

(2000) 12 BOM CK 0019
In the Bombay High Court
Case No : Criminal Appeal No. 212 of 1997

Mohamed Rashid Mohamedi	Vs	APPELLANT
V.M. Dosi, I.O., NCB, Mumbai		RESPONDENT

Date of Decision : 02-12-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 6, 7
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 23, 28, 50

Citation : (2002) 144 ELT 279

Hon'ble Judges : S.S. Parkar, J

Bench : Single Bench

Advocate : F.E. Saldanha, for the Appellant; Prakash S. Thakur and P.H. Kantharia, APP, for the Respondent

Final Decision : Allowed

Judgement

S.S. Parkar, J.—The appellant has impugned in this appeal his conviction and sentence under the provisions of the NDPS Act recorded by the Special Judge in NDPS Special Case No. 94 of 1994 by judgment and order dated 7th January, 1997.

2. The brief facts leading to the prosecution of the appellant under the provisions of the NDPS are as follows :

The Customs Authorities had received information that some passengers going to leave Bombay by Ethiopian Flight scheduled at 4.45 hrs. On 8th March, 1994 were suspected to be carrying contraband with them. The Customs Officers, therefore, collected the copy of manifest and found that names of nine suspect persons were found on the manifest. The appellant was one of those nine persons. All the nine suspect persons were intercepted by the Customs Authorities between 2 a.m. and 3 a.m. They were intercepted after they had completed their immigration and their identity was confirmed from passport, air-ticket and boarding card. Their search was taken separately in the presence of

two panchas at the air-port. The panchas were one Mr. Mohini and another Mr. Kotian who were Ethiopian Airlines personnel. The search of the appellant was also taken in respect of his checked-in baggage which he himself opened so also in respect of his hand bag which he was carrying. Nothing incriminating was found either from the checked-in baggage or from the hand bag of the appellant. Accordingly panchnama was drawn. When asked whether he was carrying any narcotic drugs by swallowing inside the body or concealed in cavity or anywhere, it was denied by this appellant as well as other accused. The appellant and others were thereafter asked whether they were prepared to be examined by a doctor. As all the nine accused agreed, they were all brought to the office of NCB at their Bombay Zonal Unit in Exchange building at Ballard Pier by about 7 a.m. The travel documents including the passports, air tickets, boarding card, flight coupon and the copy of the manifest were attached under a common panchnama.

3. In the office again two panchas were called and the personal search of the appellant was taken and nothing was recovered from the appellant from his personal search. Thereafter all the suspects including the appellant were taken to J.J. Hospital in OPD. Therefore, the doctor OPD in JJ. Hospital was told about the purpose of bringing the suspects. The Radiologist of J.J. Hospital was asked to take X-rays of all the nine suspects. X-ray examinations of all the suspects including the appellant showed that there were certain foreign bodies present in their abdomen and, therefore, they were suspected of having swallowed the narcotic drugs in capsule forms for carrying them abroad.

4. Thereafter all the suspects including the appellant were taken to the office of NCB and were shown arrested under memo of arrest which was served on them and the grounds of the arrest were communicated to them. The accused were arrested under arrest memo. Thereafter all the accused were produced before the Special Judge for remand and under the orders of the Special Judge they were then admitted to Ward No. 19 of J.J. Hospital for the purpose of purging the foreign bodies shown to be in the abdomen of the accused as per the X-ray reports. All the suspects were accordingly admitted under the charge of Dr. Algotar. The said doctor was briefed with the facts of the case and the purpose of the admission of these nine suspects.

5. The appellant is alleged to have purged 40 capsules by 11th March, 1994 during his stay in the J.J. Hospital for the said purpose. The capsules purged by the appellant were collected and seized under the panchnama dated 16th March, 1994 which is produced at Exhibit 12. PW1 Vilas Dosi, the Investigating Officer was an Intelligence Officer who took charge of the 40 capsules made of black insulation tape. Inside the insulation tape a small polythene bag was found which contained brown powder in hard semi solid form. One capsule was opened and small quantity of the powder was used by PW 1 for testing with the help of field testing kit and it tested positive for heroin. All the capsules purged by the appellant were opened and the contents thereof were collected in one polythene bag. The same weighed 320 grams. The entire powder was mixed and was

divided into three separate parts and three separate sample packets of 5 grams each then collected and were put in polythene bags and then sealed. They were sealed with three separate packets. On the sample packets signatures of the panchas were obtained after the particulars about the case were written on the samples. The remaining bulk was separately packed, sealed and put in a carton. The panchas label was affixed on it with particulars of the case and signed by the Intelligence Officer. The three sample packets and the carton were sealed with Seal No. 03. The sealing material used by the accused for capsules for wrapping and covering were separately collected in polythene bag sealed and put in a carton. The said carton also was sealed and labelled and the signatures of the panchas were obtained. This was recorded in a separate panchnama. Thereafter the staff returned to the office of the NCB along with the panchnama and muddemal in a sealed condition.

6. Out of the three samples, sample No. R-III was sent to the Deputy Chemist Laboratory, New Customs House along with the triplicate test memo signed by PW 1 and deposited in the said laboratory for which he obtained the acknowledgement from the concerned clerk on the third copy. The sample packet was handed over in sealed condition. Sample packet bearing No. R-IV was sent to FSL Kalina through another officer and the third sample bearing No. R-V was retained by the officer as reserve sample packet. The CA reports were received from both the laboratories. Both the reports showed that the samples contained Dactyl Morphin i.e. heroin : The reports were received along with the remnant samples in sealed condition. The CA report is produced as Exhibit 14 while the report of the Deputy Chief Chemist from the New Customs House has been produced on record as Exhibit 18.

7. The complaint was filed in the Court of the Special Judge on 2-5-1994 against the accused. The charge was framed by the Special Judge for offence u/s 8(c) read with Section 21 as well as u/s 28 read with Section 23 of the NDPS Act for possessing 40 capsules containing narcotic drug viz. heroin hidden in the body cavity with intention to export the same. The accused denied the charge and claimed to be tried.

8. On behalf of the prosecution four witnesses have been examined. PW 1 is the Intelligence Officer Vilas Dosi who is the Investigating Officer. PW 2 is Deepak Bhambri who was the Intelligence Officer in Bombay Zonal Unit of NCB who had reduced to writing the gist of information received by the Customs Authorities which is at Exhibit 22. PW 3 is Sudhakar Gamre who was admitted as an in-door patient in the J.J. Hospital and had acted as a pancha to the handing over of the capsules to the NCB officers. PW 4 is Dr. Mohan J. Algotar who was attached to the J.J. Hospital at the relevant time and was in-charge of Surgical Unit called Ward No. 19. The defence of the accused was that he was falsely implicated in the case.

9. After considering the entire evidence on record the Learned Special Judge by his judgment and order dated 7th January, 1997 convicted the appellant u/s 8(c)

read with Section 21 of the NDPS Act and sentenced him to RI for 13 years and to pay a fine of Rs. 1 lakh in default SI for six months. The appellant was also convicted u/s 28 read with Section 23 of the NDPS Act and sentenced to RI for ten years and to pay a fine of Rs. 1 lakh in default SI for six months. The substantive sentences were directed to run concurrently. It is this order of convictions and sentences which is under challenge in this appeal.

10. Mr. Saldanha appearing on behalf of the appellant raised several contentions. Firstly he contended that there was non-compliance with Section 50 of the Act. It is an admitted position that according to the prosecution the raiding party was acting pursuant to the prior information received by Assistant Director Rohatgi that the accused allegedly was carrying capsules containing "heroin" in his body cavity which were purged by him when he was admitted in the J.J. hospital in Ward No. 19 from 8th March to 16th March 1994. PW 1 Vilas Dosi, the complainant and the Investigation Officer in para 5 of his deposition states that the Assistant Director Rohatgi, not examined, made the accused aware of his right to be searched before a Gazetted Officer or a Magistrate. When he was informed of his right, according to the deposition of this witness. "The accused also agreed for his search before the Gazetted Officer saying that he had no contraband with him. When the accused was apprised (of) his right to be searched before Gazetted Officer or Magistrate, prior to his search, Asstt. Director Rohatgi also told him that he himself and Vijay Shahasane were the Gazetted Officers and such offer was accepted by the accused for his search before Mr. Rohatgi and Mr. Shahasane, both the gazetted officers." In my view the aforesaid offer is not in compliance with the mandatory provisions of Section 50 of the NDPS Act. The accused was not properly apprised of his right when the officer told him that he himself i.e. Asstt. Director Rohatgi and another member of raiding party Mr. Vijay Shahasane were the gazetted officers which would mean that those two officers, though members of the raiding party, were the gazetted officers contemplated by Section 50. It is significant to note that when the accused learnt about his right u/s 50 he agreed for his search before the gazetted officer as contemplated u/s 50 of the NDPS Act.

11. Reference may be made in this regard to the decision of the Division Bench of this Court to which I was a party in the case of Mohanlal Khetaram Jangid v. State of Maharashtra reported in 1998 ILJ 405, in which view was taken that the gazetted officer who is a member of the raiding party is not an independent or responsible officer contemplated u/s 50 of the Act. It was further observed in the said judgment that when the accused is informed that he will be searched in the presence of the gazetted officer who is a member of the raiding party the same will not amount to compliance with the provisions of Section 50 of the Act. Secondly in a recent decision of the Apex Court in the case of In the Matter of: Ahmed Vs. State of Gujarat, it is held by the Supreme Court that where the accused requested for search before another nearest gazetted officer or before the nearest Magistrate in compliance with the mandatory requirement of Section 50 and its denial on the ground that the arresting officer who conducted the

search was a gazetted officer himself, vitiates the search. In that case the accused had requested for search before another nearest gazetted officer or before the nearest Magistrate but it was denied on the ground that the arresting officer who conducted the search was himself a gazetted officer. In this case as appears from the above quoted deposition of Vilas Dosi, when the accused was informed of his right the accused agreed for his search before the gazetted officer. In that event the members of the raiding party ought to have arranged for an independent gazetted officer from the vicinity or the nearest Magistrate but instead the Assistant Director Rohatgi told him that he himself and another member of the raiding party by name Vijay Shahasane, none of whom have been examined, were the gazetted officers. Non compliance with the mandatory provisions of Section 50 of the Act renders the search illegal because the suspect was not able to avail of the in-built protection given to him and consequently conviction and sentence based solely on such recovery is liable to be set aside as held by the constitution Bench of the Supreme Court in the case of State of Punjab Vs. Baldev Singh, .

12. Mr. Thakur appearing for Respondent No. 1 contended that Section 50 would not be applicable as the contraband was not found on the person or on the body of the accused but inside his body. According to him Section 50 is applicable only in case the contraband is found on the body i.e. when he is carrying contraband on his person outside the body and not inside his body. In my view the said argument is devoid of substance. The wording used in Section 50 of the NDPS Act is "When any officer duly authorised u/s 42 is about to search any person". Thus the search of any person or personal search contemplated by Section 50 cannot be confined to the search on the person or outside body of the person. In my view the search of the inside body of a person or the search of body cavity of the person would also be covered by the provisions of Section 50 of the Act and, therefore, the mandatory provisions of Section 50 would be applicable and failure of compliance therewith would result in search being illegal and the conviction and sentence vitiated.

13. The next contention raised on behalf of the appellant accused is that neither the seizure of the alleged contraband was made in the presence of the accused though he was available nor a copy of the seizure panchnama (Ext. 12) was handed over to the accused which caused prejudice to the accused. According to the deposition of complainant and the investigating officer Vilas Dosi, the accused was lying in the hospital on 16th March, 1994 when seizure panchnama was made and was not discharged. In para 22 of his deposition he deposes that this accused was discharged on 17th March, 1994. However, this witness says that the accused refused to accept the copy to be true. Because there is no mention to that effect in the seizure panchnama Exhibit 12 that the copy of the said panchnama was tendered to him and he refused to accept it. This accused had admittedly put his signature on panchnama of personal search of the accused dated 8th March 1994 produced at Exhibit 10. Reliance was placed in this respect on the decision of the Division Bench of this Court in the case of

Shankar Raju Banglorkar Vs. State Of Goa, . It was a case under the NDPS Act where the allegation was that charas was recovered from the house of the accused. Copy of the seizure panchnama was not given to the accused. In that context the Division Bench held that the case of recovery had failed and the accused was entitled to acquittal. In this case the accused was not given even a copy of the Inventory (Exh. 30) maintained by the hospital in respect of the alleged purging of the contraband capsules by this accused during his stay in J.J. hospital. It was directly produced in the Court. Thus there was infraction of Sub-sections 6 and 7 of Section 100 of Cr. P.C. object of which is to ensure that the investigation was done fairly. Thus there is this another serious lacuna in the prosecution case.

14. Thirdly it is argued on behalf of the accused that though the sample of the contraband was taken on 16th March, 1994, when it was seized under the seizure panchnama, the same was sent to the Laboratories for Chemical analysis on 21st March, 1994 after a gap of five days. During this period not only the samples were kept with the Investigating officer but even the seal used on the sample packets had remained with the Investigating officer. The said officer had sent the samples for analysis to the Laboratories under his forwarding letter dated 21st March, 1994 which is produced at Exhibit 15. So far as the Forensic Science Laboratory at Kalina is concerned, column 7 of the said forwarding letter shows that the copy of the seal used for sealing the sample was sent on 21st March, 1994. Thus the Investigating officer was having possession of the seal of NCB for a period of five days giving him chance of tampering with the seal on the sample which admittedly did not bear the signature of the accused but only of the officer writing the panchnama and the panchas. In this respect reliance is placed on the decision of the Division Bench of this Court in the case of Wessel Van Beelan Vs. State of Goa, . That was a case where charas was seized from the possession of the accused. After the seized samples were sealed on 10-5-1996 and the same along with the specimen seal were sent to the office of SP CID on 11th May, 1996. During the intervening night between 10-5-1996 and 11-5-1996 the contraband sample as well as specimen seal used for sealing the sample remained in the custody of the search officer. There was no evidence that the specimen seal had been deposited in Malkhana or any other officer after the seal had been affixed on the sample. In that context that Division Bench held that the said lacuna was serious which created doubt whether the seal cover was not tampered with before it was sent for analysis. In that case reference was also made to the earlier decision of earlier Division Bench of this Court in the case of Andrea Siddi v. State of Goa decided on 17th and 18th December, 1997 in Criminal Appeal No. 42 of 1997 in which it was observed that it is of utmost importance that there must be very cogent and trustworthy evidence that the contraband seized is the same which is analysed by the C.A. It was further observed that the prosecution had to ensure that once the seal is used for sealing the sample the same should not be available with the Investigating Officer and there should be positive evidence on record that the specimen seal

was not within the reach of the investigating officer after the search and seizure formalities were completed and the impression of the specimen seal was taken.

15. The next contention raised on behalf of the accused is that the prosecuting agency has not ensured that the sample sent for the purpose of chemical analysis was the one which was recovered from the possession of the accused. It is submitted that there is no cogent and reliable evidence to show that the capsules containing "heroin" seized under the seizure panchnama were the ones which were purged by the accused while he was in J.J. hospital. In this respect the following discrepancies have been shown. Firstly according to the prosecution separate polythene bags in the name of each of the accused were used for storing the capsules purged out by him as stated by PW 1 Dosi and PW 4 Dr. Algotar, in-charge of Ward No. 19 where the accused along with other eight accused were admitted. However the prosecution has not produced in evidence the named polythene bag in respect of this accused in which capsules purged out by him were allegedly stored in the JJ. hospital.

16. The prosecution has relied on the inventory allegedly maintained by the JJ. hospital showing the number of capsules containing "heroin" purged by this accused. The said inventory is produced at Exh. 30. That inventory is not initialed or signed by anybody nor the writer of the said inventory has been examined. While the first column gives the date and the second column the timing, the third column is under the heading of "Tab" giving some figures totalling to 40. Even the name of the person who had prepared that inventory is not given by PW 4 Dr. Algotar in his deposition. Copy of the said inventory was not furnished to the accused nor there is mention about the same in the seizure panchnama. This inventory also is not proved by the prosecution.

17. The seizure panchnama Exhibit 12 cannot be said to be a contemporaneous document which can be relied on in support of the prosecution evidence. The Investigating Officer Dosi PW 1 has admitted in his evidence in para 18 of his deposition that it was in cyclostyled form and was filed before the panchas. Although the format of the said panchnama was prepared in advance and the blanks were filled in the said format at the time of seizure of the contraband from the hospital authorities it is pertinent to note that the word "heroin" in the panchnama was already in typed form which would show that the panchnama did not reflect truly the proceeding of taking charge of the capsules but the officers had presumed that the capsules contained "heroin". Admittedly the capsule was for the first time opened and tested at the time of seizure with the help of field testing kit before the cyclostyled panchnama was filled in. The contents of the panchnama also cannot be relied on fully in support of the prosecution case a copy whereof was not even given to the accused nor the seizure had taken place in the presence of the accused though he was available at the relevant time at the JJ. hospital as admitted by the Investigating Officer Dosi. There is one more circumstance which would show that the seizure panchnama Exh. 12 did not reflect the correct state of affairs inasmuch as, as per the said panchnama Dr.

Algotar handed over 40 capsules to the officer of NCB but Dr. Algotar himself in para 8 of his deposition states that the said capsules were handed over by resident Doctor in his presence.

18. Next it is pointed out that the forwarding letter to the Forensic Science Laboratory (Exh. 15) states that 320 gms. of brown powder purported to be heroin was seized from 52 capsules purged by this accused though according to the panchnama of seizure (Exh. 12) and the Inventory (Exh. 30) this accused had purged 40 capsules. The mention of 52 capsules may be a mistake but it shows that the steps in investigation were taken in very haphazard manner.

19. It was also pointed out that as per the prosecution evidence the accused was sent to radiologist for the purpose of X-ray by the Casualty Medical Officer, and the prosecution has produced X-rays taken by the radiologist, but neither the resident doctor, or the Casualty Medical Officer nor the radiologist has been examined on behalf of the prosecution to prove the X-ray reports.

20. It is further pointed out that according to the evidence of Investigating Officer Dosi and Dr. Algotar, toilet pan was provided to the accused in the toilet for passing stool from which sweeper collected the capsules, cleaned them and handed over to the resident doctor but no sweeper or hospital staff has been examined nor the resident doctor to prove that the capsules were handed over for safe custody. It is not the case of the prosecution that the toilet pan was provided to the accused on the bed but on the contrary the accused was allowed to go to the toilet for passing stool and the only care that seems to have been taken in the hospital was to provide him with a toilet pan. That action would not ensure that the capsules shown against the name of this accused were purged by him. Dr. Algotar is the only person examined from hospital in this behalf who did not have personal knowledge nor the officers of NCB did anything other than collecting information from the hospital authorities. Even the statement of Dr. Algotar was recorded on 19th April, 1994 i.e. more than one month after the alleged seizure of capsules containing heroin from the hospital authorities. The NCB officers were not party to keep the record of the capsules allegedly purged by the accused nor the capsules were collected or seized under panchnama after every purging by this accused as per the inventory. Moreover, Inventory (Exh. 30) shows that on 9th March, 1994 at 14.10 hrs. for the first time this accused had purged 19 capsules. He had purged seven capsules at 9.45 hrs. on 10th March, 1994 and again ten capsules at 18-30 hrs. on that day. Thereafter he purged three capsules at 5 hrs. on 11th March, 1994. Even the figures shown against those dates and timings in the third column under the head "Tab" of the inventory do not indicate the purging of the capsules. Thus the prosecuting agency has left everything for presumptions and assumptions of the Court without leading cogent evidence in that behalf.

21. For the aforesaid reasons I hold that the prosecution has not established beyond reasonable doubt firstly that the contraband in question was recovered from the possession of the accused and secondly that the sample sent to the

Chemical Analyser was taken from the contraband allegedly recovered from the accused. The discrepancies pointed out above coupled with the non compliance with the provisions of Section 50 of the NDPS Act and Section 100(7) of Cr. P.C and the retention of samples as well as the specimen seal with the Investigating Officer for a period of five days from 16th March, 1994 when the contraband was seized to 21st March, 1994 when the samples were sent for chemical analysis throw a reasonable doubt on the prosecution case. I, therefore, hold that the prosecution has not established the charge against the appellant accused beyond reasonable doubt and the accused is entitled for benefit of doubt.

22. In the result the appeal is allowed. The convictions and sentences recorded against the appellant accused by the Special Judge, NDPS Greater Bombay in NDPS Special Case No. 94 of 1994 are hereby quashed and set aside and the appellant accused is acquitted. The appellant shall be set at liberty forth with in case he is not required in any other case. The amount of fine, if paid, shall be refunded to him. The passport of the appellant which is in the custody of the Trial Court shall be returned to him after a period of two weeks from today.