

(1996) 08 BOM CK 0004
In the Bombay High Court
Case No : Criminal Appeal No. 586 of 1993

Veneela Tilak

APPELLANT

Vs

Shahasane, Assistant Collector of Customs and Others

RESPONDENT

Date of Decision : 07-08-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100, 103, 152
Customs Act, 1962 — Section 100, 101, 102, 135
Foreign Exchange Regulation Act, 1973 — Section 34
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 22, 23, 28, 41, 42

Citation : (1996) 98 BOMLR 634 : (1997) 2 MhLj 337

Hon'ble Judges : R.P. Desai, J;N.D. Vyas, J

Bench : Division Bench

Judgement

R.P. Desai, J.—The Appellant was charged for offences punishable u/s 22 read with Section 8(c) and u/s 23 read with Section 28 of the N.D.P.S. Act and u/s 135(1)(a) read with Section 135(i)(ii) of the Customs Act, 1962. By his Judgment and Order of conviction and sentence dated 31.3.1993, the Ld. Special Judge, Greater Bombay convicted the Appellant-accused for offence punishable u/s 22 read with Section 8(c) of the N.D.P.S. Act, 1985 and sentenced her to suffer Rule I for 10 years and to pay a fine of Rs. 1,00,000/- in default, she was to suffer Rule I for 2 years. The accused was further convicted for offence punishable u/s 23 read with Section 28 of the N.D.P.S. Act, 1985 and u/s 135(1)(a) read with Section 135(i)(ii) of the Customs Act, 1962 and she was sentenced to suffer Rule I for 10 years and to pay a fine of Rs. 1,00,000/-. In default, she was to suffer further Rule I for 2 years. The said Judgment and Order of conviction and sentence is challenged in the present appeal.

2. According to the prosecution, secret information was received by the Complainant Mr. Shahasane on 5.8.1990 that the accused along with one South African, one Mr. Zain (since acquitted) was leaving Bombay for Lusacan by Zambia Airways flight No. 02081 which was flying on 6.8.1990 at about 3.15

a.m. from Sahar Airport, Bombay, Module-II. The accused and the other person, both South African nationals were to smuggle large quantity of Mandrex tablets, a psychotropic substance. Mr. Shahasane reduced the said information into writing, sealed the same and handed over the same to his higher authority. He discussed it with them. On the night between 5th and 6th of August, 1990, at about 12.15 hours Mr. Shahasane contacted his Deputy Director Mr. R.N. Kakkar and Mr. Sawant, Superintendent of N.C.B. and called them to the Departure Module-II at Sahar Airport, Bombay at about 1.15 a.m.. Thereafter Mr. Shahasane, Deputy Director Mr. Kakkar and Mr. Sawant, Superintendent of N.C.B. met at the Airport and they went to the Departure Module-II at baggage X-ray machine. One Victor Peter, Asstt. Security Officer and Miss Varsha Parkar, Asst. Security Officer were on duty on that night. Two witnesses were called at about 1.30 a.m. on 6.8.1990. They were informed about the information received. After a few minutes a lady i.e. the present accused came there with three suit-cases. The suitcases were brown, green and black in colour. She put them on the X-ray machine. PW-3 Victor Peter noticed some concealment in the two suitcases out of the 3 suitcases which was viewed on the screen. Upon seeing this fact, Mr. Shahasane asked the accused her name and she gave her name as Veneela Tilak. He asked the accused to sit on a chair nearby the Customs Counter along with her baggage.

3. At about 2 a.m. the other person by name Mr. Zain came with black colour suitcase and a shoulder bag. He put the same on X-ray machine and PW-3 Victor Peter found a similar concealment in his suitcase. Mr. Shahasane asked his name to which he replied as Mr. Zain. Both the suspected passengers, two Air-India Officers on duty by name Victor Peter and Varsha Parkar along with two panchas Mr. S. Aigal and Mr. A. Kadam went to the nearby Conference Hall. The search of the baggage of the accused was taken. The brown suitcase was found to contain certain garments and 35 polythene packets containing white tablets suspected to be mandrex a psychotropic substance. The said packets were concealed in the folds of garments. In the other suitcase of green colour 32 similar polythene packets containing white tablets were found. The said polythene packets were concealed in the similar manner.

4. The Officers of the N.C.B. tested one tablet from each packet with the help of field testing kit and the same gave positive results for presence of Methaqualone, a psychotropic substance. The officers seized 33.5 kgs of mandrex tablets valued at Rs. 3,35,000/- under a panchanama. Nothing incriminating was found from the third suitcase. Personal search of the accused was taken by the Asstt. Security Officer, Miss Varsha Parkar, but nothing incriminating was found. The necessary samples were drawn and they were sent to the Chemical Analyser of Customs House Laboratory. The Chemical Analyser's report was received on 8.10.1990, which indicated that the samples contained Methaqualone, a psychotropic substance, covered by the provisions of N.D.P.S. Act, 1985. The Accused was arrested at about 6.30 p.m. on 6.8.1990. After completion of the investigation, she came to be charge-sheeted as aforesaid.

5. We are informed that as regards Mr. Zain, the person who was with the present accused, a separate complaint was filed. He was separately tried and acquitted. The learned Counsel for the Appellant-accused Mr. Sachwani is unable to give us any particulars about the disposal of the said case. In any case we find that the said particulars are not necessary for the disposal of the present appeal.

6. As regards the case made out by the prosecution against the present accused, the prosecution has inter alia, examined PW-1 Vijaykumar Shahasane, the Intelligence Officer, who had recorded the information received by him, PW-2 Shashank Aigal, the Asstt. Security Officer, Air India, who was on duty at the X-ray machine on the night of 5.8.1990 and 6.8.1990 and PW-3 Victor Peter, who was also on X-ray machine duty at the relevant time at the Airport. The prosecution also examined Sunil Rohatge PW-4, who is the Asstt. Director of N.C.B., who recorded the statement of the accused u/s 67 of the N.D.P.S. Act.

7. Mr. Sachwani, the learned Counsel for the appellant contended that the order of conviction and sentence deserves to be set aside because there is a violation of Sections 42 and 50 of the N.D.P.S. Act. Relying upon the judgment of the Supreme Court in the case of State of Punjab v. Balbir Singh AIR1994 SCW 802, Mr. Sachwani contended that, since Sections 42 and 50 have been held to be mandatory provisions, breach thereof entitles the accused to an order of acquittal. Mr. Sachwani contended that Section 42 requires that the empowered officer must take down the information received by him in writing and the failure to do so will amount to breach of mandatory provision of Section 42 of the N.D.P.S. Act. He contended that the prosecution has, in the instant case, not been able to show that the information was in fact taken down in writing by the concerned officer. He submitted that the extract of the said information has not been produced by the prosecution and, therefore, it must be presumed that the information was not taken down in writing.

8. In order to examine this contention of Mr. Sachwani, we have carefully gone through the entire evidence. PW-1 Vijaykumar Shahasane, in his evidence, has categorically stated that on 5.8.1990 at about 11.45 hours he received information from one of the informer that, two persons have come to Bombay from South Africa for smuggling big quantity of mandrex tablets and their names were Veneela Tilak i.e. present accused and one Mr. Zain. They were likely to leave Bombay by Zambia Airways on 6.8.1990. Mr. Shahasane has stated that he recorded this information in writing, sealed the same and handed over the same to his superior authority and discussed with them about the information. PW-2 Shashank Aigal a panch witness has also stated that on the relevant day at about 1.00 O'clock N.C.B. Officers came to him and introduced themselves to him. Mr. Shahasane informed him that they had received specific information that South African nationals would be travelling by Zambia Airlines Flight and the name of the lady was Mrs. Veneela Tilak and the name of the person accompanying her was Mr. Zain. They would be carrying with them big quantity of drugs like mandrex tablets. PW-3 Victor Peter, who was on duty at the X-ray Machine at the

relevant time, has also stated that at about 1.00 a.m. on that night PW-1 and the N.C.B. Officers told him that they had received information that on that day by the flight departing from Bombay to Zambia one lady passenger would be travelling and she was likely to carry some Narcotics in her baggage. The N.C.B. Officers told the name of the lady as Veneela Tilak the present accused. Panchanama Ex. 11-A also mentions that the officers had told the panchas that they had received information that a lady by name Veneela Tilak and one Mr. Zain, both South African nationals, who were leaving by Zambia Airways Flight No. QZ-081 to Lusaca were to carry a big quantity of Mandrex tablets, a psychotropic substance. Reference to this information is also found in Ex. 11 to the complaint. Thus, the evidence adduced by the prosecution indicates that a specific information was received giving the names of the accused and other particulars and the evidence of Shahasane indicates that it was noted down by him. He sealed it and handed it over to his higher authority and discussed with him about the information. It is significant to note that in the cross-examination, the receipt of information is not disputed. What is disputed is only the mentioning of names in the information. To us, this evidence appears to be sufficient to indicate that there is compliance of Section 42 of the N.D.P.S. Act i.e. the information was in fact taken down in writing as required by Section 42.

9. Mr. Sachwani however, contended that the prosecution ought to have produced the relevant extract to show that the information was in fact noted down. He contended that it was the duty of the prosecution to show that there is a compliance with the mandatory provisions of Section 42 by producing all the relevant materials and mere depositions of the witnesses would not be sufficient. Attention was drawn to Saiyad Mohd. Saiyad Umar Saiyad and Others Vs. State of Gujarat, wherein, while considering compliance of Section 50 of the N.D.P.S. Act, the Supreme Court has held:

We are unable to share the High Court's view that in cases under the NDPS Act it is the duty of the court to raise presumption, when the officer concerned has not deposed that he had followed the procedure mandated by Section 50, that he had in fact done so. When the officer concerned has not deposed that he had followed the procedure mandated by Section 50, the Court is duty bound to conclude that the accused had not had the benefit of the protection that Section 50 affords; that, therefore, his possession of articles which are illicit under the NDPS Act is not established; that the precondition for his having to satisfactorily accounted for such possession has not been met; and to acquit the accused.

Mr. Sachwani contended that on the same reasoning, the prosecution must also prove that Section 42 is complied with.

10. It is true that when the officer does not depose that he had followed the procedure mandated by law, no presumption can be drawn in favour of the prosecution that the necessary procedure was in fact followed. However, in the instant case, as discussed above, the prosecution has adduced sufficient evidence to indicate that information was in fact received containing names of

the accused and other necessary particulars and Mr. Shahasane, the concerned officer has in fact deposed that, he had noted down the information, sealed it and forwarded it to the superior officer. Therefore, in a case of this type, there is no question of drawing any presumption as the evidence is sufficient to indicate that Section 42 had been fully complied with. It was for the defence to challenge this in the cross examination, which it has failed to do. As indicated above, there is no cross-examination on this respect. The fact that the information was received is not at all disputed and suggestion is merely put that the information did not contain the names of the accused. Therefore in the facts and circumstances of the case it must be held that the prosecution has discharged its burden of proving that Section 42 of the N.D.P.S. Act has been complied with.

11. Mr. Sachwani then contended that there is a breach of Section 50 of the N.D.P.S. Act. According to him, neither the contemporaneous documents nor the evidence of the prosecution witnesses indicate that before search was conducted, the accused was asked whether she wanted the search to be carried out in the presence of a Gazetted Officer or a Magistrate. Mr. Sachwani relied upon the judgment of the Full Bench of the Bombay High Court in Criminal Appeal No. 531 of 1993 delivered on 22nd April, 1996. since reported in *Ebanezer Adebaya Alias Monday Obtor Vs. B.S. Rawat, Collector of Customs, R and I, New Delhi and another*, . The Full Bench was considering as to what meaning could be ascribed to the phrase "to search any person" used in Section 50 of the N.D.P.S. Act. The Full Bench formulated the question they were considering in the following manner:

Whether "to search any person" means:

- (a) search of articles on the person or body of the person; or
- (b) would include search of articles in immediate possession such as bag and other luggage carried by him or in physical possession of the person to be searched; or
- (c) would include search of bag or luggage which are presumed to be in possession of the person even though it may be lying in a house, or railway compartment or at the airport; and
- (d) whether application of Section 50 can be extended to a case of search of a place, a conveyance or a house if the accused is physically present at the time of the search.

After considering the relevant sections, they held that personal search could be confined to Clauses (a) and (b), but it would not include and cannot be extended to Clauses (c) and (d) quoted hereinabove.

12. In the instant case, evidence of P.W. 1 Vijaykumar Shahasane indicates that the accused herself put the suitcases on the X-ray machine. Therefore, there is no doubt that the 3 suitcases were in her immediate possession and would fall in category (b) and, as such, Section 50 of the N.D.P.S. Act would squarely be

attracted. It was, therefore, incumbent upon the officers to ask her whether she wanted the search to be taken before a Gazetted Officer or a Magistrate. Since none of the prosecution witnesses speak about the same arid since even the contemporaneous documents do not indicate that the accused was asked whether she wanted a search to be conducted in the presence of a Gazetted Officer or a Magistrate, it must be concluded that there is a breach of Section 50 of the N.D.P.S. Act, 1985 and on this ground, the order of conviction and sentence will have to be set aside.

13. During the hearing of this Appeal, certain astonishing facts were noticed by us. Strictly speaking, it will not be necessary to refer to them while disposing of the present Appeal. However, interest of justice demands that, we make certain observations on those facts and hence we wish to make a brief reference to them.

14. In the instant case, admittedly personal search of the accused was carried out. The search was carried out by a lady. However, it was not carried out in the presence of lady panchas. The question will be whether when a lady is to be searched, is it necessary for the investigating agency to-secure the presence of lady panchas. Section 50 of the N.D.P.S. Act, 1985 makes provision for search of a female accused. Sub-section (4) of Section 50 says that, no female shall be searched by anyone excepting a female. Section 50 reads thus:

Conditions under which search of persons shall be conducted.-(1) When any officer duly authorised u/s 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in Sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

A somewhat similar provision is also found in the Customs Act, 1962. Sub-section (5) of Section 102 of the Customs Act requires that a female shall be searched by a female. It reads thus:

Persons to be searched may require to be taken before gazetted officer of customs or magistrate. (1) When any officer of customs is about to search any person under the provisions of Section 100 or Section 101, the officer of customs shall, if such person so requires, take him without unnecessary delay to the nearest gazetted officer of customs or magistrate.

(2) If such requisition is made, the officer of customs may detain the person

making it until he can bring him before the gazetted officer of customs or the magistrate.

(3) The gazetted officer of customs or the magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) Before making a search under the provisions of Section 100 or Section 101, the officer of customs shall call upon two or more persons to attend and witness the search and may issue an order in writing to them or any of them so to do; and the search shall be made in the presence of such persons and a list of all things seized in the course of such search shall be prepared by such officer or other person and signed by such witnesses,

(5) No female shall be searched by any one excepting a female.

The Foreign Exchange Regulation Act has a similar provision-Section 34 of Foreign Exchange Regulation Act, 1973 reads thus:

Power to search suspected persons and to seize documents.-(1) If any officer of Enforcement authorised in this behalf by the Central Government, by general or special order, has reason to believe that any person has secreted about his person or in anything under his possession, ownership or control any documents which will be useful for, or relevant to, any investigation or proceeding under this Act, he may search that person or such thing and seize such documents.

(2) When any officer of Enforcement is about to search any person under the provisions of this section, the officer of Enforcement shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer or Enforcement superior in rank to him or a magistrate.

(3) If such requisition is made, the officer of Enforcement may detain the person making it until he can bring him before the gazetted officer of Enforcement or the magistrate referred to in Sub-section (2).

(4) The gazetted officer of Enforcement or the magistrate before whom any such person is brought shall, if he sees no reasonable ground for search forthwith discharge the person but otherwise shall direct that search be made.

(5) Before making a search under the provisions of this section, the officer of Enforcement shall call upon two or more persons to attend and witness the search and may issue an order in writing to them or any of them so to do; and the search shall be made in the presence of such persons and a list of all documents seized in the course of such search shall be prepared by such officer and signed by such witnesses.

(6) No female shall be searched by any one excepting a female.

The obvious intention behind this provision is to protect the modesty of a woman and to prevent a possible invasion of the same by an unscrupulous investigating

agency. In this context reference will also have to be made to the relevant provisions of the Code of Criminal Procedure, 1973. Sub-section (3) of Section 100 reads thus:

Where any person in or about such place 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.

Sub-section (4) of Section 100 is also relevant as it makes provision for witnesses for the search in order to lend authenticity to it. It reads thus:

Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

Requirement of having witnesses or panchas is to secure that the search is carried out after following the proper procedure and that it is authentic. A search of a woman also would have to be conducted in the presence of panchas to lend credibility to it.

15. Now if a woman accused has to be searched, merely calling a female officer to search her will not fulfill the legislative intent. The legislative Intent appears to be to protect the lady accused's modesty while conducting her search. The search has to be conducted by having strict regard for decency. Therefore, the officers will necessarily have to secure the presence of lady panchas. If the search is carried out in the presence of male panchas, the very purpose of Sub-section (4) of Section 50 of the N.D.P.S. Act and such similar provisions contained in other statutes would be frustrated. What is sought to be achieved by Sub-section (4) of Section 50 of the N.D.P.S. Act, the relevant provisions of Criminal Procedure Code quoted herein above and similar provisions of the Customs Act and the F.E.R.A. would be lost if the investigating agency does not carry out the search by a female in the presence of female panchas.

16. In this regard reference may be made to the decision of the Supreme Court in *Kamalabai Jethamal Vs. The State of Maharashtra*, where the Supreme Court had an occasion to comment on a search of a woman carried out in the presence of men. The Appellant in that case was tried for an offence under the Suppression of Immoral Traffic in Women and Girls Act. The charge against the Appellant was that she supplied a girl to one Manmohan Mehta, who is a witness and she kept or managed a brothel. The prosecution story was that after the information was received, a trap was laid and two persons were sent to the Appellant to ask for a girl for the purpose of prostitution. One of them was to be a panch, a witness to the fact that the appellant supplied females for prostitution. Two one-hundred rupees marked currency notes were given to

Mehta with instruction that he was to pay out of that to the appellant. He accordingly paid the amount quoted by the appellant. It is not necessary to make reference to the other facts of the case except that, during the course of investigation the women panchas accompanied the police party and searched the appellant and one hundred rupees currency note was found from her person under her blouse. It was argued that the said evidence should not be accepted, as according to law no woman can be searched except by another woman and having regard to the provisions of Sections 152 and 103 of the Criminal Procedure Code that cannot be done in the presence of men. The Supreme Court held that such a search though an irregularity was contrary to the spirit or even the letter of the Criminal Procedure Code.

17. Our attention has also been drawn by Mr. Borulkar to yet another judgment of the Bombay High Court reported in 1994 1 FAC 285 where the Bombay High Court was dealing with a case where personal search of a lady accused was conducted by the lady constable in the presence of lady panch at a crowded public road. It was held that such a search did not inspire confidence. It appears that the place where search was conducted was shabby. The Court observed that even if the lady panch had gone there, she would have kept a safe distance. In the circumstances, it was further observed that the correct procedure would have been for the raiding party to take the lady accused to some decent place and secluded area where the personal search could have been conducted in the presence of a lady panch in the circumstances that inspired confidence. The ratio of this decision is to secure that the lady accused are dealt with by the officers having strict regard to decency and in a manner which will not subject them to any humiliation and hardship.

18. In spite of the observations made by the Supreme Court in the judgment reported in Kamalabai Jethamal Vs. The State of Maharashtra, , that the search of a lady accused conducted in the presence of a male panch is contrary to the spirit or even the letter of the Criminal Procedure Code, and the observations of this Court in case reported in 1994 1 FAC 285 that ladies should be searched in secluded places, we are distressed to find that the correct procedure is still not being followed by the investigating agencies. In some cases with which we had an occasion to deal, we have noticed that the necessary care is not taken by the investigating officers while conducting search of the female accused. We find that though in some cases the investigating agencies adhere to Sub-section (5) of Section 5 of the N.D.P.S. Act, they do not follow it up by bringing in lady panchas and by taking the lady accused to a secluded place.

19. It is implicit in the above quoted provisions of Criminal Procedure code and the relevant Acts that while conducting a search of a woman, female panchas must be called and the woman accused must be taken to a secluded place. Any deviation or lapse on the part of the investigating officer in this connection would defeat the above the above provisions and may followed and the investigating Agency should refrain from diluting it or giving a go by to it.

20. We may however, make it clear that when we refer to search of a woman accused, we refer to personal search. We have already referred to the judgment of the Full Bench of this Court in Criminal Appeal No. 531 of 1993 dated 22nd April, 1996 since reported in Ebanazer Adebaya Alias Monday Obtor Vs. B.S. Rawat, Collector of Customs, R and I, New Delhi and another, where the Full Bench had an occasion to consider what meaning can be ascribed to the phrase "to search any person" used in Section 50 of the N.D.P.S. Act. A search of a lady accused would also mean, in the light of the Full Bench decision the search of articles on her person or body or search of articles in her immediate possession such as bag or other luggage carried by her or in her immediate possession such as bag or other luggage carried by her or in her physical possession. We hope and trust that in future the investigating agencies will be very careful and see to it that while carrying out search of a lady accused, the presence of lady panchas is secured and the search is conducted by a female in a secluded place. This would, in the words of the Apex Court, be in consonance with the spirit and the letter of relevant provisions of the Criminal Procedure Code and the N.D.P.S. Act.

21. Reverting back to the merit of the case, in view of fact that there is a violation of Section 50 of the N.D.P.S. Act, the order of conviction and sentence will have to be set aside. In the result, the Appeal is allowed; the order of conviction and sentence dated 31.3.1993 passed by the Special Judge, Greater Bombay in Sessions Case No. 1315/90 is set aside. The Appellant-accused to be released forthwith unless otherwise required in any other case.