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In the Bombay High Court

Case No : Criminal Appeal No. 204 of 1995

Ndukwe Onuohe — APPELLANT

Vs

Assistant Collector of Customs - Aiu, Bombay — RESPONDENT

Date of Decision : 24-09-1997

Acts Referred:
Customs Act, 1962 — Section 108, 135

Citation : (1998) 101 ELT 17 : (1998) 1 MhLj 435 : (1998) 4 RCR(Criminal) 221

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

Bench : Division Bench

Advocate : Shri G.G. Lalla and Anil G. Lalla, instructed by Lalla and Lalla, for the Appellant; Shri B.S. Thakur and I.S. Thakur, for the Respondent

Judgement

T.K. Chandrashekhara Das, J.].

1. Appellant challenges the Judgment and Order passed by the Special Judge, Greater Bombay in N.D.P.S. Special Case No. 838 of 1990 who found the appellant guilty u/s 21 read with Section 8(c) of N.D.P.S. Act and sentenced her to suffer R.I. for 10 years and to pay a fine of Rs. 1,00,000/-; and in default, she was to suffer further R.I. for two years. The learned Judge also convicted the Appellant u/s 29 read with 28 and 8(c) of the N.D.P.S. Act, 1985 and sentenced her to suffer RI for 10 years; and in default to suffer further RI for two years. She was further convicted for offence punishable u/s 135(i)(a) read with 135(i)(ii) of Customs Act, 1962 and sentenced to suffer R.I. for three years and to pay a fine of Rs. 3,000/- and in default to suffer further RI for two months. All the substantive sentences on different counts are directed to run concurrently.

2. The facts of the case according to the prosecution can be stated as under :

On 19-4-1990 at about 6.00 a.m. the appellant was about to board the flight to Adis Ababa by Ethiopian Airlines Flight No. ET-641 from Sahar International Airport, Bombay. She was carrying a brief case bearing hand bag tag of Ethiopian Airlines and one shoulder cloth bag and one purse. While she was proceeding to

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the Boarding Gate, Customs'' Sniffer dog ''Pooja'' barked after sniffing her shoes thereby giving indication that there was some narcotic substance hidden in the shoes. At that time PW. 2, Bimalchandra Mondal working as an I.O. at Air Intelligence Unit, (New International Passengers Travel), Sahar Airport along with Mr. Desai, Preventive Officer in charge Mr. Rajan, Mr. Kanade, Superintendent and Mr. Ramlathan intercepted the appellant and asked the Appellant whether she was carrying narcotics. But she denied. Since PW 2 and other officers were not satisfied with her answer, they called Panchas and again asked her whether she was carrying any narcotic substance. Again she replied in the negative. Then appellant was brought to the ground floor where the Customs Office is housed. In the meantime, Officers collected travelling documents from her. The Appellant then was asked to take out her shoes. When shoes were lifted, the pair of shoes was abnormally heavy. Then PW. 2 examined shoe on the left side. He found one packet which was packed with adhesive tape. The packet was affixed to the sole of the shoe from heal side of the shoe. PW. 2 took out that packet and then checked the right side of the shoe and the same type of parcel which was packed with adhesive and affixed with the adhesive tape was found. Then they checked the blue coloured brief case of the passenger. They opened it and found some arrangements made for the concealment. They opened that concealment and found one plastic bag. They found some brown coloured powder in that plastic bag. In the concealment of the bottom portion of the said brief case, they found one plastic bag consisting of brown sugar. The packets taken out from the shoes, containing brown sugar weighed to 460 gms. (230 gms. in each packet). Then they collected 3 samples of 5 gms. each and prepared 3 packets and put in 3 plastic covers and sealed all 3 packets and they also packed the residue contraband of brown sugar of 445 gms in one packet and sealed it. The brown sugar recovered from the box on the roof top portion of the brief case was 915 gms. and the contraband recovered from bottom portion of the brief case weighed 900 gms. From each of the packet PW 2 in the presence of Panchas took 3 samples of 5 gms. and all of them were separately packed and sealed. Then the residue contraband i.e. 1,800 gms was also packed in a Packet and sealed and labelled having signatures of panchas affixed on it. Sample packets were sent to Chemical Analyser and on chemical analysis it was found to be brown sugar. As per the Certificate of Analyst Exh. 28 the samples which were found to be (dark brown hygroscopic and sticky substance). All this was done in the presence of the Panchas, Kanagarai Peter and Lalji Singh (PW 9). After obtaining sanction, complaint was filed before the trial Court. Trial Court framed charges against the appellant who denied the charges. Before the trial Court, in all 9 witnesses were examined. The witnesses corroborated each other on material points. The trial Court found that the appellant was guilty for the offence punishable under different sections as stated in the first paragraph of the Judgment.

3. We have heard learned Counsel for the appellant Mr. G. G. Lalla and Mr. P. S. Thakur for Respondent No. 1 and Mr. I. S. Thakur for Respondent No. 2. The

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learned Counsel Mr. G. G. Lalla, appearing for the appellant mainly based his argument on the following points :

(i) He submits that there is a complete violation of Section 50 of the N.D.P.S. Act and therefore entire trial is vitiated.

(ii) The Exh. 24, the certificate of the C.A. is not relating to the contraband articles.

(iii) The C.A. report has not been examined and

(iv) Non-compliance of provisions of Sections 52, 55 and 57 of the N.D.P.S. Act.

4. On careful examination of the evidence adduced before the trial Court and also on hearing the parties, excepting the first point, all other points are to be decided against the appellant. Regarding first point, Mr. Lalla, learned Counsel for the appellant submits that before the search the mandatory requirement as envisaged u/s 50 of the N.D.P.S. Act has not been complied with by the prosecution. He submits that the mandatory requirement that before searching the person of the appellant she was not asked whether she wanted to be searched before a Gazetted Officer or Magistrate. In the absence of fulfilment of the said mandatory requirement as held by the Supreme Court Judgment in the case of State of Punjab Vs. Balbir Singh, , the entire prosecution case is bound to fail.

5. The learned Counsel for the prosecution on the other hand submits that since recovery of contraband made in this case is a chance recovery, the question of adherence to Section 50 of the N.D.P.S. Act does not arise. They urged that Section 50 of the NDPS Act does not attract the recovery which is made in this case. In the alternative, it has been contended on behalf of the prosecution that, even assuming that Section 50 of the NDPS Act is found to be violated, that itself will not ipso facto result in the prosecution case to be thrown out. It is contended on behalf of the respondents, that there was other material in this case sufficient to sustain the conviction of the appellant. On their behalf it was urged that Statement made by the appellant on issuance of summons u/s 108 of the Customs Act, though retracted by the appellant, is sufficient material to sustain the charge against the appellant.

6. In the context of the rival contentions of the parties in this case, the two questions that emerge for our consideration are :

(a) Whether the search and seizure effected by P.W. 2 Customs Officer in this case attracts by Sections 41, 42 and 50 of the N.D.P.S. Act.

(b) As pointed out earlier, if search of the person of the appellant is hit by Section 50 of N.D.P.S. Act, then whether the other evidence, particularly confessional statement recorded u/s 108 of the Customs Act can be solely relied upon far sustaining the prosecution, case.

7. The learned Public Prosecutor appearing for State contended that since the

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recovery of heroin made in this case is a chance of recovery therefore formalities contemplated under Sections 41, 42, 43 and 50 of the N.D.P.S. Act are not necessarily to be observed. This aspect of the matter has to be examined in light of the decision of the Supreme Court laid in Mohinder Kumar Vs. The State, Panaji, Goa, . As noted above, in the present case the appellant was apprehended on mere suspicion and on that basis, PW. 2 decided to effect a search of the person of the appellant. As per the Mohinder Kumar''s case, then from that moment onwards the procedure contemplated under the Act has to be followed.

In paragraph 3 of the aforesaid Judgment the Apex Court states thus :

"But when the conduct of the accused persons raised a suspicion he went there and effected the search, seizure and arrest. It was, therefore, not on any prior information but he purely accidentally stumbled upon the offending articles and not being the empowered person, on coming to know about the accused persons being in custody of the offending articles, he sent for the panchas and on their arrival drew up the panchanama. In the circumstances, from the stage, he had reason to believe that the accused persons were in custody of narcotic drugs and sent for panchas, he was under an obligation to proceed further in the matter in accordance with the provisions of the Act."

The aforesaid decision of the Supreme Court in Mohinder Kumar''s case has been followed by the Full Bench of this Court in decision of In Re: Venkadari Thippayya and Others, . The Full Bench of this Court in paragraph 5 of the aforesaid Judgment stated as follows :

"5. In Mohinder Kumar''s case, the Supreme Court has clarified that even if the search is not effected on prior information if the officer carrying such search happens to be an empowered officer, from the stage he had reason to believe that the accused persons were in possession of narcotic drugs, he was under an obligation to Proceed further in the matter in accordance with the provisions of the Act."

8. We have perused the evidence in this case. On close reading of the evidence, we do not think that the recovery effected in this case was chance recovery as contended by the Counsel for respondent. The moment the authorities were suspicious that the appellant was carrying the contraband goods, they asked her to remove shoes and also to open the brief case. This conduct of the PW. 2 and other officers who were present at the time of search would show that it cannot be said to be a chance recovery. It was held in Mohinder Kumar''s case that when the Officer has reason to believe that the appellant is in possession of narcotic drugs or substances, procedure envisaged u/s 50 of the N.D.P.S. Act has to be followed as otherwise the whole search will be vitiated. It is the duty of the Officers to Proceed with the procedure laid down under Sections 42, 43 and 50 of the N.D.P.S. Act.

9. Then the Counsel for the respondents contended that the search involved in

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this case is not a search of a person of the appellant. It is a voluntary act of the appellant. We are not impressed with this submission of the Counsel for the respondents. On going through the evidence, it can he seen that the appellant was obeying the commands of PW. 2 and other Officers. On going through the evidence, we find that on suspicion PW. 2 asked the appellant to remove the shoes. After removing shoes, contraband articles hidden in the shoes were found. Then the Customs Officer PW. 2 demanded the appellant to show the brief case which was carried by the appellant and asked her to open the brief case and when she obeyed, contraband articles were found hidden. They also asked her to show bag carried by her but after examining the bag, nothing was found. All throughout, PW. 2 was commanding her and she was carrying out those commands. Therefore, we have no hesitation to reject the contention of the respondent that the appellant was voluntarily offering herself for search. Next, the learned Counsel for respondent contended that the search effected in this case is not a personal search and, therefore, adherence to the procedure u/s 50 does not arise. This contention also has to be rejected in view of the Full Bench decision (supra) in para 11 of the judgment, reads thus :

"11. Considering the aforesaid provisions, the inference which can be drawn is that "to search any person" would mean only search of the body or wearing apparel of such person and in that case the procedure which is required to be followed would be the one prescribed u/s 50, in contrast, if search of any building, conveyance or place, including a public place, is to be carried out, then there is no question of following the procedure prescribed u/s 50. But when a suspected or arrested person is to be searched, then the procedure prescribed u/s 50 comes into operation and the procedure thereunder is required to be followed. This can be seen by referring to Section 100(3) of the 1973 Code which provides that where any person is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency. The concealment which is suspected is on the person or about his person."

10. The Full Bench Court also laid down the guidelines to find out whether a particular search is a personal search or not. In para 22, of the above judgment, it is held as follows :

"22. With due respect to the learned Judges of the Delhi High Court, we find ourselves unable to agree with the interpretation put by them on Section 50. In our view, the Legislature has made distinction between a personal search and search of a conveyance, building or place, whether private or public. In our view, the provisions of Section 50 would be attracted only if it is confined to search of article on the person or body of the person or bag or luggage in physical possession of the person at the time of the search. Therefore, "personal search" would be confined to clauses (a) and (b) of paragraph 5 u/s 50, but it would not include and cannot be extended to clauses (c) and (d) of paragraph 5 as

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mentioned above. If, however, the contraband is recovered in a search of a house, building, conveyance or public place, Section 50 will not be attracted. We are, therefore, in agreement with the view taken by the Division Bench in Criminal Appeal No. 416 of 1993 that if the narcotic drugs recovered from the baggage which was not in actual possession of the accused, the question of compliance with Section 50 does not arise."

"The search of a person" has been also explained by the Apex Court in 1996 (4) SCALE (SP) 45, Namdi Francis Nwazor v. Union of India in paragraphs 4 and 5 of the judgment Supreme Court held as under :

"4. On a plain reading of sub-section (1) of Section 50, it is obvious that it applied to cases of search of any person and no search of any article in the sense that the article is at a distant place from where the offender is actually searched. This position becomes clear when we refer to sub-section (4) of Section 50 which in terms says that no female shall be searched by anyone excepting a female. This would, in effect, mean that when the person of the accused is being searched the law requires that if that person happens to be a female, the search shall be carried out only by a female. Such a restriction would not be necessary of searching the goods of female which are lying at a distant place at the time of search. It is another matter that the said article is brought from the place where it is lying to the place where the search takes place but that cannot alter the position in law that the said article was not being carried by the accused on his or her person when apprehended. We must hasten to clarify that if that person is carrying a hand bag or like and the incriminating article is found therefrom, it would still be a search of the person of the accused requiring compliance with Section 50 the Act. However, when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found and on search incriminating articles are found therefrom it cannot attract the requirements of Section 50 of the Act for the simple reason that it was not found on the accused person. So, on the facts of this case it is difficult to hold that Section 50 stood attracted and non-compliance with that provision was fatal to the prosecution case."

11. In view of the above authority on the subject, we have no hesitation to hold that the search in question is a search of the person of the appellant. The first search was made in respect of shoes worn by the appellant and it cannot be said that it is not a Personal search. The brief case which was having bag tag of Ethiopian Airlines in which she was proposed to travel, which she was carrying has to be treated as personal article and search of that bag would be treated as personal search of the person. A bag or brief case carried by Air traveller having carry bag tag, cannot be said to be an article which is out of reach of the traveller. Therefore, in this case, as already observed the search was effected was personal search and Section 50 has to be complied with.

12. The learned Counsel for the appellant also brought to our notice an unreported judgment of the Division Bench of this Court in Criminal Appeal No.

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13 of 1995, decided on 21st August, 1997. The Division Bench consisting of Honourable Justice V. P. Tipnis and Honourable Justice A. B. Palkar held that the search of brief case in the hands of a traveller was an article in his immediate possession or a luggage carried by him or in his physical possession and as such the case is fully covered by words ''to search any person'' as stated in Section 50 of the N.D.P.S. Act.

13. Next point urged by the Counsel for the respondent is that even if it is assumed that the search has become illegal and cannot be relied upon for sustaining the conviction of the appellant there is other evidence to convict the appellant. In this context the Counsel refers particularly to the statement made by the appellant u/s 108 of the Customs Act. The learned Counsel brought to our notice the decision of the Supreme Court in State of Himachal Pradesh Vs. Shri Pirthi Chand and another, which was followed by a Division Bench of this Court in an unreported decision rendered in Criminal Appeal No. 13 of 1995, decided on 21-8-1997.

14. It is true that as per those decisions any evidence collected in furtherance of recorded or recovered any search held in violation of mandatory provisions does not automatically invalidate the trial. Depending upon the facts and circumstances of the case, if there is enough material to sustain the conviction then the same can be sustained. The learned Counsel contended that the statement made by the appellant in pursuance of the notice u/s 108 of the Customs Act is reliable material on which the conviction to the appellant can be sustained. The decisions quoted above have been strongly relied upon by the Counsel of the respondent. Therefore the question that arises is whether confessional statement made by the appellant which was retracted after two months could be safely relied upon to sustain the appellant''s conviction PW. 3 in his evidence stated that immediately after search was over on 19-4-1990, he had served appellant, a summons purported to be u/s 108 of the Customs Act. Mrs. Kapoor, a Lady Officer, has written the preamble of the confessional statement made by the appellant. In that statement, she admitted committing the offence but later on 19-6-1990, when she was produced before the Magistrate, retracted the said confessional statement saying the confession statement was extracted from her without her will and using force and duress. She stated before the Magistrate that she was beaten before she gave the confessional statement. Question, therefore, arises in this case as to how far such a retracted confession can be used as a foundation for establishing the culpability of the appellant.

15. The learned Counsel for the Respondent also relied upon the decision of this Court in Criminal Appeal No. 13 of 1995 (supra) wherein this Court has relied upon the confessional statement made in pursuance of the summons issued by Customs Authorities u/s 108 of the Customs Act. There cannot be any dispute that the facts disclosed in such statement made can be accepted by the Court, of course, depending upon the circumstances of the case. In the above judgment

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itself, Palkar, J. says in para 43 of the Judgment as follows :

"43. It is likely that they would not bother to collect other evidence and would only record the confessional statement of the accused and if there is delay in retraction, then on that basis even innocent persons are likely to suffer. Suffice it to point out that we have already stated that each case will have to be considered on its own facts and circumstances and we are not laying down any legal proposition that the confessional statements must be relied upon in every case."

16. Therefore whether the statement recorded u/s 108 of the Customs Act can be used as a material evidence to establish the guilt of the accused depends upon the circumstances of each case. We do not think that the circumstances in which the confessional statement purported to be recorded u/s 108 of the Customs Act in this case can be safely relied upon for sustaining the prosecution case.

17. Confession is always acceptable to God; so also to Court, provided it comes out of a mind uninhibited and unfettered by any compulsion, duress, influence, or appeasement. It should emanate from free will of a person. Law of Evidence lays down different circumstances and situations when confession of an accused is inadmissible. Sections 24, 25, 26, 28, 29 and 30 of the Evidence Act lays down the situation and circumstance where a free mind can be vitiated. In the case in hand, we have seen that the appellant made the confession while she was under the authority of Customs Officials. Assuming that the statement made by the appellant is admissible, we have to examine as to what value could be attached to it because she retracted it when she was produced before the Magistrate after two months. The Supreme Court in Puran Vs. The State of Punjab (I), has held that unless a retracted confession is corroborated in material particulars, it is not prudent to base a conviction in a criminal case on its strength alone. We find no such corroborating material in this case. As we have noticed that, the circumstances under which statement was extracted from the appellant, it lost its evidentiary value. In our view it cannot be solely relied upon for the conviction of the appellant.

18. In view of the above discussion the contention of the learned Counsel for the respondents has to be rejected. Evidence of such statements however, cannot be a material to sustain the prosecution case. Apart from this there is no other material to establish guilt of the accused. As pointed out earlier there is a breach of Section 50. In our view the prosecution has failed to establish the guilt by other material and the appellant is entitled for acquittal.

19. In the result, Appeal is allowed, Judgment of the trial Court is set aside and the appellant is set at liberty forthwith, if not required in any other case.

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