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Court : Chennai

Decided On : Apr-19-1999

Reported in : 2000(3)CTC342; 2000(120)ELT329(Mad)

Judge : M. Karpagavinayagam, J.

Acts : Narcotic Drugs and Psychotropic Substance Act (NDPS Act), 1985 -- Sections 8, 23, 42, 50, 52-A, 55, 57, 67 and 135; Customs Act, 1962 -- Sections 108 and 117-A; Terrorists Act and Disruptive Activities (Prevention) Act, 1985 -- Sections 15; Code of Criminal Procedure (CrPC) 1973 -- Sections 161 and 164(2); Constitution of India -- Article 21

Appeal No. : Crl. No. 120 of 1992

Appellant : Stanely Robert

Respondent : Assistant Collector (Customs) Customs and Airport Customs Excise, Tiruchy

Advocate for Def. : Mr. P. Rajamanickam, Special Public Prosecutor

Advocate for Pet/Ap. : Mr. R. Sankara Subbu, Adv.

Judgement :
ORDER

1. Stanely Robert is the appellant herein. He was convicted in S.C.No.187 of 1990 on the file of II Additional Session Judge, Trichy fro the offence under Section 8(c) read with Section 23 of Narcotic Drugs and Psychotropic Substances Act, and Section 135(a) of Customs Act and sentenced to undergo, R.I. for 12 years and in addition to pay a fine of Rs.1,00,000 in default to undergo R.I. one year.

2. The grave men of charge against the appellant is that on 18.6.1990 atabout 3.45 p.m. at Customs Airport, Tiruchy he was found in possession of266 gms, of narcotic drugs valued at Rs.26,000 kept concealed in the shoesworn by him, in contravention of the provisions of an offence punishableunder Sections 8(c) and 23 of the N.D.P.S. Act and Section 135(a) of theCustoms Act.

3. On behalf of the prosecution, P.Ws.1 to 8 were examined and Exs.P1 to P11 were filed and M.Os.1 to 7 were marked. On the said of defence, Ex.D1was filed.

4. The case of the prosecution is as follows:-

On 18.6.90 Stanely Robert, holder of Srilankan Passport arrived at Trichy. Airport along with his luggage in order to board at the flight bound for Colombo. When his luggage was opened and checked up. P.W.1 Sathappan, the Inspector of Customs entertained suspicion on the appellant. P.W.2 Gnanasakaran is another Inspector of Customs assisting P.W.1. When they enquired the appellant at customs Baggage Examination Hall whether he had brought any prohibited goods in his luggage or in person, the appellant replied in negative. Then, he was brought before P.W.6 the Superintendent of Customs. Airport and search was conducted on his person in the presence of two independent witnesses. The pair of shoes he. was wearing was removed and inner soles were opened. On examination, a packet of brown colour powder was found concealed in each shoe, totally weighing 266 gms. valued at Rs.26,600. After seizure of the shoes as well as the contraband, the appellant gave a voluntary statements to P.W.5, the Superintendent, Central Excise, Airport Tiruchy, stating that he came to Tamil Nadu on January 15, 1990 to search for a job in India, that through his cousin one Sudhakar approached one Selvam of Triconamalai for his help to get a job abroad, that Selvam gave the shoes at Madras to the appellant and asked him to deliver the same to Colombo by offering to pay Rs.5,000. For that job and that the

appellant acted accordingly. In the said statement he would also implicate one Sudhakar who was also arrested at the Airport entrance where he was standing to send him off. Both of them would admit in their statements that they were aware that narcotic drug was kept concealed in the shoes. On examination of the narcotic drug, P.W.5, the Chemical Examiner found that it was Diacety morphine(heroin), narcotic drug. Therefore, P.W.8, the Assistant Collector of Customs obtained sanction Ex.P.10 dated 18.7.90 from the Collector of Customs for prosecution against the appellant and accordingly, the complaint was filed on 19.7.1990.

5. After recording evidence, the appellant was questioned under Section 313, Code of Criminal Procedure to explain the incriminating circumstances found against him in the record and he denied his complicity in the crime. He would further state that he did not give any statement and his signatures were obtained by the Customs officers in the blank papers.

6. After considering the evidence on record, the trial curt convicted the appellant and sentenced him as referred to above. Hence the appeal.

7. Mr. Sankara Subbu, the teamed counsel appearing for the appellant took me through the entire evidence and raised the following contentions:-

(i) The trial court has not complied with the mandatory provisions contemplated under Sections 50, 52-A, 55 and 57 of the N.D.P.S. Act. Though there is some reference about the compliance of Section 50 in the evidence of P.Ws.1, 2 and 6, in the earlier documents, namely, show cause notice Ex.D1 and Remand Report Ex.D8, the details regarding the compliance of Section 50 have not been given. At any rate, even according to P.Ws.1, 2 and 6, there was only a partial compliance of Section 50 and as such, the non-compliance of the mandatory provisions would vitiate the entire trial. The material available on record do not show that the other sections like 52-A, 55 and 57 have been complied with. Therefore, the entire proceedings are vitiated.

(ii) Ex.P.3, the alleged voluntary confession statement made by the appellant before P.W.6 cannot be said to be admissible document under Section 67 of the N.D.P.S. Act. In view of the fact that mandatory requirements as contemplated

under Section 164(2) of Crl.P.C. have not been complied with.

8. Mr. Rajamanickam, the learned Special Public Prosecutor appearing for the customs, the respondent herein, would submit that section 60 of the N.D.P.S. Act would not be applicable to this case, as it is a chance recovery and that the other provisions have been complied with. He would also point out that section 164, Crl.P.C. would not cover the situation where the statement is obtained by the customs Officials under section 108 of the Customs Act.

9. In order to substantiate the plea made on either side, the cart load of the decisions of this Court as well as the Apex Court are placed before this Court.

10. Let me now refer to the judgments which are relevant to the issue.

11. The first contention is that the non-compliance of Section 50 of the Act would be fatal to the prosecution case. For this proposition, the counsel for the appellant would cite the following authorities:-

1) T.P. Razak v. State of Kerala, 1996 SCC (Crl) 57: 2) State of Punjab v. Balbir Singh, 1994 SCC (Crl) 634: 3) State of Punjab v. Jasbir Singh and others, 1996 SCC (Crl) 1 : 4) Mohinder Kumar v. State, Panaji, : 1995 CriLJ2074 : 5) Richard Thomas Wrigley v. Customs : 67(1997)DLT293 , Delhi H.C): 6) Namdi Francis Nwazor v. Union of India, 1998 SCC (Cri) 1516: 7) J. Prakash v. State, 1998 (2) Crimes 146, Andhra Pradesh H.C.; 8) Bijaya Kumar Subudhi v. State of Orissa, 1995 (2) Crimes 724, Orissa H.C.

12. On going through all these decisions, it is manifest that section 50 of the Act is mandatory and if the said section was not complied with, then the entire proceedings will get vitiated. However, the contention of the learned Special Public Prosecutor for the respondent is that Section 50 would not be applicable to the facts of the instance case.

13. In the light of the rival Contentions, let me now analyse, the facts of this case.

14. On 18.6.90 at about 3.45 p.m. the appellant came to the Trichy Airport in order to board at the Srilankan Flight. P.Ws.1 and 2 made a routine check up at the

baggage brought by the appellant. They found that here was nothing prohibited item in the baggage. When they further enquired the appellant whether he had brought any prohibited goods in his pocket or in person, he replied in negative. However, his movements created a suspicion in the minds of the Customs Officers. Therefore, he was taken to P.W.6, the Superintendent of Central Excise and he was searched resulting in the recovery and seizure of the shoes in which 266 gms. of Heroin-kept concealed.

15. In the light of these facts, we have to see whether section 50 would be applicable to this case.

16. Section 50 of the Act provides the conditions under which search of persons shall be conducted.

(1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Sections 41, 42 or 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).

As per this section, any officer duly authorised under section 42 is to search the person only in the presence of Gazetted Officer after informing the concerned accused about the right of his being searched in the presence of a Gazetted Officer.

17. Section 42 is applicable to the officer under section 42 which relates to the power of entry, search seizure and arrest without warrant or authorisation, any officer of the Department of Narcotics, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug in respect of which an offence punishable under the Act has been committed between sun rise and sunset, that officer can seize any drug from any person and detain him and effect his arrest.

18. A conjoint reading of Sections 42 and 50 would make it clear that when the person on prior information that the offence has been committed by a person in a particular area, the Officer attached to Narcotics Bureau should comply with the condition contemplated under Section 50 of the Act by taking him to the Gazetted Officer in whose presence search could be effected if he so requires.

19. In the instance case, P.Ws.1 and 2 did not search person as authorised under Section 42. According to prosecution through P.Ws.1 and 2, they made a routine check up at the baggage and not on any prior information. In other words, the search was conducted only on suspicion and not on any prior information. Therefore, there is no difficulty in coming to the conclusion that section 50 will not be applicable to the present case.

20. This position of law is already settled in State of Punjab v. Balbir Singh, : 1994 CriLJ3702 wherein the Supreme Court has held thus:

'If a police officer without any prior information, as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offence as provided under the provision of Crl. P.C. and when such search is contemplated at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance (of) recovery of any narcotic drug or psycho tropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provision of the NDPS Act. If he happens to be an empowered office also, then from the stage onwards, he should carry out the investigation in accordance with the other provision of the NDPS Act.

21. This section relates to the police officer who has been empowered or not empowered to comply with the condition under section 50 that too, on any prior information. So, this decision as referred to earlier will not, in any way, be helpful to the point raised by the appellant's counsel. On the contrary, the counsel for the respondent submits that conclusions in paras (5) and (6) in the citation, would indicate that Sections 42 and 50 would be applicable only in the case where search was conducted on prior information.

22. In a similar situation, I have also render a judgment, which is reported in Deepa Ghosh v. State, etc., 1997 (1) LW (Crl.) 41. Therefore, the contention regarding the non-compliance of Section 50 urged by the counsel for the appellant would fait.

23. As regards the non-compliance of Sections 52-A, 55 and 57 of the Act, though it is contended that the provision have not been complied with, it is pointed out that some of the provisions have been complied with and some of the other provisions need not be complied with, as there are notification to that effect.

24. Section 52-A provides for the disposal of seized narcotic drugs. The learned Special Public Prosecutor appearing for the respondent, while adverting to the alleged non-compliance of sub-section (2) of the Section 52-A, would submit that the Central Government have already issued a Standing order dated 13.6.1989, by virtue of the powers conferred under sub-section (1) of Section 52-A, detailing the elaborate procedure to be adopted by the such law enforcement agencies while seizing drugs.

25. A perusal of the Standing Order would reveal that an elaborate procedure had been prescribed with regard to the drawal of sample, dispatch of samples for, testing etc. Therefore, in the instant case, the procedure contemplated under Notification issued in sub-section 52-A has been scrupulously complied with. This aspect also has been dealt with by this Court in Rekha v. Assistant Collector of Customs .

26. Even as regards the other sections, namely, Sections 55 and 57, as pointed out by the Public Prosecutor appearing for the respondent, there are materials to show that they have been complied with. Even otherwise, those provisions cannot be considered to be mandatory. Even assuming that there is non-compliance of those provisions, unless prejudice is shown, the said non-compliance would not affect the credibility of the case of the prosecution. 26(A) therefore, all the contentions raised by the counsel for the appellant, as discussed above have no merits and the same are liable to be rejected.

27. Let me now go to the admissibility of Ex.P3, the alleged confession statement made by the appellant before P.W.6.

28. According to the counsel for the appellant, P.W.6, the Officer, before whom Ex.P3, the alleged confession statement was made, did not warn him before recording the said confession as per the mandatory requirements contained in Section 164(2), Cr.P.C., on the strength of the decision rendered by the Apex Court in Kartar Singh v. State of Punjab, 1994 (2) LW (Crl.) 422 in which it is held that when the confession is recorded by the competent officer under Section 15(1) of TADA Act, he has to necessarily follow the procedure under Section 164, Crl.P.C by which the statutory warning shall be given to the accused that he is not bound to make a confession and that, if he does no, it may be used as evidence against him and since the said procedure has not been followed in the present case, Ex.P.3 would lose its evidentiary value, as this statement also is recorded under Section 67 of the N.D.P.S. Act which is analogous to Section 15 of the TADA Act.

29. The above submission, in my view, lacks substance of the followingreasons.

30. Under section 15 of the Act, Superintendent of Police can record the confession made by a person. Notwithstanding anything contained on the code or in the Evidence Act. sub- section (2) of Section 15 provides that when the superintendent of Police is recording the confession, he has to explain theperson making the confession that he is not bound to make the confession and that, if he does so, it may be used as evidence against him. It further provides that such police officer shall not record any such confession unless, upon questioning the person making, it, he has reason to believe that it is being made voluntarily.

31. So, in that context, the Apex Court would hold that before recording confession, the statutory warning is to be given as provided in Section 164, Cr.P.C. That is not the case here.

32. In the present case, the Customs Officials records statement underSection 108 of the Customs Act. The learned Counsel of the appellant wouldstate that section 67 of the N.D.P.S. Act should be analogous to Section 15 ofthe TADA Act.

33. But, the reading of these two provisions would clearly show that section 67 relating to the power of the officer referred to in Section 42 of he Act calling for any information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act, whereas section 15 of the TADA Act would provide for the power of the Superintendent of Police recording confession from the person accused of the contravening the provisions of the said Act, after statutory warning. Therefore, both the sections are different in nature.

34. Moreover, Section 67 of NDPS Act would refer to the officer mentioned in Section 42, who is to act under the prior information. As indicated in the earlier paragraphs, this case would relate to the chance recovery and the recording of the statement by the Superintendent of Customs. Therefore, the statement Ex.P3 is admissible under section 108 of the Customs Act.

35. The learned counsel for the appellant by citing the decisions in D.K. Basu v. State of W.B., : 1997 CriLJ743 , Ernesto A. Miranda v. State of Arzona (US) Supreme Court Reported, 694; Sahib Singh v. State of Haryana, 1997 (7) Supreme 26, would submit that the precious right guaranteed by Article 21 of the Constitution of India cannot be denied to the detenu in custody except according to the procedure established by law and that the confession statement, if challenged, shall be shown to have been made voluntarily and it was truthful.

36. The above submission, in my opinion, would not be of any use in this case because the statement made of P.W.6 recorded by P.W.2 was never retracted at any point of them before filing of the complaint. As pointed out by the trial court, the statement was retracted only during the course of trial. Therefore, Ex.P3 cannot be rejected merely on the reason that statutory warning was not given to the accused before recording confessing, that too, belatedly.

37. Therefore, this Court has no hesitation to accept Ex.P3 statement as a voluntary and true statement.

38. It is also relevant to note in this context that in Divakaran v. State of Kerala, 1998 (2) KLT 53, the Kerala High Court has held the Section 67 of the NDPS Act does not mandate that the accused should be informed of the consequences of

making the statements under that provisions.

39. In Pran Nath v. Union of India : 1984(17)ELT12(Del) , it is held that if person made a statement under Section 108 of the Customs Act before a Customs Officer in the course of an enquiry, the provisions of sub-section (2) of Section 164 of the Code of Criminal Procedure are not applicable as the Customs Officer is neither a police officer nor a Magistrate.

40. In Assistant Director E.D. (F.E.R.A.) v. M.A. Wajid, 1999 Cri. L.J. 857, the Andhra Pradesh High Court taking support of the observation made by the Apex Court in Harbom Haji v. State of Maharashtra, 1968 Cri. L.J. 1017 would hold that the statement made in answer to the notice under section 40 of the Act is not a confession recorded by the Magistrate and hence, the question of giving warning of caution as envisaged under section 164(2), Crl.P.C. does not arise. In Harbom Haji v. State of Maharashtra, : [1968]2SCR641 , the Apex Court would hold that the statements obtained by the Customs Officer are not confessions recorded by the magistrate under section 164 of the Code but those statements were made in answer to the notice under section 117-A of the Customs Act.

41. The police officer is recording a statement under section 161 Crl.P.C. and the Magistrate is recording the statement under Section 164 Crl.P.C. Admittedly, the Customs Officer is recording confession not as a Magistrate. Therefore, it cannot be contended that prosecution of Section 164, Crl.P.C. would be available to the accused in a case where the Customs Officer is recording the confession under Section 108 of the Customs Act.

42. In view of the above reasonings, I am of the considered opinion that the materials available on record would be genuine and acceptable and the same would be sufficient to record conviction on the appellant for the offence under Section 8(c) read with section 23 of the N.D.P.S. Act and section 135(a) of the Customs Act. Therefore, I do not find any merit in this appeal.

43. In result, the appeal is dismissed confirming the conviction. However, under the facts and circumstances of the case, the sentence is modified into 10 years R.I., being the minimum and to pay fine of Rs.1,00,000, in default, to undergo R.I.

for one year.

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