

Umar Abdul Sakoor Sorathia

Vs

Intelligence Officer, Narcotics Control Bureau

Criminal Appeal No. 743 of 1999

(K. T. Thomas, D. P. Mohapatra JJ)

06.08.1999

JUDGMENT

K.T. Thomas, J. –

1. Leave granted.

2. Appellant had a diplomatic outfit earlier (an honorary officer in the Consulate of Liberia at Mozambique) of which he was subsequently stripped. He is said to be an Indian citizen as he holds a passport issued from India. He is now facing a charge under Section 29 of the Narcotic Drugs and Psychotropic Substances Act (for short "the NDPS Act") before a Special Court at Chennai. He moved the trial court for a discharge under Section 227 of the Code of Criminal Procedure, but in vain. He then moved the High Court of Madras for quashing the said order of the Special Court. A learned Single Judge of the High Court dismissed his petition as per the impugned order.

3. On 21.4.1994, the Royal Police of the Kingdom of Swaziland (situate adjacent to South Africa and Mozambique) intercepted a container truck carrying nearly 2_«_ million tablets of "Mandrax". They were packed in plastic packets of 1000 tablets each and cartoned in slabs consisting of 9 packets each. The contraband was concealed in packets of electric globes. Mandrax is a High potency narcotic substance, the chemical name of which is "Methaqualone". As the catch was of a significant quantity of forbidden substance, messages were sent to various Narcotic Control Bureau. It was eventually discovered that the said stock was despatched from the port of Chennai in India in the name of M/s. K.J. Exports, 36 Seventh Street, Shastri Nagar, Chennai-20 and the destination was shown as a company in South Africa by name M/s. Dynamic Electronics Ltd., Annfrere (South Africa). After the investigation, a complaint was filed against four persons (1. Arib K. Patel, 2. Y.V. Nagraj, 3. G.N. Venugopal, 4. M. Arumugam) under different offences (Sections ?) of the NDPS Act. Subsequently the investigating agency received some more information about the aforesaid Mandrax and the connection of the appellant therewith. They obtained permission from the Special Court to conduct further investigation into the matter under Section 173(8) of the Code. Such investigation revealed to the investigating officer that appellant was one of the key persons who conspired with the other four accused already charge-sheeted. Subsequently appellant was also arraigned with them for the offence under Section 29 of the NDPS Act.

4. In support of the plea for pre-charge exoneration appellant pleaded before the High Court, *inter alia*, that no sanction has been obtained under Section 188 of the Code. That plea was repelled by the High Court and learned counsel did not, according to us rightly, raise that plea in this Court during arguments.

5. Two documents pressed into service by the appellant before the High Court and in this Court are : (1) A letter addressed by the Mozambique Police in August, 1966. (2) A fax message sent by South African Police Service on 3.4.1997 stating that no material has been thus far collected to connect the appellant with the contraband consignment.

6. The High Court did not accept any of those documents to sustain the plea of the appellant. We too do not find any force in the contention based on those two communications, for, they revealed only what the police then felt on the materials they could unearth till then. Such a view expressed by the police in those countries cannot foreclose the investigating force in India from arriving at the right conclusion, nor even the police authorities of those countries themselves from taking a different view subsequently.

7. If the allegations are correct, there is an undeniable position that a serious offence under Section 23 of the NDPS Act had been committed in respect of the aforesaid contraband articles. It is for the prosecution to establish the persons who have committed the offence. Four persons who were already charge-sheeted are said to be those engaged at the exporting end. There must have been human persons at the importing stage and it is for the prosecution to establish who they were. Investigation revealed the following facts also :

8. Both the consignor and the consignee are fictitious concerns and no such company was ever in existence. But the clearing agency which presented the Bill of Entry on behalf of the non-existing consignee and which took possession of the consignment during the off loading operations was a company by name M/s. Miami Travels and Tours Ltd. It was submitted that appellant was the Chairman of the clearing agency company.

9. The aforesaid is a very material and incriminating circumstance which, if established, would take the prosecution a long way off.

10. Another fact which the prosecution wants to prove is the following: The driver who drove the container truck left Mozambique and proceeded towards Annfrere (South Africa) but en route the vehicle was intercepted at Lomahasha Border post on 21.4.1994 by a police squad comprising of Mr. Albert Mkhathshwa (who was the Inspector of Royal Swaziland Police Force). That Inspector has given a statement on oath before the Commission of Police, South Africa. The relevant portion of the statement is the following:

"While we were busy off-loading the boxes containing Mandrax hidden between globes from the truck with registration number HBZ 728T, I noticed a black car that was making a U-turn at the shop opposite to the police station. The vehicle was heading back towards the border post and the driver (an Indian male who was alone in the car) was looking curiously towards what we were doing. I cannot remember exactly what kind of car he was driving, it was either a Mercedes Benz or BMW sedan, but it was black in colour. Because of the driver's curiosity towards our activities at that stage, I contacted the borderpost gate telephonically to stop the black car because I'd like to interrogate the driver. The border post is 120 m from the police station. The Indian male was stopped at the border post and he was brought to me by a member of the border post personnel. I questioned this Indian male about his curiosity and he told me that he was actually coming from Mozambique to look for someone at the shop that he was supposed to meet, but this guy didn't show up. He also told me that he was a diplomat from Liberia and he was staying in Mozambique.

He appeared also very nervous to me. I was confused by this because this man was an Indian and I asked for his passport. He gave his passport to me and the contents thereof confirmed that it was a diplomatic passport issued by the Republic of Liberia. I cannot recall the name or surname of the man."

11. The next circumstance highlighted by the learned counsel for the respondent is that a photo of the appellant was shown to Mr. Albert Mkhathshwa later and he identified that figure in the photo as the person whom he saw driving the car at the time of interception of the truck.

12. It was contended that identification by photo is inadmissible in evidence and, therefore, the same cannot be used. No legal provision has been brought to our notice which inhibits the admissibility of such evidence. However, learned counsel invited our attention to the observations of the constitution bench in *Kartar Singh v. State of Punjab, 1994(2) RCR (Crl.) 168 : 1994(3) SCC 569* which struck down Section 22 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. By that provision the evidence of a witness regarding identification of a proclaimed offender in a terrorist case on the basis of the photograph was given the same value as the evidence of a test identification parade. This Court observed in that context:

"If the evidence regarding the identification on the basis of a photograph is to be held to have the same value as the evidence of a test identification parade, we feel that gross injustice to the detriment of the persons suspected may result. Therefore, we are inclined to strike down this provisions and accordingly we strike down Section 22 of the Act."

(para 361)

13. In the present case prosecution does not say that they would rest with the identification made by Mr. Mkhathshwa when the photograph was shown to him. Prosecution has to examine him as a witness in the court and he has to identify the accused in the Court. Then alone it would become substantive evidence. But that does not mean that at this stage the court is disabled from considering the prospect of such a witness correctly identifying the appellant during trial. In so considering the Court can take into account the fact that during investigation the photograph of the appellant was shown to the witness and he identified that person as the one whom he saw at the relevant time. It must be borne in mind that appellant is not a proclaimed offender and we are not considering the eventuality in which he would be so proclaimed. So the observations made in *Kartar Singh* in a different context is of no avail to the appellant.

14. Shri R.K. Jain, learned senior counsel contended that the circumstances arrayed against the appellant, even if proved, may not establish that he was involved in a criminal conspiracy to export the said consignment. We do not agree with the learned counsel on this score. We do not want to elaborate that aspect at this stage lest it may have an impact on the ultimate conclusion.

15. Section 23 of the NDPS Act deals with punishment of any person who imports into India or exports from India or transshipment of narcotic drugs and psychotropic substances, in contravention of the provision of the NDPS Act. Section 29 reads thus:

"Punishment for abetment and criminal conspiracy. - (1) Whoever abets, or is a party to a criminal conspiracy to commit an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in

pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code, be punishable with the punishment provided for the offence.

(2) A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India, abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which -

(a) would constitute an offence if committed within India; or

(b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constitute it such an offence the same as or analogous to the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India."

16. It is well settled that at the stage of framing charge the court is not expected to go deep into the probative value of the materials on record. If on the basis of materials on record the court could come to the conclusion that the accused would have committed the offence the court is obliged to frame the charge and proceed to the trial.

17. Learned counsel relied on the decision of the Court in *Satish Mehra v. Delhi Administration*, 1996(9) SCC 766. It was held therein:

"When the Judge is fairly certain that there is no prospect of the case ending in conviction the valuable time of the court should not be wasted for holding a trial only for the purpose of formally completing the procedure to pronounce the conclusion on a future date. We are mindful that most of the Sessions Courts in India are under heavy pressure of workload. If the Sessions Judge is almost certain that the trial would only be an exercise in futility or a sheer waste of time it is advisable to truncate or snip the proceedings at the stage of Section 227 of the Code itself."

(Para 15)

18. The present is certainly not a case where the aforesaid ratio can justifiably be applied. A three-Judge Bench of this Court in *State of Maharashtra & ors. v. Som Nath Thapa & ors.*, 1996(4) SCC 659, has held thus :

"If on the basis of materials on record a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offense. It is parent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

(para 32)

19. There is no scope for contending in this case that the court cannot frame charge under Section 29 read with Section 23 of the NDPS Act. The trial court and the High Court rightly repelled the

plea of the appellant in that regard. We, therefore, dismiss this appeal. Needless it is to say that the trial court shall dispose of the case untrammelled by any observations made by the High Court in the impugned order or by us in this judgment.

Appeal dismissed.