which also contained brown powder. Three samples from each bottle weighing 5 grams from the brown coloured powder from the 24 plastic bottles were taken. The total weight of the contraband before taking the sample seized was about 8 kilos. It was seized under Ex.P1 mahazar, in which the said two independent witnesses, P.W.1, the Customs Superintendent and the accused all have signed. It is not disputed by the appellant that Ex.P2 was the plane ticket of the appellant dated 16.10.97 for his travel in Indian Airlines plane IC 573, and Ex.P3 was his passport. It is pertinent to note that Ex.P4 was the receipt issued to A-1. Under Ex.P4 receipt, he has paid for the excess luggage in his possession. Ex.P5 tags relating to the 3 checked in bags of A-1 tallied with the numbers found in Ex.P6 tags.

8. From the evidence of P.W.1, it would be clear that M.O.3 series 12 plastic Regaul Blue bottles were taken out of M.O.1 and baggage of A-1. The contraband which were recovered from the accused were produced before the concerned Magistrate's Court along with a letter of requisition for sending the samples for chemical analysis. P.W.7 Analyst in his evidence has stated that as per the requisition under Ex.P13 and test memo under Ex.P14, 24 sealed packets were received; that he analysed the same and found the presence of di-acetylmorphine in it which was heroin. The Analyst's report was marked as Ex.P37, and thus, from the evidence through P.Ws.1 to 6 the prosecution has proved that the accused was intercepted by P.W.1, and on his consent a search was made in his baggage, which was found to contain brown powder, and the other 3 checked in baggages of the appellant were also searched and totally 24 Regaul Blue plastic containers contained the narcotic substance, which was seized procedurally under Ex.P1 mahazar in the presence of the witnesses, and the same weighed about 8 kilos. From the report of the Analyst, it has been proved that the contraband contained narcotic substance viz. heroin, and thus, the prosecution has clearly proved that A-1 was in possession of the contraband namely narcotic substance as alleged by the prosecution. Hence, the fact that A-1 was in possession of the narcotic substance as alleged by the prosecution cannot be disputed.

9. The first contention of the appellant's side that the mandatory provision under S. 50(1) of the NDPS Act was not followed cannot be countenanced for the simple reason that from the available evidence it cannot be disputed that the narcotic substance was seized from the 12 Regaul Blue plastic containers which were found in the handbag of A-1 and another 12 Regaul Blue plastic containers in the already checked in baggages. The requirement of informing the person of his right under S. 50 of the NDPS Act to be searched in the presence of a gazetted Officer or a Magistrate would arise only to the search of a person and not to the search of the baggage. The Apex Court in a case reported in *Kalema Tumba Vs. State of Maharashtra and Another*, has held as follows:

"Only when the person of an accused is to be searched then he is required to be informed about his right to be examined in the presence of a gazetted officer or a Magistrate. As rightly pointed out by the High Court search of baggage of a person is not the same thing as search of the person himself. If a person is carrying a bag or some other article with him and a narcotic drug or a psychotropic substance is found from it, it cannot be said that it was found from his "person"."

In the instant case, it has been by sufficient evidence proved that the bag that was carried by the appellant/A-1 and the checked in baggage were searched, and hence, the said contention cannot be accepted.

10. The presumption of culpable mental state is available in favour of the prosecution in the instant case. There is ample evidence to prove that the appellant has acted not only with the knowledge but also with intention. The appellant has failed to prove that he had no such mental state with respect to the acts charged namely the possession of the narcotic substance.

11. As could be well seen from the seizure mahazar, both the attesting witnesses for recovery of the contraband were not from the Customs Department but they belonged to two airlines, and thus, it cannot be stated that they were not independent witnesses. The appellant made an oral statement before the Officials, which has been written by the brother of the appellant. The said fact is not disputed by the appellant. It is pertinent to point out that the appellant has not come forward with an explanation why and under what circumstance his brother happened to write such a statement, but the statement bears the signature of the appellant. Hence, it would be clear that the said statement was of the appellant voluntarily made. From the evidence of P.W.3, the house of the appellant was raided at 5.30 P.M. on the very day, and Ex.P27 search memo was prepared wherein the brother of the appellant has signed as a witness. It would be, therefore, quite clear that only thereafter, the brother of the appellant has come to the Airport where he wrote the statement as given by the appellant, and the same does not cast a doubt in the prosecution case. That apart, as rightly pointed out by the learned Special Public Prosecutor that the possession of the contraband by and the seizure of the same from the appellant is proved by satisfactory evidence beyond all reasonable doubts.

12. In the light of the above reasons, the Court is unable to notice any merit in the contentions put forth by the appellant's side. The judgment of the Court below has got to be necessarily sustained. The learned Counsel for the appellant would submit that the default sentence awarded by the lower Court may be reduced. In view of the facts and circumstances of the case, the Court is of the view that the default sentence has got to be reduced. Accordingly, the default sentence of 1 year R.I. imposed by the Court below is modified, and the appellant, in case of default of payment of fine imposed by the Court below, shall undergo 3 (three) months R.I.

13. In the result, this criminal appeal is dismissed with the above modification.