

**Yusuf Suleman Hattia Vs. V.M. Dosi, Intelligence Officer, Narcotics Control Bureau, Bombay and anr.**

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**Court :** Mumbai

**Decided On :** Jun-25-2001

**Reported in :** 2001ALLMR(Cri)1349; 2001(4)BomCR545; 2001CriLJ4830; 2001(4)MhLj76

**Judge :** S.S. Parkar, J.

**Acts :** [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 22, 23, 28, 29, 30, 42, 50 and 67; [Customs Act, 1962](#) - Sections 11, 102, 102(1), 108 and 135(1)

**Appeal No. :** Criminal Appeal No. 9 of 1995

**Appellant :** Yusuf Suleman Hattia

**Respondent :** V.M. Dosi, Intelligence Officer, Narcotics Control Bureau, Bombay and anr.

**Advocate for Def. :** P.S. Thakur, Adv. and ;A.M. Shringarpure, A.P.P.

**Advocate for Pet/Ap. :** Sharmila S. Kaushik, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**S.S. Parkar, J.**

1. By this appeal the order of convictions and sentences recorded against the appellant by the Special Judge, Greater Bombay, on 29th August, 1994, convicting and sentencing him under the provisions of N.D.P.S. Act, in N.D.P.S. Special Case No. 746 of 1991 has been challenged.

2. Briefly, the prosecution case is as follows :

On the night of 22nd September, 1991 Intelligence Officer of N.C.B., P.W. 1 Shahasane received information that the appellant-accused, a South African National, was scheduled to leave Bombay for Osaka by Zamblan Airways flight No. QZ-081 on 23.9.1991 at 1.15 hours and likely to carry mandrax tablets concealed in his baggage. The said information was reduced to writing by him. It was signed by the informant and countersigned by P.W. 1 Shahasane and kept in a sealed envelope. P. W. 1 discussed the matter with Deputy Director Mr. Kakkar on telephone, who asked him to take action. Thereafter, P. W. 1 went to Departure Module-II near baggage X-ray machine operated by the Air India and kept surveillance. At about 1.45 a.m. accused came with two suitcases in his hands towards X-ray machine. P. W. 1 stopped the accused and asked him his name and other particulars. As the name of the person was same as per the information, P. W. 1 with the help of Junior Security Assistant present at the baggage X-ray machine called two panchas and told them that search of the appellant was to be taken. The appellant was asked to produce his travel documents. The appellant produced his passport and two air tickets. He was then asked to gel his two suitcases, one of maroon colour and another of dark brown colour, screened on the X-ray machine, Mr. Prabhu, Junior Security Assistant, examined as P.W. 3, noticed concealment of tablets in both the suitcases. Thereafter, the accused was taken to nearby security office room along with his baggage and panchas. Accused was asked to open his suitcases, the maroon colour suit case was having combination lock which was opened by the accused after adjusting the numbers. Apart from the personal effects of the accused, a false bottom to the said suitcase was noticed in which 15 polythene packets containing off-white colour tablets were found. Then the other suitcase of dark brown colour was opened by the accused

after adjusting the combination lock and opening the other lock with a key. This suitcase also had false bottom and when the same was opened, besides the clothes 20 polythene bags were found containing tablets with marking 'M' and 'Swastik' on one side and R/L on the other side. The tablets from both the suitcases when tested with field testing kit, answered positive for methaqualone. Fifteen polythene packets with tablets found in maroon colour suitcase weighed 7-1/2 kgs. and the weight of twenty polythene packets with tablets recovered from brown colour suitcase was 9-1 /2 kgs. Thus, total weight of the contraband was 17 kgs.

3. P. W. 1 then took out few tablets from both the suitcases and drew two mixed representative samples of 10 gins, each and put them in two separate small polythene packets and sealed, them after heating. Those polythene packets were put in other two separate envelopes. The said envelopes were closed, packed and sealed with N.C.B. Seal No. 03. The signatures of both the panchas and of the accused were obtained on the sealed packets. Remaining quantity of tablets was put into a bigger polythene bag and put in a carton which was packed and sealed and label bearing signatures of panchas and the accused was pasted. The two suitcases were also sealed with N.C.B. Seal No. 03 with label bearing signatures of panchas and accused pasted on them. On the search of the person of the accused his travelling documents were found which were taken charge of and signatures of panchas and the accused were obtained on them. The key, which was used for opening the suitcase was also seized and put in a separate envelope. The envelope was closed and sealed and the signatures of the panchas and the accused were obtained on the envelop. On the search of one checked-in-baggage of the appellant nothing incriminating was found.

4. At the time of interrogation, the appellant disclosed that he was travelling along with his associate by name Philip Joseph, Original Accused No. 2. Staff of Zambian Airways on request traced out the said person and brought him along with his baggage. On his search nocontraband was recovered from him. However, his documents were seized. Seizure panchanama was prepared on the spot. It was signed by both the panchas and the accused after supplying copies thereof to them. Both the accused along with the muddemal articles and other articles and

documents were brought to N.C.B. office. They were produced before the Deputy Director of N.C.B. P. W. 1 also submitted report of seizure in writing to Deputy Director. The Assistant Director Mr. Rohatgi served summons on both the accused for recording statement under Section 108 of Customs Act and under Section 67 of the N.D.P.S. Act and their statements were recorded. Both the accused were arrested and sent to Azad Maidan Police Station on the same day.

5. On 25.9.1991 one of the samples was sent to Dy. C. C. for chemical analysis with covering letter and forwarding memo. As per the report of the C. A. methaqualone was detected in the sample. The muddemal articles were deposited in the New Customs House Godown under forwarding letter dated 25.9.1991. The two suitcases were deposited in Sewri Godown. The statements of witnesses were recorded, including that of Receptionist of Hotel Shalimar where the accused were staying.

6. After completion of the investigation, all the concerned papers were submitted before the Collector of Customs, Airport for obtaining sanction. Thereafter, the complaint was filed before the Special Court under N.D.P.S. Act and Customs Act. The learned Special Judge framed charges against the appellant-accused for acquiring, possessing and transporting the Methaqualone (Mandrax) tablets and illegally exporting the same out of India in contravention of Section 8(c) read with Section 29 of the N.D.P.S. Act. Secondly, the appellant was charged for possession of 17 kgs. of mandrax tablets in contravention of Section 8(c) read with Section 22 read with Section 30 of the N.D.P.S. Act. The charge was also framed under Section 8(c) and Section 23 read with Sections 30 and 28 of the N.D.P.S. Act against both the accused. Lastly, both the accused were charged for fraudulent evasion of the provisions of Section 8(c) of N.D.P.S. Act read with Section 11 of the Customs Act punishable under Section 135(1)(a) read with Section 135(1)(ii) of the Customs Act.

7. As the accused pleaded not guilty, on behalf of the prosecution evidence was led of eight witnesses and documentary evidence was produced. P.W. 1 is Vijaykumar Shahasane, an Intelligence Officer, who had received the information and reduced it to writing and was member of the raiding party. P. W. 2 is Soumen

Chakraborty, panch, who was working as Senior Security Assistant at N.I.P.T. Sahar, Bombay, P. W. 3 is Vishwajeet Prabhu, who, at the relevant time, was working at Sahar Airport as Junior Secretary Assistant. P. W. 4 is Manohar Nalk, Preventive Officer (Customs) attached to N.C.B., Bombay, who carried out the further investigation from 25.9.1991. P.W. 5 is Bala Chandran Veetil who was also N.C.B. Officer and has prepared the arrest memo of the accused and placed the papers before the Collector of Customs, Airport for sanction for prosecution of the accused. P. W. 6 is Vilas Doshi, N.C.B. Officer, who filed complaint Exh. 34 in the Court. P. W. 7 is Shital Mahindkar who was Receptionist of Shalimar Hotel where the accused were staying. P, W. 8 is Sunil Rohatgi, Assistant Director of N.C.B. who recorded the statments of the accused under Section 67 of the N.D.P.S. Act and under Section 108 of the Customs Act. The defence of the accused was of total denial and false implication.

8. After considering the entire evidence on record, the Trial Court acquitted the original accused No. 2 by name Philip Joseph but convicted the appellant-original accused No. 1 under Section 22 read with section 8(c) of N.D.P.C. Act and sentenced him to suffer R.I. for 10 years and to pay a fine of Rs. 1 lac in default to suffer further R.I. for three years. He was next convicted for offence under Section 23 read with Sections 28 and 8(c) of N.D.P.S. Act and sentenced to suffer R.I. for 10 years and to pay a fine of Rs. 1 lac in default to suffer further R.I. for three years. He was lastly convicted for offence under Section 135(1)(a) read with Section 135(1)(ii) of Customs Act and sentenced to suffer R.I. for three years and to pay a fine of Rs. 10,000/- in default to suffer further R.I. for one year. All the substantive sentences were directed to run concurrently. The appellant-accused was, however, acquitted of other offences of which he was charged. The said order of convictions and sentences is impugned by the appellant in this appeal.

9. It may be mentioned here that the Slate had filed Criminal Appeal No. 656 of 1994 against the order of acquittal of original accused No. 2 which was dismissed by the Division Bench of this Court on 9.3.1998 confirming the order of acquittal.

10. Ms. Kaushik appearing for the appellant raised several contentions and challenged the conviction of the appellant under the provisions of N.D.P.S. Act as

well as the Customs Act. In my view, the order of convictions and sentences of the appellant under the provisions of N.D.P.S. Act and under the provisions of Customs Act can be quashed for noncompliance with the mandatory provisions under Section 50 of the N.D.P.S. Act and under Section 102 of the Customs Act.

11. It is well settled by a catena of judgments, including the judgment of the Constitution Bench in the case of *State of Punjab v. Bombay Singh*, that provision of Section 50 is mandatory and non-compliance thereof would create suspicion about search, seizure and arrest of the accused and, therefore, conviction under the provisions of N.D.P.S. Act is liable to be quashed and set aside. The said judgment is followed in the subsequent judgments by the Supreme Court in the case of *Kalayath Nassar v. State of Kerala*, and in the case of *Abdul Rashid Ibrahim Mansuri v. State of Gujarat*.

12. From the perusal of the evidence of prosecution Witness sites clear that though the officers were acting pursuant to the prior information received by P.W. 1 and contraband was allegedly found in the personal search of the accused and the same was recovered from two suitcases carried by the accused in his hands before the search was taken, the appellant was not apprised of his right under Section 50 of the N.D.P.S. Act that if he so desired he was entitled to be searched in the presence of either a nearest Gazetted Officer or a Magistrate as mandated by the Constitution Bench in *Baldev Singh's case* (supra). Neither the evidence of P.W. 1 who took personal search of the appellant nor P.W. 2, the panch witness, has stated about it. Even the seizure panchanama makes no mention about the accused having been apprised of his right under Section 50 of the Act. Panch witness P.W. 2, when asked in his cross-examination, in para 23 of his deposition, states that he did not remember whether P.W. 1 Shahasane had informed the accused No. 1 apprising his right for taking his personal search before any Magistrate or Gazetted Officer. That is not even the case of P.W. 1. Thus, this case is squarely covered by the above judgments of the Supreme Court and, therefore, the order of convictions and sentences under the provisions of N.D.P.S. Act is liable to be quashed and set aside.

13. This takes me to deal with the question of conviction and sentence recorded against the appellant under the provisions of Customs Act. Ms. Kaushik has tried to challenge the conviction and sentence under the provisions of the Customs Act on the ground that since N.C.B. Officers did not carry out their duties under the provisions of the N.D.P.S. Act, their evidence is suspect and, therefore, the same cannot be relied on as regards the seizure even for the purpose of contravention of the Customs Act. She further contended that there is discrepancy as regards the time when the accused arrived at the Airport. She brought to my notice Exhibit 40 which is the bill of Shalimar Hotel where the appellant was staying. The said bill shows that he left the hotel at 3.05 hours on 23.9.1991 and thus he could not have been intercepted at the Airport at 1.45 a.m. on that night. The address of the Hotel is shown to be of August Kranti Marg. If the scheduled time of departure of the plane was 1.15 a.m. the appellant could not have been in Shalimar Hotel, at August Kranti Marg at 3.00 a.m. and, therefore, there does appear to be discrepancy in the prosecution evidence.

14. Ms. Kaushik then contended that the statements of the accused recorded under Section 67 of the N.D.P.S. Act and under Section 108 of the Customs Act also cannot be relied on against the appellant as the appellant was beaten by the N.C.B. Officers, tortured and forced to sign and make an endorsement on the said statements recorded by the Assistant Director of N.C.B. The Trial Court, in paras 11 and 12 of the judgment, has clearly held that the statements made by the appellant were not true and voluntary and were result of the force, coercion or threats held out to the accused. It is further observed that Assistant Director P. W. 8 Rohatgi had admitted in his evidence that right from the conclusion of the recovery panchanama till recording of their statements both the accused were with N.C.B. Officers and were not allowed to go out of N.C.B. office. The Trial Court has further held that the statements of both the accused recorded by P.W. 8 during inquiry under the provisions of N.D.P.S. Act are not their free and voluntary statements and, therefore, are not admissible in evidence. Thus, prosecution cannot take any support from the aforesaid statements of the appellant recorded under Exh. 42. The Trial Court has also observed that both the accused had complained about the ill-treatment to them on the very first day of remand on 24.9.1991. They were beaten by the N.C.B. Officers because of which they

sustained injuries on their bodies and, therefore. Chief M.M., Bombay referred both of them to hospital for medical check-up and treatment by his order dated 24.9.1991. 15. Lastly, it was contended by Ms. Kaushik that Section 102 of the Customs Act was not complied with and, therefore, the conviction and sentence recorded against the appellant even under the provisions of Customs Act is liable to be quashed and set aside.

16. Sub-section 1 of Section 102 of the Customs Act mandates that when any officer of customs is about to search any person under the provisions of the Customs Act, the officer of customs shall, if such person so requires, take him without unnecessary delay to the nearest Gazetted Officer of Customs or Magistrate. The wording of Sub-section 1 of Section 102 is mandatory in nature and is on par with Section 50 of the N.D.P.S. Act which is held to be mandatory. The only difference is that whereas under Section 50 of the N.D.P.S. Act if the accused so requires he has to be searched either in the presence of a nearest Gazetted Officer of any of the departments mentioned in Section 42 of the Act or a Magistrate but under the provisions of Customs Act the accused has to be taken without unnecessary delay to the nearest Gazetted Officer of Customs or Magistrate. As stated earlier in respect of the similar provisions of the N.D.P.S. Act the Apex Court has held that the accused has to be apprised of his right and asked whether he wants his search to be taken in the presence of a Gazetted Officer or a Magistrate and the search, seizure and arrest of the accused without appraisal of his right to the accused becomes suspect and his conviction is liable to be set aside. On the same analogy, the search, seizure and arrest of the appellant under the provisions of the Customs Act without appraisal of his right to the accused under Section 102 of the Customs Act would become suspect and the conviction based on such search and seizure is liable to be set aside. In these circumstances, the conviction and sentence recorded against the appellant even under the provisions of the Customs Act is liable to be quashed and set aside.

17. In the result, this appeal is allowed and the conviction and sentences recorded by the Trial Court against the appellant both under the provisions of the N.D.P.S. Act as well as under the provisions of the Customs Act are quashed and set aside. The appellant is acquitted and is directed to be released forthwith if not required in

any other case. The travelling documents of the appellant which are produced on record at Exhibits 9, 10 and 11 are directed to be returned to the appellant forthwith.

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