

Kalema Tumba

Vs

State of Maharashtra and Another

Criminal Appeal No. 817 of 1998

(G.T. Nanavati, S.N. Phukan JJ)

16.09.1999

JUDGMENT

NANAVATI J.:-

1. The appellant, a Zairian National, arrived at the Sahar Airport (Bombay) by an Ethiopian Airlines Flight on 22-11-1990. Mr. Anil Menon, Intelligence Office in Narcotic Control Bureau had received information that one Zairian national, Kalema Tumba (the appellant), was to arrive by that flight and was likely to carry a sizeable quantity of heroin. That information was reduced to writing and a watch was kept at the airport by him and other officers. After the flight had arrived and the appellant had reported at the customs checking counter, Mr. Dange who had accompanied Mr. Menon and Mr. Rohtagi, Assistant Director, questioned the appellant and after satisfying themselves that he was the same person in respect of whom they had earlier received the information, asked him to identify his baggage. The appellant identified his black-coloured rexine bag with brown stripes. It was found locked. The baggage tag fixed on it tallied with the claim tag affixed on his air ticket. The appellant then opened the bag after taking out a key from his pocket. On examination packet containing brownish powder were found from it. The test revealed that the said powder was heroin. The total quantity thus found from the possession of the appellant was 2 kg. The Customs Officers thereafter completed all the formalities in the presence of two panch witnesses and then took him to the Office of the Narcotic Control Bureau. There his statement under Section 108 of the Customs Act was recorded and on the same day in the evening at about 9.00 p.m. he was arrested. After obtaining the report of the chemical analyser he was chargesheeted and prosecuted in the Court of the Special Judge (NDPS) for Greater Bombay in NDPS Act. He also convicted him under Section 135(1)(a) read with Section 135(1)(b)(I) and (ii) of the Customs Act, 1962.

2. The learned Judge relying upon the evidence of PW 1 Mr. Menon, PW 2 Mr. Rohtagi, PW 5 Mr. Dange and the evidence of panch witnesses held that the appellant had brought 2 kg heroin with him and was in possession thereof. He, therefore, convicted the appellant for the offences punishable under Section 21 read with Section 8(c) and Section 23 read with Section 28 and 8(c) of the NDPS Act. He also convicted him under Section 135 (1)(a) read with Section 135(1)(b) (I) and (ii) of the Customs Act, 1962.

3. The appellant challenged his conviction before the High Court. His appeal (Criminal Appeal No. 401 of 1994) was partly allowed by the High Court. His conviction was confirmed but the sentence awarded in default of payment of fine was reduced.

4. Ms M. Qamaruddin, learned counsel for the appellant submitted that the mandatory requirement of Section 50 of the NDPS Act was not complied with the therefore the evidence regarding recovery

and seizure of heroin should be regarded as illegal. She further submitted that the appellant could not have been convicted on the basis of that evidence. It was submitted by her that the appellant was not told before the search by the officers of the Narcotic Control Bureau that he had a right to be searched in the presence of a gazetted officer or a Magistrate. This contention deserves to be rejected because only when the person of an accused is to be searched then he is required to be informed about his right to be examined in the presence of a gazetted officer or a Magistrate. As rightly pointed out by the High Court search of baggage of a person is not the same thing as search of the person himself. In *State of Punjab v. Baldev Singh* ((1999) 6 SCC 172 : 1999 SCC (Cri) 1080 : JT (1999) 4 SC 595) This Court has held that the requirement of informing the accused about his right under Section 50 comes into existence only when the person of the accused is to be searched. The decision of this Court in *State of Punjab v. Jasbir Singh* ((1996) 1 SCC 288 : 1996 SCC (Cri) 1 : JT (1995) 9 SC 308) wherein it was held that though poppy straw was recovered from the bags of the accused, yet he was required to be informed about his right to be searched in the presence of a gazetted officer or a Magistrate, now stands overruled by the decision in *Baldev Singh Case*¹. If a person is carrying a bag or some other article with him and a narcotic drug or a psychotropic substance is found from it, it cannot be said that it was found from his "person". In this case heroin was found from a bag belonging to the appellant and not from his person and therefore it was not necessary to make an offer for search in the presence of a gazetted officer or a Magistrate.

5. It was next contended that the report which was given by the chemical analyser was a cryptic report and, therefore, no reliance could have been placed upon it. It was submitted that as it contained no details of the test, it had no evidentiary value. As rightly pointed out by the High Court the appellant had himself admitted in his statement under Section 108 of the Customs Act that it was herein. Moreover, in this case we have evidence of the officers of the Narcotic Control Bureau also who had tested the substance found from the appellant. Therefore, this contention is also rejected.

6. It was then urged that no reliance should have been placed upon the statement recorded under Section 108 of the Customs Act as it was not made by the appellant voluntarily and he did not know what was written in it when he had signed it. The submission was that the appellant does not know the English language. He knows only the French language. In his examination under Section 313 CrPC, he had stated that the statement was obtained by force and that he was beaten by the officers of the Narcotic Control Bureau. He had not stated at that time that he did not know English. Apart from the evidence of the officers of the Narcotic Control Bureau. He had not stated at that time that he did not know English. Apart from the evidence of the officers of the Narcotics Department there is evidence of an employee of Jewel Hotel where the appellant had stayed from 16-11-1990 to 22-11-1990, who has proved some of the entries made in English by the appellant himself in the register maintained by the hotel. The panchnama also contains the words "received copy" written by the appellant. The said statement of the appellant was recorded in 1990. He retracted it in 1994. Till then he had not complained against any officer as regards the alleged beating or use of force nor had he stated that he did not know English. Therefore, this contention also cannot be accepted.

7. Other contentions which were raised before the High Court were also raised before us. We agree with the reasons given by the High Court for rejection of them. In our opinion, the High Court was right in relying upon the evidence of the aforesaid witnesses and the statement recorded under Section 108 of the Customs Act and in confirming the conviction of the appellants. As we do not find any substance in this appeal, it is dismissed.