
(2011) 12 BOM CK 0019
In the Bombay High Court
Case No : Criminal Appeal No. 1101 of 2005

Ogbu Awah

APPELLANT

Vs

The Narcotics Control Bureau, Mumbai Zonal Unit, Mumbai
and The State of Maharashtra

RESPONDENT

Date of Decision : 09-12-2011

Acts Referred:

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

Citation : (2012) BomCR(Cri) 763

Hon'ble Judges : M.L. Tahaliyani, J

Bench : Single Bench

Advocate : Murtuza M. Nazmi, for the Appellant; P.S. Hingorani, APP for the State, for the Respondent

Final Decision : Dismissed

Judgement

M.L. Tahaliyani, J.—The appellant is aggrieved by the judgment and order dated 31st August, 2005 passed by the Special Judge sat 2 cri. appeal 1101-2005 appointed under the NDPS Act. The appellant has been convicted of the offences punishable u/ss. 21(C) r/w. 29 and 23(C) r/w. 28 of the NDPS Act. For both the conviction he has been sentenced to suffer RI for 10 years each and to pay a fine of Rs. 10 lakhs each and in default, to undergo RI for 3 months each.

2. The appellant is a Nigerian national. He had come to Mumbai on 30th June, 2002 and was staying at Hotel Colaba Causeway. The officers of Narcotics Control Bureau, Mumbai, has intercepted him at Sahar International Airport on the basis of certain information that he would be carrying Heroin by Swiss International Airlines Flight No. LX 155 ETD. His checked-in baggage and cabin baggage was subjected to search. He was given opportunity of being searched in presence of a Gazetted Officer or the Magistrate as provided by the law. He refused to avail the said opportunity. Nothing incriminating was found during the course of search of his checked-in baggage. However, Heroin weighing 1.200 kgs. was recovered

from his cabin baggage which was concealed in a false bottom of his VIP sky bag. The same was seized. Two samples were drawn. The samples were named as Awah-I and Awah-II, respectively. The bulk quantity was packed in cartoon and sealed. Panchnama was prepared. The documents found during personal search of the appellant and his travel documents were seized under the panchnama. His statement u/s. 67 of the NDPS Act was recorded.

3. During the course of recording of statement of appellant, it was revealed that he was staying at Spain since 1998. He came to Mumbai on 30th June, 2002. He had a Nigerian friend by name Peter who stays in Amsterdam. The appellant was offered 2000 US Dollars by the said Peter for carrying drugs from India. The appellant was assured that there would not be any chance of appellant being apprehended. The appellant, therefore, accepted the proposal and undertook to carry out the job. His arrangements for journey from Spain to India were made by Peter. After reaching India, the appellant had received Rs. 2,70,000/- from Mr. Peter through Western Union Money Transfer. One African National had visited hotel room of the appellant on 11th July, 2002. The appellant had paid Rs. 2 lakhs to the said African national as directed by the Peter and in exchange received suitcase from the said African national.

4. It is the case of the prosecution that it is the same suitcase in which there was a concealed bottom and Heroin was kept in the concealed bottom. The said suitcase was carried by the appellant and, as already stated, the appellant was intercepted at the Airport. The suitcase was found to be cabin baggage of the appellant.

5. The field test of the alleged Heroin tested positive for the Heroin. Sample Awah-I was sent to Deputy Chief Chemist by Narcotics Bureau. The Deputy Chief Chemist reported that the sample is in the form of white powder and it answers the tests for dactyl Morphine (Heroin). The sample Awah-II was sent to Forensic Science Laboratory on 16th July, 2002. The Assistant Chemical Analyzer of the Laboratory had reported that the sample contained Heroin (Dactyl Morphine) Hydrochloride along with other opium and that alkaloids is detected in the Exhibit. It is stated by the Chemical Analyzer that Exhibit fell u/s. 2(xvi)d of the MDPS Act, 1985. The bulk of Heroin which was sealed in the carton was opened by the Special Magistrate for drawing a sample as per Section 52-A of the NDPS Act. The Special Magistrate prepared panchnama after drawing the sample. The carton was repacked and resealed after the panchnama was drawn by the Special Magistrate. After completion of investigation, complaint was filed in the Court of Special Judge, Mumbai.

6. Charge for the offences stated in para one of this judgment was framed against the appellant and it was explained to him. He pleaded not guilty to the said charge and claimed to be tried.

7. During the course of trial, the prosecution had examined six witnesses who are as under:-

PW -1 - Mr. Vipin Nair, Intelligence Officer,

PW 2 - Mrs. Shabana Sayyed, Office Manager in Hotel Samrat.

PW 3 -Mr. Ijaaz Ahmed Ansari working at respective counter in Hotel Causeway.

PW 4 -Mr. Madhukar Malve, Asstt. Chemical Analyzer working in Forensic Science Laboratory, Kalina, Mumbai.

PW 5 - Mr. Bhushan Muley, Intelligence Officer attached to office of Narcotics Control Bureau,

PW 6 -Mr. Nitin Amrathe working with Khambatta Aviation on the relevant date.

8. PW 1 has more or less has adhered to the prosecution story in his examination-in-chief. He had stated that information was received by him and it was placed before the Superior Officers. Watch was kept in the examination hall of International Airport on the night of 11th and 12th on the basis of the secret information received by the Narcotics Control Bureau. This witness has also stated that the appellant was intercepted after he had checked in. There was no recovery of any incriminating articles from his checked-in baggage. However, according to this witness, 1.200 kgs. Heroin was recovered from the false bottom of the cabin baggage of the appellant which was in his personal custody at the time of interception. This witness has also given evidence regarding opening of the false bottom, seizure of the contraband and drawing of two samples. The witness had further given evidence that one of the samples was sent to Deputy Chief Chemist on the same date and other sample was sent to Forensic Science Laboratory, Kalina, Mumbai. The report given by the Deputy Chief Chemist and Chemical Analyzer of Forensic Science Laboratory have already been reproduced by me hereinabove. It is, therefore, not necessary to repeat the same here.

9. PW 2 is the lady who was working as Office Manager in hotel Samrat. She had produced hotel register to show that the appellant was staying in the said hotel from 30th June, 2002 to 1st July, 2002.

10. PW 3 Ijaaz has stated that he was working in Hotel Causeway and according to his record, the appellant Mr. Ogbu Awah had stayed in the said hotel from 1.7.2002 to 5.7.2002 onwards. He had produced xerox copy of the concerned register of the hotel.

11. PW 6 is the panch witness in whose presence panchnama was prepared by PW no. 1. He has more or less supported the evidence given by PW no. 1.

12. PW 5 was one of the officers of Narcotics Control Bureau who was associated with the investigation of the present case. He had also given evidence more or less similar to the evidence given by PW 1 and PW 6.

13. PW 4 was working as Assistant Chemical Analyzer attached to Forensic Science Laboratory, Kalina, Mumbai. It is stated by him that on 16th July, 2002, sample in respect of file no. NCB/BZU/CR-09/2002 was received in the

laboratory. Seals were found intact. The sample was assigned the independent Laboratory serial number being ML Case No. M-303/2002. The sample was off-white powder contained in a polythene bag. Fifteen tests were carried out on the same. After analysis it was opined by this witness that the sample was containing Dactyl morphine. He had produced data sheet of the various tests carried out by him at Exhibit 27/3. The report of analysis dated 17th September, 2002 is at Exhibit 27/2. Exhibit 27/1 was the report regarding percentage of active ingredients.

14. The case of the appellant before the trial court was that he was falsely implicated in this case and that Heroin as alleged was not recovered from his cabin baggage. It is the case of the appellant before the trial court that Heroin was recovered from some other passenger and the same had been foisted upon him to create a false case against the appellant. As can be seen from the cross-examination of the witnesses and judgment of the learned trial court, the case of the prosecution was assailed by the defense on the following grounds amongst others :

- 1) There is discrepancy in the evidence of PW 1 and the panch witness PW 6 Mr. Amrathe.
- 2) The sample Awah-II was retained by PW no. 1 with him for three days and therefore, there was possibility of tampering with the evidence.
- 3) The sample collected from the Heroin seized from the another passenger - Nigerian national travelling by the same flight, viz. Fransis Azubike Okpara was dishonestly shown as a sample of the substance seized from the appellant.

15. It was submitted that the PW 1 has not stated in evidence that the samples were first collected in polythene bag. Wherein PW 6 has stated in his evidence that samples were collected in polythene bag. As far as this discrepancy in the evidence of PW 1 and 6 is concerned, it was brought to the notice of the learned trial court as well as this Court that the panch witness Mr. Amrathe has stated that two samples of 5 grams each were drawn in polythene pouches and that polythene pouches were put in the packets and thereafter, packets were sealed. Whereas PW 1 has stated that the samples were put in polythene sachets and sachets were heat sealed. It was submitted that PW 6, the independent witness, has not stated that the pouches/sachets were heat sealed. In brief, it is contended that therefore, there was possibility of tampering with the evidence. This apprehension of the appellant, it is submitted, is fortified by the fact that the PW no. 1 had retained the sample with him for three days. The sample Awah-II was forwarded to the Analyzer on 16th July, 2002. It was submitted that these two infirmities in the prosecution case coupled with the name of other passenger in the forwarding letter addressed to the Forensic Science Laboratory clearly indicates that the sample drawn from the substance collected from some other passenger had been shown as sample drawn from the substance seized from the appellant. My attention was drawn to the Exhibit 26, copy of the letter addressed

to Forensic Science Laboratory by Narcotics Control Bureau. PW 1 in his cross-examination has admitted that person by name Fransis Azubike Okpara was arrested by Narcotics Control Bureau and Heroin was seized from him also. He has stated that the name of the Fransis Azubike Okpara in Exhibit 26 is a typing mistake.

16. The learned trial court has dealt with all the three points in detail. As far as use of polythene bag and heat sealing is concerned, I am of the view that omission of this nature in the evidence of one of the witnesses does not create a doubt that the sample was not properly sealed. It is just impossible to have two witnesses giving verbatim same evidence. On the contrary, witnesses giving stereotype evidence are normally tutored witnesses. Few contradictions, omissions and discrepancies not of material nature are bound to occur in the evidence of witnesses when there are more than one witnesses to the same incident. The duty of the Court is to examine whether the particular omission or discrepancy creates a doubt about the genuineness of the fact which is sought to be proved by the said evidence. In the present case, the learned trial court has rightly rejected the contention of the appellant that the sealing was not properly done with a view to have a chance to tamper with the evidence later on.

17. The learned trial court has also criticized the PW 1 for retaining the sample with him for three days. However, at the same time, the learned trial court has expressed a view that the retention of the sample by PW no. 1 by itself does not lead the court to conclude that PW 1 might have tampered with the sealed packet. The learned trial court has stated in its judgment that two following days were holidays and therefore, obviously, the PW 1 could not have submitted the sample to Forensic Science Laboratory on the same day or the next day. The fact regarding holidays has not come in the evidence of PW no. 1. However, the learned trial court has rightly taken judicial notice of the calendar and has rightly come to the conclusion that no serious fault could be found with the PW no. 1.

18. As far as appearance of name of Fransis Azubike Okpara in covering letter addressed to the Forensic Science Laboratory in respect of forwarding of the sample of substance seized from the appellant is concerned, it is admitted that in column no. 2 which states in brief the history of case, name of Fransis Azubike Okpara is stated to be the person from whose possession 1.200 grams of off-white powder was seized. The learned trial court has observed that in all probability the forwarding letter prepared for the case of Fransis Azubike Okpara must have been copied and pasted and thereafter necessary changes must have been carried out in the pasted forwarding letter which was the letter in respect of the present appellant. The PW 1 has stated that it was typing mistake. In fact, what the learned court has stated appears to be the correct position. There is no mistake in the name of the passenger in first paragraph of the same letter. Appellant's name clearly appears in the first paragraph. Passport NO.C-584086 also belongs to the passport of the appellant. The mistake had occurred on page no. 2 where brief history of the case is mentioned. Since Fransis was also

apprehended on the same day, samples of the contraband recovered from the possession of passengers might have been forwarded on the same day and forwarding letters also must have been prepared by the same typist. It is not uncommon that such mistakes are committed by typist and stenographer in other offices including courts. This is noticed by me in many cases that case number of one case appears in the heading of another case. It is mainly because the heading of the case remains the same. The name of the court remains the same and only case number and names of the parties are different. Therefore, many a times, the document is copied and pasted and necessary changes are later on made. However, some changes are left out. In the result, name of a party to "x" proceedings in the court may appear in the papers of another proceedings. It is the mistake of this nature which had occurred in the present case. As such, I do not find any weakness in the prosecution evidence. Though the confession given by the appellant had been retracted, the learned trial court has rightly stated that the evidence of recovery, report of Chemical Analyzer and retracted statement of the appellant are sufficient to substantiate the charges leveled against the appellant.

19. After having overall view of the evidence of the witnesses and the retracted statements of the appellant, I have come to the conclusion that the appellant was rightly found guilty for the offences of conspiracy to transport Heroin. The appellant was also rightly found guilty of the offence of possessing Heroin in contravention of the provisions of NDPS Act. The appellant is further found guilty of the offence punishable u/s. 28 i.e. attempt to commit offence under the NDPS Act. The appellant was found guilty of attempting to export/transport of Heroin out of India. I have gone through the final order passed by the learned Special Judge. In my considered opinion, the final order has not been drafted properly. The offence punishable u/s. 21(C) is an independent offence and the offence punishable u/s. 29 (conspiracy) is also an independent offence. The offence of conspiracy is an independent offence irrespective of the fact as to whether the actual offence is committed or not. Therefore, these two sections in fact should not have been clubbed together while imposing punishment. However, the offence punishable u/s. 23(C) of the NDPS Act is rightly clubbed u/s. 28 of the NDPS Act.

20. In fact, the learned trial court could have imposed three different punishments for the offences punishable u/ss. 21-C, 29 and 23(C) r/w. 28 of the NDPS Act. Though the substantive sentences have been directed to run concurrently, the additional fine of Rs. 1 lakh could have been imposed for an independent offence of conspiracy. However, I am not inclined to disturb the sentence imposed on the appellant as the NCB or the State has not filed any appeal against the said judgment and order. At the same time, it is necessary to be stated here that no prejudice has been caused to the appellant so far as the defect in the final order is concerned. On the contrary, the appellant had been benefited to some extent.

21. In view of what has been stated by me hereinabove, the appeal stands dismissed.