

(1994) 08 MAD CK 0050

Madras High Court

Case No: Criminal Appeal No. 653 of 1988

S. Rajan

APPELLANT

Vs

State Asst. Collector of
Customs (Intelligence)
Madurai

RESPONDENT

Date of Decision: Aug. 17, 1994

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 23, 28, 41, 41(2), 44

Citation: (1995) CriLJ 1594

Hon'ble Judges: Rengasamy, J

Bench: Single Bench

Advocate: K.M. Venugopal, for the Appellant; P. Rajamanickam, Special Central Govt. Public Prosecutor, for the Respondent

Judgement

1. This appeal arises against the conviction and sentence of the learned Addl. Sessions Judge, Ramnad at Madurai in S.C. No. 110 of 1988 dated

20-9-88 for the offences under S. 8(c) read with S. 23, Section 28 read with Section 53 of the Narcotic Drugs and Psychotropic Substances Act

1985 and S. 135(1)(a)(11) of the Customs Act to undergo rigorous imprisonment for 10 years and also to pay a fine Rs. 1 lakh, in default to

undergo rigorous imprisonment for two years. The prosecution case is as follows :-

P.W. 1 was Superintendent in Customs Department in Rameswaran and on 5-10-87, on information, he along with the Inspectors of the Customs

P.Ws. 3 and 4, proceeded to the jetty in Rameswaran. About 50" away from the Customs checking place, he found the appellant coming towards

the jetty with M.O. 1 bag in his hands. He wanted to interrogate him and therefore took him inside the checking premises and sent for two

independent witnesses to examine the appellant. P.W. 7 and another Sugumar were brought to be witnesses for the search of the appellant. After

questioning the appellant, his body was searched and nothing was concealed. Thereafter, when M.O. 1 bag was opened, certain clothes were

found inside and underneath the clothe, the rexin bag M.O. 2 was found in which a polythene bag containing heroin power M.O. 3 was kept. Ex.

P. 2 letter also was found inside the bag M.O. 1. P.W. 1 sent for P.W. 8 (sic) to which the heroin and it was found weighing 212 grams including

the weight of the polythene bag. In the presence of the witnesses, P.W. 1 took 10 grams for sample and the same was packed and sealed. The

balance 200 grams heroin M.O. 3 was also packed and sealed. Ex. P. 3 is the Mahzar for the seizure of heroin from this appellant. The accused

gave the statement Ex. P. 4 admitting the possession of heroin power for the purpose of transporting to Sri Lanka. P.W. 1 handed over the sample

packet for delivering to the Asst. Collector, Ramnad, for being sent to the Customs House, Chemical analysis Laboratory. P.W. 6 the Customs

Inspector, who received this sample packet from the Asst. Collector, Ramnad, delivered it in the Custom House Chemical Analysis Laboratory,

which sent the report Ex. P. 8 stating that the sample packet contained the substance of heroin. Meanwhile, P.W. 1 sent the report Ex. P. 5 to the

Asst. Collector and Addl. Director of Customs and obtained the sanction Ex. P. 9 from P.W. 2 to prosecute this appellant, Ex. P. 10 is the

complaint filed against this appellant before the Court.

2. After the evidence, the learned Addl. Sessions Judge questioned the accused to explain the incriminating circumstances found against him and

the appellant denied his complicity in the crime. The Learned Addl. Sessions Judge, after considering the evidence, has found this appellant guilty

of all the charges framed against him and convicted him in the manner stated above.

3. The Learned counsel for the appellant contends that the punishment under the provisions of the Narcotic Drugs and Psychotropic Substances

Act, 1985 (hereinafter to be referred to as the Act) is so severe and therefore the complainant should have strictly complied with the mandatory

provisions but in this case, as they were not complied with the appellant is entitled to acquittal. In support of his contention, the learned counsel for

the appellant refers to a decision of the Gauhati High Court in Md. Jainulabdin alias Nahamacha and etc. Vs. State of Manipur and etc., , wherein it

is held that the non-compliance of the mandatory provisions of the Act will vitiate the trial. The first contention of the learned counsel is that Section

41(2) of the Act was not complied with by recording the information which P.W. 1 had received and as it is mandatory under the Act to record

the information, the violation of it will vitiate the trial. In this case no buildings, conveyance or place was searched. Section 41(2) of the Act refers

to the searches to be conducted on information, in the building, conveyance or places. Therefore, as no such search was conducted in this case,

Section 41(2) of the Act is not attracted for recording the information by P.W. 1 before he started for detecting the person about whom he

received the information.

3A. The Learned counsel for the appellant referring to Section 50 of the Act would contend that before he commenced the search of this appellant

on person, and also his bag M.O. 1, P.W. 1 should have informed the appellant about his right for being searched either before a Magistrate or a

gazetted officer and only after ascertaining his choice, he should have searched the appellant and as this was not complied with, the prosecution of

the appellant is illegal, Section 50 of the Act is applicable only for the search of person, that is the body of the accused. In this case, even though

the body of the accused was examined, nothing was received from his body but the heroin was found only in M.O. 1, bag, which this appellant

was keeping in his hand. Even though, the learned counsel for the appellant would contend that the search of the M.O. 1 bag, which was alleged to

have been in the hand of the appellant will also amount to search of a person, as the bag was in the personal custody of the appellant, the law laid

on this subject by the Supreme Court is against the contention of the learned counsel for the appellant. In *Sunder Singh Vs. State of Uttar Pradesh*,

, while referring to Section 103, Code of Criminal Procedure of 1898, the Supreme Court has observed that the Section 108 of the old Code was

applicable only for a search to be made in a place but not to the search of a person and the seizure of the pair of shoes worn by the accused

person will not amount to the search either of place or of a person. In the view of the Supreme Court, the "person" refers to the body of an

individual and therefore, the shoes worn by him cannot be the "person" and therefore the law relating to the search of a person and place is not

applicable to the search of the shoes, though worn by a person. Applying this parameter as laid down by the Supreme Court., the bag in the hands

of the appellant cannot be treated either as a place or a person and therefore Section 50 of the Act, which is specifically applicable for the search

of person, cannot be applied to the search of M.O. 1 bag. Therefore, the allegation of non-compliance of Section 50 of the Act also loses its

value.

4. The third contention of the learned counsel for the appellant is that non-compliance of the sub-sections u/s 52 of the Act. According to the

learned counsel, u/s 52(1) of the Act any officer arresting the person under Sections 41 and 44 of the Act shall inform him the grounds of such

arrest and in this case neither P.W. 1 nor the Inspector of Customs P.Ws. 3 and 4., who were present at the time of arrest, have said that they

informed this appellant, the grounds of his arrest on 5-10-87 and this will amount to violation of the mandatory provision of the Act. It is no

doubt true that in the evidence of P.Ws. 1, 3 and 4, it is not found that they informed this appellant the grounds of his arrest. But, learned counsel

appearing for the respondent Mr. Rajamanickam would contend that only when prejudice was caused to the accused, due to non-compliance of

certain provisions the prosecution will become illegal and in this case after seizure of the heroin powder from this appellant under Ex. P. 3

Mahazar, as a statement Ex. P. 4 also was recorded from this appellant, who has narrated the circumstances under which he came into possession

of the narcotic substance the appellant himself was fully aware that only for the possession of the narcotic substance he was arrested and there is

nothing to show that the appellant was put to any prejudice on account of the non-compliance of Section 52(1) of the Act. The learned counsel

Mr. Rajamanikam relies upon a decision of the Supreme Court in State of Punjab Vs. Balbir Singh, , in support of his contention. That is also a

case falling under the Act and paragraph 26 of this decision reads as follows (Para 25, at. p. 3717 of Cri LJ) :

26. Sections 52 and 57 come into operation after the arrest and seizure under the Act, Some what similar provisions also are there in the Cr.P.C.

If there is any violation of these provisions, then the Court has to examine the effect of the same. In that context, while determining whether the

provisions of the Act to be followed after the arrest or search are directory or mandatory, it will have to be kept in mind that the provisions of a

statute creating public duties are generally speaking directory. The provisions of these two sections contain certain procedural instructions for strict

compliance by the officers. But if there is no strict compliance of any of these instructions, that by itself cannot render the acts done by these

officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may

invalidate such arrest or search. But such violation by itself does not invalidate that the trial or the conviction if otherwise there is sufficient material.

Therefore, it has to be shown that such non-compliance has caused prejudice and resulted in failure of justice. The officers, however, cannot totally

ignore these provisions and if there is no proper explanation for non-compliance or where the officers totally ignore the provisions, then that will

definitely have an adverse effect on the prosecution case and the courts have to appreciate the evidence and the merits of the case bearing these

aspects in view. However, a mere non-compliance or failure to strictly comply by itself will not vitiate the prosecution.

So, the view of the Supreme Court is that Sections 52 and 57 of the Act are not mandatory in nature rendering the acts done by the officers null

and void for the non-compliance of the directions in these sections. Unless prejudice has been caused to the accused. As stated above the

appellant himself has given the statement under Ex. P4 as to the possession of the narcotic substance by him for the purpose of transportation to

Sri Lanka, and when, he was caught and arrested by the custom authorities, certainly, he should have known for what purpose he was arrested.

Therefore, as observed by the Supreme Court, the failure to strictly comply with the Section 52 of the Act will not vitiate the prosecution case.

5. The Learned counsel for the appellant contended that u/s 52(3) of the Act, after seizure of the narcotic substance, the arrested person and the

articles seized shall be forwarded to the officer-in-charge of the nearest police station or the officer empowered u/s 53 of the Act without any delay

and in this case there is no evidence to prove that the remaining part of the heroin, after taking the sample, was forwarded either to the nearest

police station or to the officer empowered u/s 53 of the Act and therefore the non-compliance of this provision is also fatal to the prosecution.

P.W. 1 has stated in his evidence that after taking the sample from the heroin seized from the appellant, the balance was sealed. This sealed packet

is produced before the court and marked as M.O. 3. It is true that P.W. 1 has not spoken whether he immediately sent it to the superior officer

who is empowered u/s 53 of the Act. M.O. 31 is available before the Court in sealed condition. The question is whether this appellant was in

possession of the narcotic substance heroin. The sample taken in the presence of the appellant and witnesses was sent to the Customs House

Chemical Analysis Laboratory and it was found from the report Ex. P. 8 that the substance seized from this appellant and send as sample

contained the heroin substance. Thereafter, even assuming that the remaining part sealed by the P.W. 1 was not forwarded to the empowered

officer, it is not going to affect the prosecution case because the sample was found to contain the narcotic substance. It appears that the failure to

mention the remaining part of heroin to the concerned officer only omission. Any how, as mentioned in the above decision of the Supreme Court,

the non-compliance of Section 52 of the Act will not affect the prosecution case unless it has caused any prejudice to the Appellant. No prejudiced

is alleged by the appellant and it cannot be also because the sample is proved to be a narcotic substance attributing the punishment under the Act.

Therefore, all the points urged by the learned counsel for the appellant with regard to the non-compliance of the provisions of the Act, have no effect.

6. The Learned counsel for the respondent would contend that Ex. P. 4 statement of the accused/appellant itself is sufficient to prove the

prosecution case as he has admitted the possession for the purpose of transporting it to Sri Lanka and Ex. P. 4 cannot be disbelieved for any

reason. But the learned counsel for the appellant contended that the blank signatures were obtained from, the appellant and the appellant also has

explained that at the time of questioning him u/s 313, Code of Criminal Procedure and the same has to be accepted. The statement Ex. P. 4 is in

Tamil and the appellant also has signed only in Tamil. The prosecution witness has spoken that the appellant knows to read and write Tamil.

Except the statement of the appellant that his signatures were obtained in the blank papers, there is no other circumstances to corroborate his

version. Therefore, the evidentiary value of Ex. P. 4. cannot be denied and this document has the corroborative value to the evidence of the

prosecution witnesses.

7. The Learned counsel for the appellant contended that P.W. 7 the attester of the Mahazar for the seizure was not present when the appellant

accused was identified by P.Ws. 1, 3 and 4 for the search near jetty and as he was brought only later when the appellant was kept in the checking

corridor, he must be a witness under the control of P.W. 1 and therefore the evidence of P.W. 7 for the seizure cannot be believed. The evidence

of P.Ws. 1, 3, and 4 is that as the appellant was coming with M.O. 1 bag in his hands, towards, the jetty, he was called inside the checking

corridor which is only about 50" away from the place where he was coming and as he had to be searched in the presence of the independent

witnesses, P.W. 1 sent for P.W. 7, an another person. For the reason that P.W. 7 was brought subsequently his evidence has to be discarded, the

Customs Inspectors, P.Ws. 3 and 4 were with P.W. 1 and there is no reason for P.Ws. 2 and 3 to falsely implicate this appellant. Further 210

grams contraband also has been seized in the search. There is no reason for these customs officials to choose this appellant who is a stranger to

them, to foist a case, falsely implicating him in the offence. Therefore, taking into considration of the oral evidence, which I found to be trustworthy,

and other documents, there is no reason to hold that the conclusion arrived at by the Court below is incorrect. Therefore, the conviction and

sentence has to confirmed.

8. In the result, the appeals dismissed confirming the conviction and sentence imposed by the Court below.

9. Appeals dismissed.