

(1990) 09 MAD CK 0050

In the Madras High Court

Case No : Criminal M.P. No. 10808 of 1990

Rekha Parameswari alias Gnanambigal Muthiah

APPELLANT

Vs

Assistant Collector of Customs

RESPONDENT

Date of Decision : 12-09-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482

Customs Act, 1962 — Section 135

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 23, 28, 42, 50, 52A

Citation : (1992) CriLJ 901 : (1992) 37 ECC 105

Hon'ble Judges : Janarthanam, J

Bench : Single Bench

Advocate : S. Palaniappan, for the Appellant; P. Rajamanickam, Central Govt. Public Prosecutor, for the Respondent

Judgement

Janarthanam, J.—Miss. Rekha Parameswari, a Sri Lankan national, stated to be falsely styled as Gnanambikai Mukhaiya, holding a Sri

Lankan passport, also stated to be a forged one, was a passenger bound for Colombo by Indian Airlines flight I.C. 573 on 21-2-1989. She

proceeded for security check after customs clearance at the Madras International Airport. The lady Security Officer, while frisking her, felt that

something was kept concealed on her person. She was therefore taken to a toilet and when her person was searched in the presence of two lady

witnesses, her undergarment jetty was found bulging, creating a suspicion that something was kept concealed within. On being asked to remove the

jetty for examination, she did so and a polythene bag was kept in between two jetties stitched together and it was found to contain some brown

powder, suspected to be narcotic substance weighing 500 gms. When

questioned, she was stated to have admitted that the said powder was brown sugar and the same was given to her by a person to be smuggled out of India to Sri Lanka. She was not holding any permit and therefore the same was seized by the Security Officer under a mahazar for taking action under the Customs Act read with the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "N.D.P.S. Act"). She was stated to have given a statement before the Customs Officer in her own writing in Tamil, confessing the clandestine transport of brown sugar from India to Sri Lanka for monetary consideration. After completing the formalities of investigation, the Assistant Collector of Customs, Prosecution Cell, Preventive Department, Customs Department, Madras-1, laid the complaint against her before the Sub-Divisional Judicial Magistrate, Poonamallee, in C.C. Nos. 33 of 1989 alleging offences under S. 135(1)(a) of the Customs Act, 1962 read with Ss. 8(c) and 79 of the N.D.P.S. Act, punishable under S. 135(1)(ii) of the Customs Act, 1962 read with Ss. 23 and 28 of the N.D.P.S. Act and Rs. 53 of the Rules made thereunder. The learned Magistrate, after observance of formalities, committed the case to Sessions, which is now pending in S.C. No. 15 of 1990 on the file of the Assistant Sessions Judge, Poonamallee. The petitioner/accused has now come forward with the present action, invoking the inherent jurisdiction of this Court to quash the said proceedings.

2. Learned counsel appearing for the petitioner would virtually mount a scathing attack on the sustainability of the prosecution against the petitioner by stating that inasmuch as the provisions of the N.D.P.S. Act are so stringent in punishing ruthlessly the offenders in inflicting imprisonment up to a minimum period of ten years and a fine of Rs. 1 lakh, the Parliament made certain procedural safeguards to ensure the liberty of citizens accused of such offences by incorporation of certain mandatory provisions, non-compliance of which will have the effect of throwing lock, stock and barrel the case of the prosecution by rendering a verdict of acquittal. He would amplify this submission that, in so far as the case on hand is concerned, the provisions contained in Ss. 42, 50, 52-A(2) of the N.D.P.S. Act had been flagrantly violated and besides the test report for determining the nature of the substance seized from the petitioner has not been obtained from the Authority prescribed under the Rules framed under the Act, and

therefore, it is, that the prosecution launched against the petitioner is liable to be quashed.

3. Mr. P. Rajamanickam, learned counsel appearing for the Customs Department, would repel such submissions and he would state that the

invalidity of a proceeding or illegality of a search or seizure, does not vitiate the prosecution, unless such invalidity or illegality has resulted in

causing prejudice to the person accused of the offence.

4. Section 42 deals with the power of entry, search, seizure and arrest without warrant or authorisation. The Central or State Government, for the

exercise of power under the section, can empower any Officer Superior in rank to a peon, sepoy or constable of the Departments of Central

Excise, Narcotics, Customs, Revenue, Intelligence or any other Department of the Central Government or the Border Security Force. Learned

counsel for the petitioner would contend that the search, seizure and arrest had been effectuated by the lady Security Officer at the airport, who is

an Officer in the Cadre of a Sub-Inspector of Police, and admittedly she is not an Officer empowered by the Government under S. 42 and as such

the proceedings are illegal.

5. Section 50 prescribes conditions under which search of persons shall be conducted. According to it, if the accused person requires, the Officer

shall take such person without unnecessary delay to the nearest Gazetted Officer of any of the Departments mentioned in S. 42 or to the nearest

Magistrate. Learned counsel for the petitioner would contend that if the person to be searched requires him to be taken to the nearest Gazetted

Officer or Magistrate, the competent Officer desirous of searching the accused shall without unnecessary delay comply with this request. He would

further contend that the materials on record would not furnish any clue that the petitioner was taken to the nearest Gazetted Officer or Magistrate

and in such state of affairs, it is not far wrong to contend that the procedural safeguard adumbrated under this section had been violated with

impunity, causing prejudice to the cause of justice and therefore the proceedings have to be quashed.

6. Section 52-A deals with disposal of seized narcotic drugs and psychotropic substances and sub-section (2) which is relevant for the purpose of

this case, reads as follows :

Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the

officer empowered u/s 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances

containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the

narcotic drugs or psychotropic substances of the packing in which they are packed, country of origin and other particulars as the Officer referred

to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and

make an application, to any Magistrate for the purpose of -

(a) certifying the correctness of the inventory so prepared, or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any

list of samples so drawn.

A reading of the above provision shows that it deals with the procedure for the preparation of an inventory of the seized material by the competent

officer, certification of the correctness of the inventory by the Magistrate, drawing of representative samples of such seized material in the presence

of the Magistrate, and taking of photographs in the presence of such Magistrate of the substance seized and certifying such photographs to be true.

Learned counsel for the petitioner would submit that the said procedure is mandatory and the same not having been complied with, the

proceedings are vitiated.

7. The last submission of the learned counsel for petitioner revolves on the test report determine the quality and nature of the substance seized from

the custody and possession of the petitioner. Rule 2(c) defines "Chemical Examiner" as follows :

""Chemical Examiner"" means the Chemical Examiner, Government Opium and Alkaloid Works, Neemuch or, as the case may be, Ghazipur."

Admittedly, the sample of the substance had not been sent to the Chemical Examiner as defined under Rs. 2(c) of the Rules framed under the

N.D.P.S. Act, but was sent to the Chemical Examiner, Customs House, Madras-1,

and therefore, it is the contention of learned counsel for the petitioner that the test report received from the Chemical Examiner, Customs House, Madras-1, cannot at all be construed as a test report in the eye of law, deciphering the nature and quality of the substance seized and in this view of the matter also the proceedings initiated against the petitioner deserve to be quashed.

8. No doubt true it is, as rightly contended by learned counsel for petitioner, that the woman Security Officer in the rank of a Sub-Inspector of

Police, who happened to seize the contraband article from the custody and possession of the petitioner, by search of her person on the relevant

date, is not an Officer empowered by the Government under S. 42 of the N.D.P.S. Act. Such seizure and arrest in the peculiar facts and

circumstances of the case cannot at all be stated to have caused any prejudice to the petitioner. Even an Authorised Officer under this section has

to effect initially the search and thereafter, the seizure and arrest, only when he has reason to believe from his personal knowledge or by

information given by any other person, that any narcotic drug or other substance, possession whereof is punishable under Chapter IV of the Act,

had been in the possession of the accused. Recapitulating the facts of the instant case, worthwhile it is to mention that the petitioner crossed the

frontiers of the Customs Check, and while she was undergoing the security check, suspicion arose as to her keeping certain article concealed in her

person. The Security Officer, who effected the search, was completely oblivious of the possession of any narcotic drug or psychotropic substance

by the petitioner. If such a thing was known to her, there is every possibility for the petitioner to be handed over straightway to the Customs

Official without even effecting any search and consequent seizure. The fact of possession of the narcotic substance by the petitioner was brought to

the notice of the Security Officer only after the search and seizure of the contraband from the petitioner. In the very nature of things in the

circumstances of the case, this is the only plausible feat to be performed by the Security Officer. What is concerned in such a situation is as to

whether the search and seizure were true and the evidence to be adduced by the prosecution through the Security Officer during the course of trial

is inspiring confidence in commanding acceptance at the hands of Court. The

factum of violation of the procedure by itself can by no stretch of imagination be stated to be causing any sort of material prejudice to the case of the petitioner, vitiating the entire prosecution.

9. As regards the next contention of the learned counsel for the petitioner with regard to the taking of the petitioner to the nearest Gazetted Officer

or the Magistrate with the least practicable delay as contemplated by S. 50, this is to be resorted to only if the person accused of the offence

requires him to be taken so, and no otherwise. Apparently, no material whatever is available on record pointing out that the petitioner did make

such a request and as such, the submission on this aspect of the matter is of no substance.

10. While making the submission on the premises of sub-section (2) of S. 52-A as regards the non-following of the prescribed procedure, learned

counsel for the petitioner is rather oblivious or has forgotten the salient provision adumbrated under sub-section (1) of that section which gives

power to the Government for prescribing the procedure from time to time for the disposal of the seized narcotic drug or psychotropic substance.

Pertinent it is to mention here that by virtue of the powers conferred under sub-section (1) of S. 52-A of the N.D.P.S. Act, 1985, as amended by

NDPS (Amendment) Act, 1988 (2 of 1989), the Central Government have issued a Standing Order No. 1/89 dated 13th June, 1989, detailing the

elaborate procedure to be adopted by the drug law enforcement agencies while seizing drugs, drawing samples therefrom, proper storage and the

manner in which such drugs could be disposed of by the officers concerned. An elaborate procedure had been prescribed respecting the drawal of

sample, drawal of a representative sample, despatch of samples for testing, etc. It is not disputed that, in the instant case, the procedure prescribed

in the Standing Order referred to above had not been violated in respect of these aspects of the matter.

11. The other contention of non-obtaining of the test report from the Chemical Examiner as contemplated under R. 2(c) of the Rules, is of no

substance, on the face of clause 3 of the Standing Order referred to above which reads as follows :

Despatch of samples for testing; To whom to be sent ?

The seizing officers of the Central Government Departments, viz., Customs,

Central Excise, Central Bureau of Narcotics, Narcotics Control

Bureau, Directorate of Revenue Intelligence, etc. should despatch samples of the seized drugs to one of the Laboratories of the Central Revenue

Control Laboratory nearest to their offices depending upon the availability of test facilities. The other Central Agencies like BSF, CBI and other

Central Police Organisations may send such samples to the Director, Central Forensic Laboratory, New Delhi. All State Enforcement Agencies

may send samples of seized drugs to the Director/Deputy Director/Assistant Director of their respective State Forensic Science Laboratory.

As adverted to earlier, factually clause 3 has been complied with by sending of the sample of the contraband seized to the Chemical Examiner,

Customs House, Madras-1, and hence this submission also bristles next to nothing.

12. Learned counsel for the petitioner would also incidentally contend in a half-hearted fashion that the confessional statement, stated to have been

given by the petitioner to the Customs Official, is not the resultant product of voluntariness and therefore it is that such a statement cannot at all be

used against the petitioner for mulcting or fastening criminal liability. The arena of consideration of the voluntary nature or otherwise of the

confessional statement given by the petitioner may of course fall for consideration during the course of trial and the same could be decided by the

learned trial Judge, on the assessment of the adduction of evidence before him and it cannot at all be stated that such a consideration is legally

permissible in a petition of this kind under S. 482, Cr.P.C. what this Court at this stage can consider is the prima facie material available on record

in the shape of a confession, stated to have been given by the petitioner before the Customs Official, containing the necessary ingredients

constituting the commission of certain offences alleged. In this view of the matter, this incidental submission made by the learned counsel for

petitioner merits little substance.

13. For the foregoing reasonings, there are no merits in this petition and the same deserves to be and is hereby dismissed.

14. Petition dismissed.