

(2001) 01 BOM CK 0055

Bombay High Court

Case No: Criminal Appeal No. 344 of 1997

Irne Wanjiru

APPELLANT

Vs

The State of Maharashtra and
Another

RESPONDENT

Date of Decision: Jan. 30, 2001

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 428
- Customs Act, 1962 - Section 135A
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 21, 41, 42, 43, 50

Citation: (2001) ALLMR(Cri) 1480 : (2001) BomCR(Cri) 665 : (2001) 3 BOMLR 421 : (2001) 2 MhLj 635 : (2001) 4 RCR(Criminal) 388

Hon'ble Judges: N.V. Dabholkar, J

Bench: Single Bench

Advocate: Mr. M.P. Tiwari, for the Appellant; Ms. Usha Kejriwal, Assistant Public Prosecutor and Mr. P.S. Thakur, Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

N.V. Dabholkar, J.

The appellant accused was tried by the Court of Special Judge for Gr. Bombay in the case registered as Special Case No. 175/94.

By a judgment delivered on 26th and 27th March, 1997. the learned Judge found appellant accused to be guilty for offences punishable u/s 21 r/w 8(c) of the N.D.P.S. Act, 1985 as also u/s 80 of the N.D.P.S. Act r/w 135A of the Customs Act. 1962. She is sentenced to suffer R.I. for 10 years and fine of Rs. 1 lac i/d R.I. for one year on the first count, and R.I. for 5 years and fine of Rs. 50,000/- i/d R-I. for six months on the second count.

The substantive sentences are directed to run concurrently, after giving set off u/s 428 of the Criminal Procedure Code, 1973.

This conviction and sentence is being impugned by present appeal.

2. The story with which the prosecution approached the Court, in a nutshell, is as under :-

Mr. Sanchis, Superintendent of Customs Department, Marine and Preventive Wing, received information at about 9.30 p.m. on 16th June, 1994. It was informed that one Kenyan national by name Ms. Irene Wanjiru, that time staying at Room No. 204, 2nd Floor of Hotel Mahim Palace, Mahim (W), Bombay, was in possession of about half a kilogram of heroin. The heroin was reported to have been concealed in some articles kept in her baggage. It was further reported that she was scheduled to depart by flight of Kenyan Airways sometime between 0530 to 0600 Hours on 17.6.1984 (next early morning). Thus, she was likely to smuggle/export heroin.

Mr. Sanchis recorded the information, discussed about the same with Mr. Menon-Inspector of Customs and also placed it before his immediate superior viz. Assistant Commissioner Mr. R. K. Sharma, the same night. Mr. Sharma was available in the office at that time.

The raiding party comprising of officers Mr. Sanchis, Mr. Menon, Mr. R. Ramesh, lady Inspector - Ms. Suchitra Desai proceeded to the spot, viz. Mahim Palace Hotel at about 1.30 a.m. on 17th June, 1994. This was only after the department got confirmation from the informant.

Assistant Commissioner Mr. Sharma had left office, when the party departed, and it was not possible to obtain further authorisation or search warrant. Therefore, since the immediate search was necessary, in the circumstances. Mr. Sanchis recorded his reasons for information to his superior and then proceeded for the raid. The reasons recorded were tendered before Assistant Commissioner Mr. Sharma on the next morning (morning of 17th June, 1994).

The raiding party reached the said hotel around 2.30 a.m. and after confirmation from the receptionist Mr. Errol about the suspect's stay in room No. 204, Mr. Errol and another room boy were requested to act as panchas. In response to door knocking by Mr. Menon, accused opened the entrance of Room No. 204. After disclosing identity of raiding party members, she was informed of intention to search the room on suspicion of illegal possession of narcotic drugs.

Room was thereafter searched in presence of panchas. Near the bed, hand bag (floral printed) was found containing three containers and some personal effects of the accused. Three containers were of Rajhans Liquid Blue, Jonald Rose Talc and Well Blossom Instant conditioner. On opening, the containers were found containing polythene bags four in the container of Rajhans blue, four inside the conditioner and one in the talcum powder container. Thus, totally nine polythene

bags weighing 600 grams brown powder were recovered. With the aid of field testing kit, it was confirmed to be heroin.

Three samples were drawn from the powder recovered from each container, after uniting the powder from four polythene bags recovered from each of the two containers. Thus, in all nine samples were drawn. The samples were separately packed and sealed and signed by officers, panchas and the accused. Those were marked as S-ION. The balance powder was also duly sealed in a carton and the carton was also sealed as above. Some documents as Kenyan Airways Ticket, passport of the accused etc. were also seized. Thereafter, raiding party returned to the office with the accused and seized material. Accused was served summons u/s 67 of the N.D.P.S. Act (Exh, 9) and her statement was recorded (Exh. 10).

Mr. Menon carried out further investigation, who submitted the report regarding the seizure and arrest on the morning of 17th June, 1994. The samples were in safe custody of Mr. Menon, who delivered those to Deputy Chief Chemist and obtained report. The samples were found containing diacetyl morphine viz. heroin (Exh. 14).

The charge-sheet was filed in due course of completion of investigation and the criminal trial culminated into conviction as described earlier.

3. The only ground pressed into service for appellant by Learned Counsel Mr. Tiwari was, non-compliance of Section 50 of the N.D.P.S. Act, 1985. Section 50(1) of the N.D.P.S. Act, reads as follows :-

"Section 50. 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."

The provision has been extensively and thoroughly considered by the Constitution Bench of the Hon"ble Supreme Court in *State of Punjab v. Baldev Singh*, while dealing with reference placed before it, in view of divergence of opinion between different Benches of the Supreme Court with regard to the ambit and scope of Section 50 of the N.D.P.S. Act, 1985, and in particular with regard to the admissibility of the evidence collected during search and seizure conducted in violation of Section 50 of the Act. The conclusions are recorded by the Hon"ble the Supreme Court in para 57 of the judgment. Some of the conclusions, which are relevant for the purpose of matter before this Court, can be summarised as follows :-

(i) When a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person to be searched of his right to be taken before the nearest Gazetted Officer or a Magistrate for search. However, such intimation is not necessarily required to be in writing.

(ii) Failure to inform the person to be searched about this right would cause prejudice to accused (persons searched).

(iii) Search on prior information without informing of this right u/s 50(1) or failure to take the person to be searched before a Gazetted Officer or a Magistrate, if he so opts, may not vitiate the trial, but renders the recovery suspect and vitiates the conviction and sentence of the accused, where conviction is based only on the possession of illicit article recovered during the search conducted in violation of Section 50 of the Act.

(iv) Whether or not safeguards provided u/s 50 have been duly observed, would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, would be relevant for recording conviction or acquittal.

(v) Illicit articles seized from the person of an accused during search conducted in violation of Section 50 cannot be used as evidence of proof of unlawful possession of the contraband by the accused.

4. As far as the matter under consideration, according to prosecution, the accused was present in the hotel room, so was the baggage which was searched and from which the contraband is alleged to have been recovered. It is the case of the prosecution that baggage was lying by the side of the bed. The accused was informed that the party had come to take search of the room and baggage on suspicion of possession of contraband under the N.D.P.S. Act.

It is not the claim of the prosecution that intentions to search the person of accused were disclosed, nor it is claimed that accused was informed of her right to be taken before either a Gazetted Officer or a Magistrate for personal search.

In fact, it is the case of the prosecution that there was no search of the person of the accused. It is this point where the prosecution and the defence make divergent contentions. It is claimed on behalf of the appellant accused that the baggage which was lying near the bed and from which contraband is allegedly recovered, will have to be termed "search of person". Section 50 shall therefore be attracted. Since the prosecution does not claim that intimation regarding right to be searched before a Gazetted Officer or a Magistrate was given to the accused appellant, the appellant is entitled for acquittal in view of the search having been conducted and seizure effected in violation of provisions of Section 50(1) & (4) of the Act.

In view of above rival contentions, it is not required to be determined if the safeguards provided u/s 50 have been observed. The point of conflict is limited whether search of baggage lying by the bed side can be termed to be "search of person". Both the sides have placed reliance mainly on Full Bench Judgment of this Court in *Ebanezer Adebaya v. State of Maharashtra*. Both the sides have also relied upon some other judgments as illustrations.

5. In *Mrs. Parchal v. State of Maharashtra*, the Division Bench of this Court while acquitting the accused by allowing an appeal against conviction held that although narcotic drugs were recovered from the appellant on prior information, but before effecting the search, the prosecution had not proved beyond reasonable doubt that she (appellant) was apprised of her right to be searched before a nearest Gazetted Officer or a Magistrate as mandated by Section 50(1) of the N.D.P.S. Act, 1985. That being so, in view of the decision of the Constitution Bench of the Supreme Court, recovery of the drugs from the appellant would be rendered suspect and her conviction and sentence would stand vitiated.

In this matter, the contraband (Mandrex tablets) contained in two polythene bags, was recovered from the hand bag of the accused. In fact, on going through the reported judgment, location of hand bag, whether on the person of accused or elsewhere, cannot be ascertained and hence this case is incapable of providing any guidance for the decision of case at hand. *Kalayath Nassar v. State of Kerala*, was a case wherein Circle Inspector Police received information that certain persons were on the move in an Auto Rickshaw carrying brown sugar. He therefore went in search of Auto Rickshaw and when came across the same, stopped the vehicle. Appellant and two other persons were occupying the seat. On search, appellant was found carrying the bag containing 300 grams of brown sugar. Two other bags kept close to him were also seized as those bags also contained brown sugar. Admittedly, appellant was not informed of his right of being searched in presence of a Gazetted Officer or a Magistrate. Hon'ble the Supreme Court allowed the appeal and acquitted the appellant holding that the evidence concerning the search was not acceptable in view of non-compliance with the requirements of Section 50. The crucial facts in this case are that one bag was carried by the appellant on his person and two bags were kept close to him.

In *Mrs. Vaneela Tilak v. Shri. Shahasane*, the Division Bench of this Court allowed the appeal against conviction, even after considering interpretation of clause "search of person" as done by the Full Bench of this High Court in *Ebanezer's* case. In this matter, while N.C.B. Officials, on the basis of information received, were waiting near departure module II at baggage X-ray machine of Sahar International Airport, the appellant accused came there with three suitcases and she put those suitcases on the X-ray machine. However, search of the baggage was taken by taking the accused and the baggage to nearby Conference Hall. In view of evidence of P.W. 1 Shahasane indicating that accused herself put the suitcases on X-ray machine, the Division Bench held that the suitcases were in her immediate possession and would fall in category (b) as referred in the Full Bench Judgment. Therefore, it was held that Section 50 would squarely be attracted and it was incumbent upon the officers to ask the appellant, if she wanted the search to be taken before a Gazetted Officer or a Magistrate.

6. Special emphasis was laid by Mr. Tiwari, learned Advocate for Appellant on the case Ali Mustafa v. State of Kerala, by pointing out that in the case of State of Punjab v. Baldev Singh, the Constitution Bench of Hon"ble the Supreme Court has approved the view in Ali Mustafa's case.

In the opening para of the judgment in State of Punjab v. Baldev Singh, the order referring the matter to a Larger Bench is reproduced and concluding part of the said order reads as under :-

"From the above resume, it would thus appear that though a two-Judge Bench of this Court considered the earlier judgments of this Court, it held in the case of Pirthi Chand (and affirmed in the case of Labh Singh). that breach of Section 50 does not affect the trial, while in the case of Ali Mustafa. another Bench categorically laid down that breach of Section 50 makes the conviction illegal. In view of the divergent opinions so expressed, we deem it fit to refer these matter to a Larger Bench."

It is evident that neither while considering the reference, nor while considering the cases in which divergence of views had occurred earlier and which was the cause for reference. Hon"ble the Supreme Court was required to consider interpretation of clause "search of person".

In Ali Mustafa's case relied upon by learned Advocate Mr. Tiwari, the appeal was allowed because of violation of provisions of Section 50 of the N.D.P.S. Act by the prosecution, but in this matter the appellant was found sitting with the bag, although on Railway platform; from which Charas was recovered. Not only that, on questioning the appellant himself had taken out a small packet of Charas from his bag and handed it over to the raiding party.

7. It must be said that in all the cases (viz. Ali Mustafa, Kalayath Nassar and Mrs. Parchal) the contraband is recovered from the baggage which was on the person or adjacent to the person of accused. In Vaneela Tilak's case. the accused keeping bag on the X-ray machine was taken to be indication of immediate possession and hence, in all these cases, the search was held to be search of person of accused, provisions of Section 50 were held attracted and violation of the same resulted all the cases into acquittal. At the cost of repetition it must be said that none of these cases interpreted clause "search of person" and therefore, the decisions can be said to be applicable to the particular case in the light of facts and circumstances of those cases. But, those cases cannot be said to have laid down any law regarding interpretation of "to search any person". In fact, these comments are also applicable to the cases relied upon by learned Public Prosecutor Mr. Thakore which are discussed hereinbelow.

8. In Namdi Francis v. Union of India and anothers, it was held that "when an article is lying elsewhere and is not on the person of the accused and is brought to a place where the accused is found, and on search, incriminating articles are found therefrom, it cannot attract the requirements of Section 50 of the Act for the simple

reason that it was not found on the accused person." This was a case where contraband was recovered from checked in baggage of the accused.

In Abdul Rashid v. State of Gujarat, the appellant accused was a Driver of the Rickshaw in which gunny bags containing contraband were recovered. Hon"ble the Supreme Court held that question of non-compliance with the conditions stipulated in Section 50 of the Act, did not arise because place where the gunny bags were found stacked in vehicle, was not inextricably connected with the person of the accused.

In Sarju Das v. State of Gujarat, need for informing the accused of the right u/s 50(1) was held not arising, because charas was found kept in a bag hanging on the scooter, which the accused were riding. It was held that charas was not found on the person of the accused.

9. As already observed, cases relied upon by both the parties do provide illustrations, but not interpretation of clause "to search any person", and therefore for the purpose of interpretation there is no option but to follow Full Bench decision of this High Court in the case of Ebanazer Adebaya v. State of Maharashtra. The Full Bench formulated, in para 5 of the judgment, the question required to be considered as follows :-

However, the question which requires consideration is what meaning can be assigned to the phrase "to search any person" used in Section 50 of the N.D.P.S. Act. Whether "to search any person" means :

(a) search of articles on the person or body of the person;

(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 taking into consideration plethora of reported cases including the decision of Hon"ble the Supreme Court in Ali Mustafa's case (which is heavily relied upon by learned Advocate Mr. Tiwari), the Full Bench in para 22 recorded its conclusion as follows :

"Therefore, "personal search" would be confined to clauses (a) and (b) of paragraph 5 u/s 50, but it would not include and cannot be extended to clauses (c) and (d) of paragraph 5 as mentioned above."

It is claimed by Mr. Tiwari that case of present appellant is covered in clause (b) of the four categories enlisted by Full Bench in para 5 of its judgment. According to him, the baggage lying by the side of the bed in the room occupied by the appellant was an article in immediate possession, and therefore, in view of observations of Hon"ble the Supreme Court. Section 50 did stand attracted and admitted non-compliance of Section 50 entails acquittal.

According to learned P. P. the case of the petitioner falls in category (c) to which according to Full Bench. Section 50 of the N.D.P.S. Act has no application.

10. Clause (b) as drafted by Full Bench includes two sub-clauses :

(i) articles in immediate possession such as bag and other luggage carried by him

or

(ii) articles in physical possession of the person to be searched.

On reference to modern Oxford Dictionary, word "physical" means; of or relating to body as opposed to the mind, involving bodily contact or activity. In the present case, it is not the case of either party that the bag from which contraband was recovered was in bodily contact or bodily activity of the appellant. Advocate Mr. Tiwari has relied upon the first part of clause (b) and claimed that the bag was in immediate possession of appellant accused.

Coming back to the cases relied upon by learned Counsel for the appellant in Mrs. Parchal's case, probably the hand bag was in the hands of accused. In Kalayath Nassar's case one bag was on his person and two other bags were kept close to him. In Ali Mustafa's case, the appellant was sitting with the bag. All these cases seem to be cases involving bodily contact, whereas in Vaneela Tilak's case, it was a case of bodily activity, since the accused was seen putting the bag on X-ray machine.

The phrase "immediate possession" used in clause (b) is illustrated by Full Bench by extension "such as bag and other luggage carried by him." It is evident that immediate possession as contemplated in this clause is synonymous to physical possession as referred in the later half. An article cannot be carried by a person without involving any bodily contact or bodily activity with the article, and therefore, the extension "carried by him" suffixed to "immediate possession" makes that clause synonymous to "physical possession". An article detached from the person of the accused therefore would not come within the ambit of this clause (b).

Such an interpretation should stand confirmed when we consider clause (c). Clause (c) is reproduced hereinbelow at the cost of repetition.

"(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."

This clause covers the articles which are presumed to be in possession of the accused, in the peculiar facts and circumstances of the case, although not in physical contact of the accused nor bodily activity of the accused is capable of linking him to the article. That the article contemplated by this clause is detached from the person of the accused, is evident from the portion "even though it may be lying in" The articles which are placed at a location detached from the accused, but are presumed to be in possession of the accused due to facts and circumstances, are covered in clause (c).

The baggage in the present case was lying by the side of the bed. Certainly, it was not in physical contact with the accused. It cannot be said to be in immediate possession as contemplated in clause (b) because, it was not carried by her. On the contrary, the circumstances were such that the baggage could be presumed in possession of the accused, because it was in the hotel room occupied by the accused, even though lying by the bed side. The case of the appellant accused would fall under clause (c) and not under clause (b) out of four categories drafted by Full Bench.

That Section 50 need not to be extended to present case stand confirmed, when we refer to clause (d). By drafting clause (d) Full Bench has also considered, whether Section 50 should be extended to cases of search of a place, conveyance or a house, if the accused is physically present at the time of search. The Full Bench has held that Section 50 is not applicable to such a situation.

In all the three cases relied upon by learned P.P., the baggage from which contraband was recovered, was certainly detached from the person of the accused, although presumably in possession of the accused, and those were cases covered by clause (c) as drafted by the Full Bench.

11. Having arrived at a conclusion that in the facts and circumstances of the case, the case of the appellant is one covered by clause (c) and not by clause (b) as contained in para 5 of the Full Bench decision, Section 50 is not attracted. Consequently, compliance of Section 50(1) & (4) of the N.D.P.S. Act was not necessary and non-compliance of the same shall not entitle the appellant accused to an acquittal.

12. Appeal therefore deserves to be and is accordingly dismissed.