

## IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## CRIMINAL APPELLATE JURISDICTION

## CRIMINAL APPEAL NO.306 OF 2010

**Ms.Naomi Banda**

Zambian National,

Aged about 35 yrs,

Kabwe, Lusaka, Zambia

PP.No.ZM-033477

**.. APPELLANT***Versus***1) Union of India****2) State of Maharashtra****.. RESPONDENT**

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Mr.Ayaz Khan, Advocate for the appellant.

Mr.N.Natrajan, Advocate for respondent no.1.

Mr. Deepak Thakre, APP for the Respondent State.

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**CORAM : ABHAY M. THIPSAY, J.****RESERVED ON : 6<sup>th</sup> AUGUST 2015****PRONOUNCED ON : 12<sup>th</sup> OCTOBER 2015**

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**JUDGMENT :**

1            On the basis of a complaint filed by Shri V.K. Menon, Intelligence Officer attached to Air Intelligence Unit, Customs, the appellant was prosecuted on the allegation of having committed offences punishable under Section 21(c) of the NDPS Act read with section 8(c) thereof, and section 23(c) of the NDPS Act read with sections 8(c), 21(c) and 28 thereof.

2           The Special Judge, who held the trial, convicted her of the aforesaid offences, and sentenced her to suffer Rigorous Imprisonment for 10(ten) years, and to pay a fine of Rs.1,00,000/- on each of the said two counts. Being aggrieved thereby, the appellant – a Zambian National – has approached this Court by filing the present Appeal.

2           The prosecution case, as put forth in the complaint, may, in brief, be stated thus :-

That, during the night intervening 24<sup>th</sup> and 25<sup>th</sup> February 2007, the complainant V.K. Menon, and other Officers of the Air Intelligence Unit (AIU) of Customs attached to its “A” Batch, were on duty in the Departure Hall of Module 2-C of Chhatrapati Shivaji International (CSI) Airport, Mumbai. When the checking-in of the passengers departing by South-African Flight No.SA-251/25.02.07 was in progress, the appellant was noticed by the complainant and other Customs Officers. The said flight was scheduled to depart for Johannesburg. The appellant checked-in at the counter of the Airlines. As the appellant had been suspected, the airlines staff was asked to mark her baggage for custom examination. A watch was kept on the movements of

the appellant, and she was intercepted while she was proceeding towards the Transit Lounge after having cleared through the immigration and the customs. The appellant was holding a Zambian passport in her own name i.e. Ms.Naomi Banda. The appellant was taken to the baggage identification area. On reaching there, the Customs Officer called for two panchas. That, in the presence of the panchas, the appellant was asked to produce her travel documents which were accordingly, produced by her. The Officers of the Customs then, in the presence of panchas, asked the appellant to identify her checked-in baggage. The appellant identified three checked-in bags as her own. These bags were having baggage identification tags. The baggage claim tags affixed on the Airlines ticket of the appellant were compared with the identification tags on the baggage and they matched.

3           Among the three bags which were the checked-in baggage of the appellant, there was one green colour stroller zipper suitcase. A sniffer dog – Maya – along with her handler, was brought, and on sniffing the said green colour stroller zipper suitcase, the dog gave positive indication/signal for the presence of Narcotic drug/Psychotropic substances inside it, by barking. No such signal was given with respect to the other two bags.

Suspecting the concealment of contraband in the said green colour stroller zipper suitcase, it was decided by the Officers to examine the baggage of the appellant. The appellant was brought to the Office of the Air Intelligence Unit (AIU), and in the presence of the panchas was asked whether she was carrying any narcotics or psychotropic substances, to which the appellant replied in negative. The appellant, however, stated that the said bag had been given to her by one Mary outside the Module 2-C, and that the same was to be delivered to the said Mary at Lusaka. The Officers formed two teams and took the appellant, along with her baggage, outside the Module 2-C of the Airport to see whether Mary could be found there, but the appellant did not identify anyone as 'Mary', and hence, the Officers, the appellant and panchas came back to the Office.

4            In the said green colour stroller bag, apart from other belongings, some cosmetics and toiletries kept in plastic containers were found. 9(Nine) of the said plastic containers were felt hard when pressed at some places. The said containers were, therefore, segregated and marked with roman numbers (i) to (ix), serially. On the same being cut open, nine polythene pouches – one in each container – were found inside. These nine pouches were again

numbered as (i) to (ix) according to the container from which they had been recovered. Polythene pouches bearing markings (i) to (iv) & (vi) to (ix) were containing off-white colour powder and the remaining polythene pouch bearing marking (v), was containing light brown colour powder. The powder from all the pouches was tested on Drug Identification Kit, which answered positive for *morphine*. The contents of the polythene pouches marked (i) to (iv) and (vi) to (ix) (i.e. the off-white powder) were emptied into a small polythene bag which was marked as “A”. The net weight of the off-white powder was found to be 1427.6 grams. The contents of the remaining polythene pouch were emptied into a small polythene pouch which was marked as 'B”. The net weight of the said powder, was found to be 189.8 gms. That, three samples of 5 gms each, from the contents of the polythene bag marked “A”, were drawn. They were marked AS-I, AS-II and AS-III, and were sealed. From the polythene bag marked “B”, also three samples of 5 gms each, were drawn, then packed and sealed (marked BS-I, BS-II and BS-III). A panchnama (Exhibit-11) was drawn.

5           An attempt was made to record the statement of the appellant, but the appellant declined to make any statement. This fact was recorded under a panchnama (Exhibit-14).

6           The seized articles were deposited in the Customs Warehouse. The appellant was formally arrested. On the next day i.e. 26/2/2007, two representative samples were withdrawn from the Customs Warehouse DS-I, and were sent to the Office of the Dy.C.C, Mumbai for Chemical Analysis. A report was received, indicating that the sample marked “AS-I” (of the white crystalline powder) answered positive for *heroin*, but that the sample marked “BS-I” (of the light brown powder) did not answer to the test for any Narcotic Drug or Psychotropic substance. Thereafter, on 23/05/2007, two sealed representative samples marked as “AS-II” and “BS-II” were forwarded to the Central Forensic Laboratory at Hyderabad. A report to the effect that the sample marked 'AS-II' gave positive report for the presence of *heroin* and *caffeine*, and that the sample marked 'BS-II' gave positive result for the presence of Acetaminophen (paracetamol) (which is not a Narcotic drug or Psychotropic substance) was received. Further inquiries into the matter were carried out, and on completion thereof, the complaint came to be filed.

7           The prosecution examined 20 witnesses during the trial. The learned Special Judge, upon considering the evidence before him, held the appellant guilty of the aforesaid offences.

8           I have heard Mr.Ayaz Khan, the learned counsel for the appellant. I have heard Mr.N. Natrajan, learned counsel for the respondent no.1. I have heard Mr.Deepak Thakre, learned APP for the State. With their assistance, I have carefully gone through the evidence – oral and documentary – that was adduced during the trial. I have also carefully gone through the impugned judgment.

9           According to Mr.Khan, the learned counsel for the appellant, the order of conviction, as recorded by the learned Special Judge, is not in accordance with law. He submitted that the evidence indicated that fabrication of documents was done by the Investigating Agency. He also submitted that the bulk articles that were produced in the Court, were not in accordance with the case of the prosecution. He also contended that the samples which had reached the Chemical Analyzer and the remnant samples produced before the Court, did not match with the description given in the panchnama. He also contended that there was a doubt as to in which Warehouse the seized articles, including the contraband drugs were kept, and that, there existed a possibility of the samples having been tampered with. He also submitted that

since all the investigation was carried out by the complainant V.K. Menon (PW 1) himself, it was hazardous to place reliance on his evidence.

10           Mr.Natrajan, learned counsel for the respondent no.1, on the other hand, contended that the impugned judgment is proper and legal. According to him, the learned Special Judge has dealt with all the contentions raised by the appellant, and has come to a correct conclusion. He submitted that the appellant had never disputed the recovery of the contraband articles from her baggage, and that the bag in which the contraband articles were found, belonged to the appellant, was beyond dispute. He submitted that the variations or discrepancies, as were being pointed out by Mr.Khan, did not go to the root of the matter. According to him, there is no merit in the Appeal.

11           The first point needing determination is whether the bag in which the contraband is said to have been found, was a part of the appellant's baggage. In that regard, the evidence of V.K. Menon (PW1), the evidence of Dipti Amin (PW16) and the evidence of Jivan Jatkar (PW2) an Officer of Customer Services in the Air India, needs to be examined.

12           Menon (PW1) has, in his evidence, stated facts consistently with the version in the complaint. According to him, while he was keeping a watch on the passenger in the departure hall, he and his colleagues noticed the appellant. As they suspected her, they asked the Airlines staff to mark her baggage in order to keep the same separate. That the appellant, after completing the check-in procedure, went to immigration counter, and after completing the immigration check, she went to the Customs counter. From there, she was proceeding towards the security area when she was intercepted. Menon (PW1) categorically stated that the appellant identified her baggage in the presence of panchas. The appellant also produced her travel documents which included two excess baggage tickets. Menon categorically stated that the baggage tags and the claim tags affixed to the Air ticket of the appellant were checked, and on checking, the numbers tallied.

13           In her evidence, Dipti Amin (PW 16), an employee of South African Airways, who acted as a panch, says that since last five years, she has been working as Ground Staff with the said Airlines at the CSI Airport at Bombay. According to her, Air India

is the handling agent of many other Airlines and South African Airways, being one of them, the check-in counters of South African Airways are manned by the staff of Air India. That, on 25/2/2007, when she and one Mr.Mukesh Sharma were on duty at the Airport, at about 1.15 a.m, they were called by the Officers of the Air Intelligence Unit at Circle Area situate behind the check-in counters. That, the bags which are required to be off-loaded are taken out from the conveyor belt in this area. Three bags were kept aside, and the passenger was called. According to her, this passenger is the appellant. That, on these three bags, there were security straps and baggage tags. After the passenger was brought to that area on the basis of the claim tags, it was ascertained that the three bags belonged to the same passenger. The appellant also admitted the bags to be belonging to her. That, the appellant was a passenger of South African Airways Flight No.SA-0251 proceeding to Johannesburg and Lusaka from Mumbai. That, the appellant was also having a boarding card and Air ticket to which three claim tags, were affixed. According to her, the appellant was also having an excess baggage ticket.

14           Dipti (PW 16) then gives the details of the happenings thereafter i.e. that the Officers, she herself, the other panch,

appellant, all went to the AIU Office along with the baggage of the appellant. According to her, after reaching the AIU office, enquiries were made with the appellant, and at that time, the appellant replied that the green colour bag was given to her by a lady by name 'Mary' outside the Terminal 2C. That, the appellant was then taken out by the AIU Officer outside the Terminal 2C to find out Mary, but Mary was not found. Dipti (PW 16) further says that a green colour stroller bag from out of the baggage of the appellant, was opened in her presence and speaks, *inter alia*, about 9 containers being opened by the AIU Officer and one plastic pouch being found in each container. She also speaks about 8 pouches, containing white powder, and the remaining one containing brown powder. She then speaks about taking of the samples, their being marked, etc.

15           The evidence of Jivan Jatkar (PW 2) shows that he had been working as Officer Customer Service in Air India since 1996. It was his duty to check the passport and Air ticket of the passenger who would come for checking-in at the check-in counter of the departure. He has explained that if the passenger has any baggage, the same would be kept on the belt and weighed, and a tag would be affixed to the bag. A claim tag is affixed to the Air-

ticket of the passenger. That, he used to take out flight coupon from the Air-ticket of the passenger, and then issue boarding pass to the passenger. He also states that before coming to the check-in counter, the passenger would be required to go to the Security Check. During his examination-in-chief, he was shown the excess baggage ticket (Exhibit-19), boarding card (Exhibit-20), flight coupon (Exhibit 21), Air-ticket of the appellant to which three claim tags and flight coupon were affixed (Exhibit-22), three baggage tags (Exhibit-23) collectively, and counter foil of the boarding pass (Exhibit-24). On observing these documents, Jatkar said that he had checked-in the passenger to whom those documents belonged. He stated that the said passenger had showed her passport and Air-ticket to him, and that she was having three pieces of baggage, weighing 41 kgs. That, there were Security straps on the baggage, indicating that the passenger had cleared Security check. He also stated that the passenger was charged for excess baggage which was rounded to 10 kgs. According to him, the passenger had produced receipt in respect of the payment of excess baggage charges, that he had issued boarding pass to her, and then returned her passport and Air-ticket. The flight coupon and the excess baggage coupon were retained by him. He also states that when the passenger had gone

to pay excess baggage charges, the Officer of AIU had directed him to put cross tags on her baggage. He did not identify the appellant as the same passenger. However, from the documents that were shown to him, there can be no doubt that the passenger regarding whom he was speaking was none else, but the appellant. As a matter of fact, that the appellant was present in the Airport, and was scheduled to depart by the said Flight, is not in dispute at all.

16 I have carefully gone through the cross-examination of these three witnesses. I am of the opinion that the evidence of these witnesses, has not been shattered, in any manner, by their cross-examination. The evidence clearly indicates that the appellant had checked-in with three pieces of baggage, that one of them was a green colour stroller bag, that the appellant had also paid excess baggage charges, and that, identification tags were attached to her baggage, which on examination tallied with the baggage claim tags affixed to her Air-ticket. Thus, that the bag in which, according to the prosecution, the contraband articles were found, was in the possession of the appellant, and formed part of her baggage which was checked-in, cannot be doubted at all.

17 I have carefully seen the reasoning of the learned Special Judge in that regard, as is reflected from paragraph no.58 of the impugned judgment. I do not find any infirmity in the reasoning of the learned Special Judge. In my opinion, that the green colour stroller bag was part of the baggage of the appellant, cannot be doubted at all.

18 There is also no reason to doubt that the off-white powder and light brown colour powder were found in the plastic containers which were in the said green colour stroller bag. The evidence in that regard has been believed by the Learned Special Judge. On going through the same, I also find no basis for disbelieving the evidence to that effect.

19 The only other point that needs determination is whether the powder / powders found in the bag of the appellant was / were containing a narcotic drug or psychotropic substance. In this regard, the case of the prosecution is that the off-white powder that had been concealed in the baggage of the appellant was containing *heroin* (diacetyl morphine) – a substance covered under the NDPS Act, 1985. The case is that the samples of the two

types of powders found with the appellant were taken and forwarded to the Dy.C.C. A second set of the samples were forwarded to the CFSL at Hyderabad. The reports of the examination of the substance, as done by the Dy.C.C. and by the CFSL at Hyderabad, have been placed on record (Exhibits 34 and 39 respectively). There is no challenge to these reports. The only question is whether the reports related to the samples of the powders found with the appellant.

20            The contentions raised by Mr.Khan about the shortcomings in the prosecution case, are based basically on the difference between what was actually observed and what was mentioned in the panchnama/record. They may be examined one by one.

21            During his evidence, the complainant Menon (PW 1) produced three sealed envelopes which were marked as Article 9, 10 and 11. The envelope marked "Article 9" was containing the passport of the appellant (Exhibit-18). The envelope marked "Article 10" contained excess baggage ticket (Exhibit-19), boarding pass (Exhibit-20), flight coupon (Exhibit-21), Air ticket of the appellant with three claim tags (Exhibit-22), further flight coupon

for Johannesburg to Lusaka with three baggage tags (Exhibit-23), counterfoil of boarding pass (Exhibit-24) etc, all bearing signatures of panchas. The envelope "Article 11" contained 3 cross tags (Exhibit 28 colly) and transfer tags (Exhibit-29 colly). Now, the contention of Mr.Khan is that the panchnama (Exhibit-11) does not indicate that these articles were put in envelopes, and that the envelopes were signed by the panchas. Indeed, the panchnama does not indicate either the passport, or the other articles being put in an envelope or envelopes, or the envelopes being signed by the panchas.

22           It is not specifically suggested by Mr.Khan as to what inference can be drawn from the same having not been mentioned in the panchnama. It is a fact that such envelopes were produced before the Court, and that they did contain the signatures of panchas. In the cross-examination, it was put to Menon (PW 1) that it was not mentioned in the panchnama (Exhibit 11) that the said documents were put in envelope, and that the envelopes being signed by the panchas, and he did admit it. It was also put to him that, that the cross-tags and transfer tags (Exhibit-28 and 29) were found on the bags of the accused; and that it was also not mentioned in the panchnama that the said tags were sealed in

a separate envelope. Menon admitted it to be so. Menon also admitted that it was not mentioned in the panchnama that all the travel documents of the appellant were put in a separate envelope, and it was also not mentioned in the panchnama that the passport of the appellant was kept in any separate envelope. *No further explanation as to how these documents came out from the different sealed envelopes was sought for, from the witness during the cross-examination.* What can be gathered from this is that the panchnama does not reflect the facts accurately, and that the record made in the form of panchnama, is not an accurate record of the happenings. It, at the most, indicates that certain things were done by the Investigating Agency subsequently, and without making any record thereof in the panchnama. In my opinion, this however, would not mean that the evidence of the seizure of the documents, as stated by Menon (PW 1) and Dipti Amin (PW 16), supported by the evidence of Jivan Jatkar (PW 2) which is supported by the existence of the said documents, needs to be discarded only on that ground. That, the record of panchnama does not appear to be an accurate one, would indeed require the evidence of these witnesses to be scrutinized more carefully, but the same cannot result in an automatic rejection of their testimonies, as unreliable. The entire evidence has to be viewed

together, and a conclusion about the facts has to be arrived at. That, the documents were coming out from sealed envelopes, though the panchnama does not say they being put in such envelopes, is a matter indicating the record not to be authentic. It cannot be taken as an indication of the documents such as boarding pass, excess baggage receipt, the baggage identification tags etc, all being false and fabricated documents. As aforesaid, really speaking, there is no dispute – and cannot be sensibly raised – about the appellant having been in the Airport and intending to travel by the said South African Airlines along with baggage. The only dispute that is raised is whether the green colour stroller bag in which contraband articles were allegedly found, was a part of the appellant's baggage. As already observed, the same is clearly established from the evidence which is consistent, convincing, reliable and corroborated by the existence of the relevant documents and certain other circumstances which are either not in dispute, or are satisfactorily proved. Therefore, based on the inaccuracy of the record, the conclusion that the bag from which the said powders were recovered, did not belong to the appellant, or was not the part of her checked-in baggage, cannot logically or rationally be drawn.

23           The learned Special Judge has duly considered the aforesaid contentions, and has dealt with them in paragraph no.74 of the impugned judgment. The learned Special Judge has taken a view that when Menon (PW 1) and the panch have given evidence about the seizure and sealing of the articles at the time of panchnama, the mere omission in panchnama to mention the same would not be sufficient to disbelieve the entire case of the prosecution. I am in agreement with the view of the learned Special Judge in that regard.

24           It is also contended that the bulk articles produced in Court, were not in accordance with the prosecution case. It is pointed out that the panchnama (Exhibit-11) indicates that the bulk was packed in two separate polythene bags. That, off-white powder was kept in a polythene bag marked "A" and light brown powder was kept in a polythene bag marked "B", and that both the bags were kept in a cardboard carton which was sealed. That, a tag was attached to the carton and the panchas signed on the tag as well as the carton. It is also pointed out that in his evidence, Menon (PW 1), stated that both the polythene bags marked as "A" and "B" were kept in a carton which was closed and sealed with

AIU Seal No.131, and a tag bearing details of the seizure and signature of the panchas was attached to the carton, but he does not say about panchas signing the carton. Mr.Khan pointed out that when the carton was produced in the Court, it was bearing a yellow tag and when the carton was opened, the polythene bag containing white powder, having marking "A" was knotted and adhesive tape bearing signatures of panchas was found on the knot. Similarly, the other polythene bag having marking "B" was also knotted, and adhesive tape bearing signatures of panchas was found on the knot. The contention is that the polythene pouches were knotted and adhesive tapes bearing signatures of panchas were affixed on the knot, was not the case of the prosecution. The admission elicited from Menon (PW 1) that it is not so mentioned in the panchnama, is also sought to be highlighted. Then, this is contrasted that the evidence of panch Dipti Amin (PW 16) where she says that the plastic bag in which the white powder was put, was kept in an envelope which was sealed and that her signature was affixed to the envelope. It is also pointed out that, 'that her evidence in examination-in-chief, that the plastic bag containing the white powder was kept in an envelope which was sealed and signed by panchas, was not correct', has been admitted by her. I am not impressed by this contention for the same reason, that is,

that this would only indicate the inaccuracy of the record or the inability of the panch to precisely remember the manner of packing and sealing. When the evidence of the panch and the other evidence showing recovery of the articles from a bag belonging to the appellant is reliable, and without infirmities, the discrepancies in the evidence regarding the manner of packing and sealing the articles, would not be necessarily fatal. It would depend on the facts of each case. Such infirmities would be fatal only if a suspicion of the articles having been tampered with, can be reasonably entertained on that basis.

25           It is similarly contended that the samples which reached the Chemical Analyser and the remnant samples produced before the Court are not as per the panchnama. It is contended that as per the panchnama, samples were packed in three green cloth line covers. That the panchas signed the said three covers, and then the same were sealed. It is contended that the samples that were actually produced before the Court and marked, were not as per the description thereof, mentioned in the panchnama. All the polythene pouches that were marked as Article '5B', '6B', '7B' and '8B', there were signatures of panchas, but in the seizure panchnama, 'that such signatures were

obtained', has not been mentioned. It was also contended that the sample envelopes were shown to the panch when she admitted that they could not be described as 'cloth line covers'. It is also pointed out that though the sample envelopes were supposed to be having only the signatures of panchas, there was one more signature on the sample markings. It is contended that how these discrepancies had occurred, was not explained by the prosecution. I am not impressed by these contentions, if on the basis thereof, a conclusion rendering the seizure of the powders from the baggage of the appellant doubtful, is expected to be arrived at. In fact, in the re-examination, the panch Dipti (PW 16) accepted that there existed 'cloth lining' inside the envelope (Article 6) qualifying her previous statement that the envelopes could not be described as 'cloth line covers'.

26           It is also contended that as per the evidence of Menon (PW 1) he deposited the seized articles in the DS-I Warehouse with a forwarding memo. However, the evidence shows that actually the articles were received in the Warehouse DO-II. This has been established from the evidence of Vijay Ghoradkar (PW8). Raoji Gaikwad (PW 9) working as a Detention Superintendent-I, DS-I Warehouse stated that on 26/2/2007, he found that some

articles were wrongly deposited in DO-II, instead of DS-I, and that he took charge of all the said articles which were so lying wrongly in DO-II, and brought them to DS-I warehouse, and also made an appropriate entry in the register maintained in that warehouse. Based on this, it is contended that either the evidence of Menon (PW 1) that he deposited the articles in DS-I is incorrect, or that Vijay Ghoradkar (PW 8) is a got-up witness who made a false entry of having received the articles in the warehouse DO-II. It is also contended that the entry made in the register of warehouse DS-I showed that the articles were received by Superintendent Soman Mathew, and that in the absence of examination of Soman Mathew, the prosecution version was suspicious. These contentions need careful consideration, so as to see whether there exists a reasonable possibility of the samples/articles having been tampered with. I, have, therefore, carefully examined the evidence in that regard.

27           Indeed, according to Menon (PW 1) the seized articles were forwarded by him to DS-I warehouse on 25/02/2007 with a forwarding memo (Exh.30). It also appears that actually the goods were received by Vijay Ghoradkar (PW 8) in the warehouse DO-II, on that date. He had entered the same in the register vide

No.APS/MI/74/07. The copies of the relevant entries from the register have been produced and marked as Exh.69. The evidence of R.S.Gaikwad (PW 9) shows that on 26/02/2007 he found that on the previous dates some articles were wrongly deposited in the warehouse DO-II, instead of DS-I, and that he took charge of all the seized articles in DS-I warehouse and made an entry in the register vide No.DSI/MI/24/07 (Ex.71). The entry shows that the articles which had been wrongly registered with DO-II vide No.APS/MI/74/07 were received by Superintendent Soman Mathew in the warehouse DO-II.

28            Now, the contention is that it was incumbent for the prosecution to have examined Superintendent Soman Mathew, and that since he was not examined as a witness, the prosecution case is rendered doubtful. I find no substance in this contention.

29            Evidently, the contention of Mr.Khan that V.K.Menon (PW1) has given incorrect evidence of having deposited the articles in DS-I warehouse has to be accepted. The fact seems to be that the articles were wrongly deposited in the warehouse DO-II and were entered in the register maintained in that warehouse by Vijay Ghoradkar (PW8). However, on the next day this mistake was noticed and the articles were taken in the charge of the

warehouse DS-I. The relevant entries which have been made by the customs officers in due discharge of their duties and in official register maintained as record of the articles received and taken out, are themselves admissible in evidence.

30           Thus, non-examination of Superintendent Soman Mathew cannot be said to be fatal, and for such non-examination, the fact of initially the articles having been received in the warehouse DO-II and later on the same being transferred to the warehouse DS-I, cannot be disbelieved.

31           Mr.Khan has also raised a contention based on the Authority Letter (Exh.31) issued by the Deputy Commissioner of Customs – Gose Sebastian Fernandes (PW4) authorizing V.K.Menon (PW1) to receive two samples marked AS-1 and BS-1 from the DS-I/strong room for forwarding to Deputy C.C. for test purpose. In this Authority Letter the number that has been mentioned is 'DSI/MI/24/07'. The contention of Mr.Khan is that 'since the articles were deposited under No.APS/MI/74/07, how could the Deputy Commissioner of Customs know about the number having been changed to DSI/MI/24/07'. I find no substance in this contention. Simply because G.S.Fernandes, Deputy Commissioner of Customs (PW4) was not a party to the

raid, or the arrest of the appellant, it cannot be said that he would have no information about the happenings from his subordinates. Incidentally, G.S.Fernandes (PW4) was not questioned about it, in the cross-examination. The question as to how he came to know the number DSI/MI/24/07, when initially the number given was APS/MI/74/07 was not asked to him.

32           Mr.Khan also raised a contention that the panchnama (Exh.14) destroys the genuineness of the alleged seizure of the contraband from the appellant. His arguments is thus :- the drug seizure panchnama (Ex.11) commenced at 1.15 a.m. and concluded at 4.30 a.m. on 25/02/2007. That the same set of panchas were once again called at 5.00 a.m. for drawing a panchnama in respect of the refusal of the appellant to make a statement. The panchnama (Exh.14) speaks of panchas 'being introduced to the customs officers', and 'the customs officers then introducing the panchas to the appellant', 'the customs officers telling the panchas that the appellant had been intercepted', and 'powder having been recovered from her checked-in bags', etc. The contention of Mr.Khan is that 'if the panchas had already acted as such in respect of the seizure panchnama (Exh.11) and if they had, as per the recitals in the said panchnama, already been

introduced to the customs officers and to the appellant, and had witnessed the seizure where was the occasion to re-introduce the same persons again to them'. It is, therefore, contended, in view of the recitals of the panchnama at Exh.14 that the panchas had earlier not witnessed anything and that the seizure panchnama is, therefore, a bogus and fabricated document. It is not possible to accept this contention. This would indicate that the recitals in panchnama at Exh.14 are not correct and things simply could not have happened that way. It is again a matter of wrong record of the happenings being made. The panchnama (Ex.14) has been mechanically drawn without application of mind and in a routine manner. It fails to take into consideration the fact that they had already acted as such during the seizure panchnama and had been acquainted with the appellant and the customs officers; and that, therefore, there was no question of the panchas again being introduced to the same persons. This reflects not on the truth of the fact of the seizure, but on the intelligence of the officer writing panchnama in such a manner. It is not possible to hold from this that the recitals in the panchnama (Exh.14) falsify the case of the prosecution about the seizure of the contraband powder under panchnama (Exh.11).

33 As regards the articles/covers actually produced being different from their description as appearing in the panchnama, it has already been observed that the same cannot go to the root of the matter in the absence of any infirmity in respect of the evidence of the contraband articles having been found in the baggage of the appellant. All that it would mean is that the record made by the prosecution by way of panchnama, is not an accurate one. It may also mean that the things have not happened exactly, as claimed by the prosecution. *All these contentions however, relate to the events that took place after the contraband articles were said to have been found in the baggage of the appellant. The shortcomings in the handling of the matter thereafter, and/or in the record of the happenings maintained, would not go to the root of the matter unless they render the aspect of seizure itself, doubtful.* These shortcomings do not lead to any doubt about the seizure of the contraband articles from the baggage of the appellant which is the essence of the prosecution case. It is clear that the evidence of Menon (PW 1) about having deposited the articles in DS-I warehouse, is not correct, and that by mistake, he had forwarded the same to the warehouse DO-II. He, however, probably is trying to suppress this fact as ultimately, the articles were collected by him from the warehouse DS-I for forwarding the

same to the Dy.C.C. *This would be material only if there would appear to be a possibility of the articles which were sent to Chemical Analysis being different from the samples that were taken from out of the powders found in the baggage of the appellant.*

34           After considering the entire evidence in that regard, together with the description of the articles, as found in the entry (Exhibit-69) in the register made by Vijay Ghoradkar (PS 8) which relates to the warehouse DO-II, and the entry (Exhibit-71) made by Raoji Gaikwad (PW 9) in the warehouse register of DS-I, as also the evidence of Vivek Sawant (PW 10) and the entry (Exhibit-74) in the strong room register, I am unable to hold that there exists any reasonable possibility of the articles that were sent to the Dy.C.C. for Chemical Analysis being different from the sample of the articles said to have taken from out of the powders found in the baggage of the appellant.

35           Surely, it cannot be said that the discrepancies in the record made by the Investigating Agency such as panchnama would not be material, at all. However, these discrepancies would be material when they would go to the root of the matter. In the instant case, the facts that are required to be proved, are basically:

(a) that the appellant was having in her possession a bag which formed part of her checked-in baggage, and in that bag, two types of powders, suspected to be narcotic drug/psychotropic substance, were found.

(b) the samples of the said powders were obtained, and were sent for Chemical Analysis.

(c) That on examining the samples in laboratory, one of them found to be containing *heroine* – a narcotic drug.

36 In deciding whether these aspects are proved or not, the Court has to have a regard to the entire evidence adduced during the trial. The Court has to see what circumstances are either undisputed, or are satisfactorily established, and then see whether the other facts asserted by the prosecution are in conformity with the same, and whether, all collectively lead to an inference of an accused being guilty of the offences in question. The discrepancies/shortcomings, infirmities in the evidence, if any, should be considered in the light of the entire evidence to examine whether they throw any doubt on the basic facts asserted by the

prosecution, and/or whether they render the whole story, doubtful. *In the instant case, the shortcomings pointed out by Mr.Khan would be material only if they would create a doubt either about the fact that the green colour stroller bag in which the contraband powders were found, was actually a part of the baggage of the appellant, or about what was sent to the laboratories for Chemical Analysis, and what was opined to be containing heroin, was the same that was collected from the powder found in the said bag, as and by way of sample.* In the light of the entire evidence, no doubt can be entertained about the fact that the green colour stroller bag which is said to have contained the contraband articles, was a part of the checked-in baggage of the appellant. The shortcomings in the record and non-tallying of the description of the articles produced before the Court, and the description thereof, as given in the panchnama, cannot lead to an inference that after the seizure of the powders from the said bag of the appellant, and after taking samples therefrom, they were got changed and something else was sent for Chemical Analysis. Whether such inference on the basis of the shortcomings in the record of panchnama can be drawn, would depend on the facts of each case. These aspects would be decided on the basis of the entire evidence adduced, and not solely because of the existence of

discrepancies in the record. In appreciating the evidence, the nature of cross-examination of the witnesses with respect to the discrepancies assumes significance. That, the defence felt content only with bringing on record; or pointing out that they exist, without trying to suggest what inference could be drawn from such discrepancies, or without challenging the witness to explain the same, would be significant in appreciating the evidence.

37 In appreciating the evidence, the accuracy of the contemporaneous record would be relevant as it would be capable of creating a doubt about the facts of which it purports to be a record. Whether it can prove fatal, would depend on the facts of the case. The appellant was apprehended at the Airport which is a restricted area. The presence of the appellant at the Airport has been established by a number of documents. What was the baggage with the appellant, has also been established on the basis of the documents generated by agencies other than investigating agency in the normal course of their business. Therefore, apart from the claim of the investigating agency and their own record to support the same, there is available convincing, reliable and independent record of presence of the appellant, the baggage with her etc, and the burden of the investigating agency to prove these

aspects by supporting the same from their own record, has been reduced.

38           Undoubtedly, the investigation in this case done by the complainant himself who suspected and apprehended the accused. Mr.Khan by placing reliance on *State Vs. Rajangam* <sup>1</sup> and *Balasundran Vs. State* <sup>2</sup>, contended that this would be fatal to the prosecution. Indeed, this is a weakness in the case, but it is not possible to hold that the samples were under the control of the complainant, and he could easily tamper with them. In this case, that the same Officer, who apprehended the appellant, carried out further investigation and filed a complaint, fails to create a reasonable doubt about the guilt of the appellant.

39           A perusal of the impugned judgment shows that all the contentions that are raised before this Court were, more or less in the same terms, were raised before the learned Special Judge also. The learned Special Judge has taken the same into consideration, and has dealt with them properly. His conclusion that the evidence of Menon (PW 1), Jivan Jatkari (PW 2) and Dipti Amin (PW 16), together with the other undisputed facts, and the

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1 (2010) 15 SCC 369

2 1999 (113) ELT 785 (Mad)

existence of documents such as boarding card, ticket, excess baggage payment receipt etc, clearly established that the bag in question was part of the checked-in baggage of the appellant, and that two types of powders had been concealed in the articles that were found in the said bag, is proper. On going through the evidence, this Court also comes to the same conclusion. Once this is accepted as 'proved', the only question would be whether a reasonable doubt about any manipulation with the seized articles being done, and a wrong sample being sent to the Dy.C.C. for Chemical Analysis, can be entertained in the facts and circumstances of the case. Though it appears that initially the seized articles were sent to the warehouse DO-II (and not to DS-I) as claimed by Menon (PW 1), it also appears that, subsequently, they were received in the DS-I warehouse, and from there, samples were forwarded to the Dy.C.C. The entries made by Vijay Ghoradkar (PW 8) and Raoji Gaikwad (PW 9) in the relevant registers, show the description of the articles and from the details given therein, it is not possible to hold that the samples were tampered with.

40            Though in a criminal trial, an accused is entitled to the benefit of doubt, it is well settled that such doubt should be a

reasonable one. A reasonable doubt is one for which a sensible reason can be supplied. Since the evidence of the appellant having a bag with her in which the contraband powders were found, is convincing and reliable, doubts can revolve only around the possibility of the samples having been tampered with. Upon considering the evidence, no such possibility can be reasonably felt to exist. Consequently, there does not arise any doubt about the truth of the prosecution case. The discrepancies in the record cannot lead to a rational thinking that they are resulting because of some tampering having been done to the seized articles. The discrepancies do not appear to be arising out of a deliberate manipulation – *for they do not seek to advance the case of the prosecution* – but due to sheer inadvertence, or a failure to make a precise record. The doubt about the authenticity or the correctness of the record, cannot, by itself, lead to a conclusion about the facts stated by the witnesses – of which the record is made – are not believable. It would all depend on the facts of each case, and the nature of shortcomings/discrepancies in the record. In the instant case, though such discrepancies do exist, they do not go to the root of the matter, and are not sufficient to create a reasonable doubt about the guilt of the appellant.

41           The appreciation of evidence, as done by the learned Special Judge, does not suffer from any infirmity or error. The conclusion arrived at by him, is proper and legal.

42           However, the appellant is a Foreign National. The amount of fine is not likely to be realized from her. The default sentences that have been imposed by the learned Special Judge, appear to be rather harsh. In the circumstances, I am inclined to reduce the default sentence, on each count, to Rigorous Imprisonment for 3(three) months.

43           Subject to the aforesaid modification in the default sentences, the Appeal is dismissed.

**(ABHAY M. THIPSAY, J)**

***CERTIFICATE***

***Certified to be true and correct copy of the original signed  
Judgment/Order.***