

(1999) 12 BOM CK 0014
In the Bombay High Court
Case No : Criminal Appeal No. 352 of 1995

Zakari Mustapha

APPELLANT

Vs

S. R. Dutta, assistant collector (preventive), Bombay and
another

RESPONDENT

Date of Decision : 13-12-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428
Customs Act, 1962 — Section 108, 11
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 23, 29,
42, 50

Citation : (1999) 12 BOM CK 0014

Hon'ble Judges : Vishnu Sahai, J;D. G. Deshpande, J

Bench : Division Bench

Advocate : A. G. Toraskar, for the Appellant; Prakash Thakur for Respondent No. 1, Mrs. Usha Kejariwal, Assistant Public Prosecutor for State, for the Respondent

Final Decision : Allowed

Judgement

D. G. Deshpande, J.—This is an appeal by an accused convicted under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "N.D.P.S. Act") through Jail. Advocate Toraskar was appointed for the appellant-accused, however, he was absent when the matter was taken up. We, however, heard Mr. Prakash Thakur for the respondent No. 1 and the learned APP. Mrs. Kejariwal for the State-respondent No. 2.

2. The accused was convicted on three counts, namely, u/s 8(c) read with 21 of the N.D.P.S. Act, u/s 8(c) read with 23 of the N.D.P.S. Act and u/s 8(c) read with 29 of the N.D.P.S. Act. He was sentenced to suffer R. I. for 12 years, 10 years and 10 years respectively on each count and to pay a fine of Rs. 1,20,000/-, Rs. 1,00,000/- and Rs. 1,00,000/- each and to undergo R. I. for 14 months, 12 months and 12 months respectively, on each count. The accused is in custody since 3-9-1988 and all the sentences were made to run concurrently. He was also given set off u/s 428 of the Criminal Procedure Code.

3. The prosecution case as per the complaint lodged by the Complainant S. R. Dutta - Assistant Collector (Preventive), Sahar Airport, Customs, was that on a specific information the Officers of the Sahar Airport, Customs, intercepted the accused on 3-9-1988 at Sahar Airport. His baggage was checked and examined and it was found to contain 5300 grams of brown/white heroin powder while the accused was about to board the flight of Ethiopian Airlines and hence he was prosecuted for the aforesaid offences. After the investigation was complete, which included preparing of panchnama. Taking of samples, sending the samples to the C.A. and receiving the C.A. report and recording the statement of the accused u/s 108 of the Customs Act.

4. The defence of the accused was of total denial and so far as the legal aspect of the matter is concerned. It was his defence that the case put forth by the prosecution in evidence was contradictory to the prosecution case made out in the complaint, but the trial Court instead of giving benefit of the same to the accused gave benefit to the prosecution and convicted the accused.

5. Since nobody appeared for the accused, we were required to go through the entire evidence, the documents and the judgment. It is found by us, that apart from the charges under the N.D.P.S. Act, charge under the Customs Act was also framed against the accused by the Special Judge. For proving the said charge u/s 11 of the Customs Act, prosecution relied upon the sanction. The Special Judge found defect in the sanction and acquitted the accused under the Customs Act. However, for the offences under the N.D.P.S. Act, the accused was found guilty and was convicted, as stated above.

6. The copy of the complaint on the basis of which prosecution was initiated against the accused was seen by us from the record, the said copy also forms part of the paper book, so also we perused the sanction under the Customs Act because both these documents are vitally important.

7. In the complaint, it has been specifically mentioned that the accused was intercepted on the basis of the specific information. Same stand was taken when the sanction was obtained. The sanction is at Exhibit 34 (on page No. 104 of paper book) and it begins with the following words :

"WHEREAS it is alleged that on 3-9-1988 on specific information the officers of Customs Intelligence Unit, Bombay posted at departure hall Module - 11 NIPI Sahar, Bombay intercepted one passenger by name Mr. Zakari Mustapha "

8. From the recitals of the complaint and the sanction it will be clear that right from the beginning the case of the prosecution was that the accused was intercepted on specific information. Obviously, it means that it was a case of a pre information or prior information. The trial Court while construing sanction and complaint in this regard has held that the person signing the complaint was not having personal knowledge about the case and therefore this mistake could have appeared in the complaint as a bona fide mistake. So far as the sanction is concerned the trial Court held that the sanction was not proper as it was

obviously an instance of non application of mind.

9. We are not convinced by the reasoning given by the trial Court. If it was the case of the complainant in the complaint that the accused was intercepted on the basis of specific information which was obviously a prior information and if the sanction was also tried to be obtained with the representations that the accused was intercepted on specific information then it should have been held that the case of the prosecution was that the accused was intercepted on specific information which must be a prior information and if this was so then prosecution should have been called upon to prove the requirements of the provisions of sections 42, 50 and 57 of the N.D.P.S. Act. Since the case of the prosecution is of sudden and unexpected recovery of the contraband on suspicion and not search taken on pre intimation or pre information, no question of compliance to the aforesaid provisions arose and therefore there is no compliance to these provisions. But once it is found that the prosecution case in the complaint and in the sanction letter is of specific prior information, then non compliance of these provisions is fatal. At any rate, benefit of doubt is required to be given to the accused.

10. Obviously, this is therefore a case where the evidence is contradictory to the complaint as well as with the representations made for obtaining the sanction and the basis on which the sanction was accorded. In such a situation when the prosecution case materially differs from the complaint and the sanction then the benefit should have been given to the accused. We do not find the reasoning of the lower Court in that regard to be very sound, wherein the lower Court has tried to give benefit to the prosecution by holding that the person who prepared and signed the complaint did not have personal knowledge about the actual raid of interception of the accused at Sahar Airport.

11. Even if it is accepted for a moment that the person who prepared the complaint did not have the personal knowledge, it has to be presumed that he prepared and drafted the complaint on the basis of the record. If sanction was obtained then obviously the letters and documents sent for sanction must have been before the person who prepared and drafted the complaint, so also the sanctioning letter Exhibit 34, and if thereafter this complaint was prepared then it has to be held that the case of the prosecution was that the accused was intercepted on specific information.

12. As against this, the evidence is totally contradictory. None of the prosecution witnesses stated that the accused was intercepted on specific information i.e. prior information. There is therefore direct contradiction between the case of the prosecution and the evidence tendered, and considering the punishment imposed under the N.D.P.S. Act which is not less than 10 years, the benefit should have been given to the accused by the Special Judge.

13. Incidentally we find that the accused is convicted under sections 8(c) read with 29 or 29 read with 8(c) of the N.D.P.S. Act for entering into conspiracy to

export charas or heroin out of India. The accused is convicted for conspiracy on the basis of the statement of the accused recorded u/s 108 of the Customs Act. A perusal of the statement shows that according to the accused he came to the Airport at 3 a.m. with some luggage, when he was approached by a Nigerian passenger for carrying two hand bags of the said Nigerian passenger. The accused has stated that he conceded to the request of the Nigerian passenger without knowing the contents of those baggages. If this was the statement of the accused, we do not find that conviction of the accused for conspiracy could be sustained. Even if this statement is accepted at its face value, it does not give any colour of conspiracy to the accused or in his carrying baggage with him. Conspiracy requires something more than such a mere statement of the accused. At any rate, the conviction of the accused for conspiracy on the basis of such a statement could not be sustained.

14. Since the case of the prosecution and the contents of the complaint and the sanction letter are totally contradictory, the benefit is required to be given to the accused and therefore the appeal is required to be allowed because if the case of the prosecution is that the accused was intercepted on prior information then compliance to the provisions of sections 42, 50 and 57 of the N.D.P.S. Act was necessary. Admittedly, there is no such compliance and therefore the conviction cannot be maintained. In the result, we pass the following order:

ORDER

Appeal is allowed.

Conviction of the accused on all counts in N.D.P.S. Special Case No. 1394 of 1988 is set aside. The accused is in custody and he should be released forthwith if not required in any other case. If the accused had paid the fine, the same should be refunded to him. Only Passport of the accused be returned to him. The order relating to the destruction of property remains unchanged. Writ of this order be sent to the trial Court immediately.