

(2004) 07 BOM CK 0097
In the Bombay High Court
Case No : Criminal Appeal No. 352 of 1999

Ms. Victoria Marcel Eno

APPELLANT

Vs

Officers, N-Cell, Customs (Preventive) and The State of
Maharashtra

RESPONDENT

Date of Decision : 21-07-2004

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 2, 21, 23, 28, 50

Citation : (2005) 1 ALT(Cri) 31

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Advocate : Savita T. Suryavanshi, for the Appellant; P.S. Thakur, Public Prosecutor for Respondent No. 1 and A.M. Shringarpure, APP, for the Respondent

Final Decision : Allowed

Judgement

D.G. Deshpande, J.—Heard Advocate Appointed for the accused since the appeal is filed through jail and also heard Mr. Thakur, P.P. for the respondent No. 1 - Union of India.

2. This is an appeal filed by the accused challenging her conviction under The Narcotic Drug and Psychotropic Substances Act, 1985 (for short "N.D.P.S. Act"), by which she is convicted under the N.D.P.S. Act and sentenced to R.I. for ten years and to pay fine of Rs. 2,00,000/= in default R.I. for one year. She was also convicted u/s 28 read with 23 of N.D.P.S. Act and sentenced to R.I. for ten years and fine of Rs. 2,00,000/= in default of fine R.I. for one year, therefore she has to pay Rs. 4 lacs as fine on two counts and on default has to undergo R.I. for two years consequently.

3. The case of the prosecution was that the Customs Officers at Sahar International Airport, Mumbai, got secret information that the accused was likely to come from Chandigarh by Ethiopian Airline Flight No.FT-641/FTD 0800 hours on 26.2.1998 bound for Lome via Addis Ababa at Sahar International Airport.

She was intercepted at the Airport. Pursuant to this information the search of checked-in-baggage of the accused resulted in recovery of 1.3 Kgs. of heroin which was found concealed inside 330 cloth covered aluminium buttons stitched on to 26 ladies gowns. The samples of the contraband were duly drawn, travel documents were seized, testing and sampling was done at the spot and the samples were sent to the Chemical Analyser. One more accused was there but the said accused was acquitted by the trial court. The trial court found that the prosecution has successfully proved its case beyond reasonable doubt against this accused and therefore convicted the accused, as stated above.

4. Advocate for the accused strenuously urged that the quantity of heroin that was recovered from the accused was 1.3 Kgs. But in the report of the C.A. no quantitative analysis was made and the C.A. report Exhibit 28 shows that only qualitative analysis was made which stated as under:

"The sample is in the form of brown coloured lumps. It answers tests for the presence of heroin (diacetyl morphine) and hence covered by Section 2(xvi) e of N.D.P.S. Act, 1985."

Advocate for the accused relying upon unreported judgment delivered by Justice Parkar in Criminal Appeal No. 23 of 2000, *Mr. Kasirye Alfani v. Mr. S. N. Salve and Anr.* and judgment of Justice Parkar reported in 2004 (1) JD 292, *Diakite Ibrahime Adama v. J.L. Pandey*, contended that in the absence of quantitative analysis, the burden of which was lying on the prosecution the accused was entitled to the benefit of Section 21 of the N.D.P.S. Act and the benefit of the Notification i.e. The Narcotic Drugs and Psychotropic Substances (Amendment) Act, 9 of 2001 and Schedule under Sub-clause (viiia) and (xxiiia) of Section 2 of the Act. It is under this table the small quantity and commercial quantity has been specified in respect of every item separately. The heroin is at Sr. No. 56, small quantity is 5 grams and commercial quantity is 250 grams.

5. Advocate for the accused therefore on the basis of the aforesaid unreported judgment of Justice Parker In Criminal Appeal No. 12 of 2000 and reported Judgment in 2004(1) JD 292 contended that if the prosecution has not brought on record anything showing about the quantitative analysis then even though 1.3 Kgs. of heroin was seized and recovered from the accused, she was entitled to benefit because there was no evidence to show that the heroin in its Pursuant form was more than commercial quantity i.e. 250 grams, she there fore contended that even if it is ultimately found by the court that the accused is guilty of the offence her punishment was liable to be reduced in view of the provisions of Section 21(b) of the N.D.P.S. Act.

6. As against this, Mr. Thakur, the learned P.P., drew my attention to the Judgment of the Supreme Court reported in 2003(4) Crime 390 , *P.P. Fathima v. state of Kerala*. In that case offence had taken place on 3.8.1999 and accused claimed benefit of the Notification dated 21.9.2001 as referred to above to make a distinction between small quantity and commercial quantity. However the

Supreme Court clearly held that benefit of the Notification could not be given to the accused as the offence was committed by her prior to the date of the Notification. Para 5 of the judgment reads as follows;

"5. Having heard arguments of learned counsel and having perused the records, we are in agreement with the arguments advanced by learned counsel for the respondent-State. In our opinion there is no substance in the legal argument of learned counsel that Section 21 is not attracted to the facts of the case or that the seized goods are not contraband drugs as contended by learned counsel. A perusal of the definition Section clearly shows that brown sugar contains heroin which is punishable u/s 21 of the Act. The argument that the quantity of brown sugar possessed by the appellant did not amount to an offence, is based on a notification issued on 19.10.2001 which made distinction between small quantity and commercial quantity in its Schedule. That Notification will also not apply to the facts of the case because that notification came much later than the date of offence which was on 3.8.1999 nearly 2 years before the issuance of that notification. At the relevant point of time this distinction between small quantity and commercial quantity not being there, the benefit of a subsequent notification would not be available to the appellant because she was convicted by the Special Judge of the offence as constituted before the notification in question came into force"

In the instant case the date of offence is 26.2.1998 and notification which is of 2001 making a distinction between small quantity and commercial quantity cannot be invoked by the accused for his own benefit. Therefore, the submission of the Advocate for the accused in this regard is required to be rejected.

7. Advocated for the accused further contended that there is no compliance to mandatory provisions of Section 50 of the N.D.P.S. Act which requires the investigating agency to make aware the accused of his/her right to be searched before the Gazetted Officer. She considered that though in the panchanama it is specifically mentioned that accused was made aware of her right, but her thrust of argument was that the raiding party itself consisted of two Gazetted officers and therefore there was no compliance. In this regard. Mr. Thakur, learned P.P. drew my attention to the panchanama wherein it is mentioned as under:

"Ms. Marcel (accused) was explained the provisions u/s 50 of the NDPS Act, 1985 and given the option of being searched Magistrate or any gazetted officer and that S/shri K.J. Sanchis and S.M. Dubey Supdt. of Customs were gazetted officers present at the spot. Ms. Marcel stated that the search may be conducted before the two aforesaid gazetted officers."

8. Firstly, Mr. Thakur contended that accused was made aware of her right and she declined to exercise, she did not insist that search should be made before any independent gazetted officer. Therefore, there is no question of denial of any right to the accused.

9. Mr. Thakur further contended that in this case nothing was found on the

person of the accused and the contraband i.e. heroin was found in her checked in baggage i.e. suit case, therefore provisions of Section 50 would not apply. If some contraband would have been found on the person of the accused in the search carried out by the officers then the submissions of the Advocate for the accused could have been considered. But nothing incriminating was found on the person of the accused and the contraband was found in the checked in baggage, therefore no grievance can be made about non compliance to Section 50, which speaks about personal search. there is no dispute that the personal search of the accused was taken by Lady Inspector.

10. Mr. Thakur drew my attention to the fact the novel way in which the heroin was brought by the accused from Chandigarh. When the suitcase was opened by accused, there were 26 ladies gowns. The dresses or gowns were found unusually heavy. On closure examination, it was found that the buttons were heavier than usual; they were aluminium buttons and the top portion of the buttons was covered by similar cloth of the gown. On removing the top portion of the buttons it was found that a polyethylene wrapped packet containing brown colour powder was neatly concealed within the buttons. All the buttons of all the 26 ladies gowns were removed and all of them were found to contain polyethylene packet with brown colour powder and in this manner 330 polythene bag were recovered from the checked in baggage.

11. Further the Advocate for the accused pointed out that the colour of the suitcase is mentioned at one place in the panchanama as dark blue and at other place as black. However, there is no merit in the submission. Dark blue can always appear like black and this mistake has appeared in the same panchanama and there is no dispute about the identification of the baggage or the suit case recovered from the accused.

12. lastly and alternatively it was submitted by the Advocate for the accused that the accused is a lady. She is a foreign national and even though the court cannot reduce the substantive sentence of 10 years, the court can, looking to the fact that she is in custody from the date of the offence reduce the amount of fine and/or in default Sentence. Mr. Thakur however contended that there were no reasons to reduce the fine.

13. Under the old Section 21 the punishment that was prescribed was imprisonment for a term which shall not be less than 10 Years but which may extend to 20 years and fine which shall not be less than Rs. 1 lac but may extend to Rs. 2 lacs. There are no reasons given by the trial court why the fine of Rs. 2 lacs was necessary. Therefore considering the fact that this accused is a lady, is in custody since the date of offence, I pass the following order:

ORDER

The appeal is partly allowed. Conviction of the accused under Sections 21 and 28 read with 23 of the N.D.P.S. Act is maintained, so also substantive sentence of 10 years given by the trial court on each count which are to run concurrently.

However, fine of Rs. 2 lacs u/s 21 is reduced to Rs. 1 lacs and in default sentence is consequently reduced to six months. fine of Rs. 2 lacs u/s 28 read with 23 is reduced to Rs. 1 lac and in default sentence is consequently reduced to six months.