

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.947 OF 2023
WITH
INTERIM APPLICATION NO.3869 OF 2023**

Yurena Rosa Niebles Marchena

..Appellant

Versus

The Union of India & Anr.

..Respondents

Mr. Ajaz Khan, for the Appellant.

Mrs. Aruna Pai, for the Respondent.

Mrs. M. R. Tidke, APP for the State.

CORAM : KISHORE C. SANT, J.

**RESERVED ON : 7th MARCH, 2024
PRONOUNCED ON : 26th APRIL, 2024**

JUDGMENT

1. The Appeal is by original accused held guilty of the offence punishable under Section 8(c) r/w Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (“the said Act” for short) and sentenced to suffer for ten year rigorous imprisonment. Co-accused came to be acquitted vide judgment and order dated 07.06.2023 passed by learned NDPS Special Judge, City Civil and Sessions Court, Greater Bombay in NDPS Special Case No.83 of 2018. The Appellant is alleged to have by entering into criminal conspiracy imported narcotic 1.84 kg. Cocaine by concealing the same in package that was recovered from the present Appellant/accused No.1 on 06.11.2017 at CSI Airport, Mumbai.

2. The facts in short are that an Intelligence Officer, namely Vimal Dhaka working with NCB, Mumbai received an information on 05.11.2017 at around 10:30 p.m. that the accused holding passport of Venezuela was to reach CSI Airport, Mumbai on 06.11.2017 by flight No.ET610 of Ethiopian Airlines. She was suspected to be carrying narcotic substance in her check-in baggage. The said information came to be reduced into writing and was placed before the Superintendent, NCB. After discussing this matter with Zonal Director, one Intelligence Officer, namely Anoop Kumar was directed by the Superintendent to form a team and to take necessary action. On team being formed, the Intelligence Officer prepared for raid and reached the Airport. Two persons at the Airport were requested to act as Panch and were given personal search of the members of the raiding team. On taking personal search of the team members, nothing incriminating was found.

3. The suspect arrived at about 5:15 a.m. identified on the basis of passport. She collected her check-in baggage and cleared the customs. The Intelligence Officer accosted her and introduced the team members to her. The Investigating Officer communicated with the accused with the help of Google Translate Application. After telling her the purpose the suspect along with the bag was taken to a room near custom clearance area. The contents from the bag were taken out. The Intelligence Officer found the bottom of the bag was tampered by creating a cavity. In the said cavity, a package was found wrapped in black carbon containing white powder. On

testing, the power tested positive for Cocaine. The substance was therefore seized. Two representative samples of 5 gms. each were prepared and were kept in locking plastic bag. The remaining 1.830 kgs. of white powder was kept in heat sealed parcel and was marked as Exh.C by affixing NCB Seal No.03 on the samples as well as the bulk. The officer thereafter issued notice under Section 50 of the said Act. The officer thereafter seized documents such as Passport, Boarding Pass, VISA and hotel documents of the suspect. The Intelligence Officer thereafter recorded statement of the suspect. The accused disclosed that one Nigerian person, namely Patrick handed over the check-in baggage to her and accused No.2 was to collect the said. After following procedure and after satisfying that she was carrying contraband. She came to be arrested. The contraband and the samples were deposited in the NCB godown. In the follow-up action, NCB Sub-Zone Goa was asked to intercept the accused No.2 who was to come to La Valencia Beach Resort, Morgium, Goa to collect the contraband from the accused. On receiving this information, he was also apprehended in Goa. The allegation against accused No.2 was that he had arranged for tickets for accused No.1 from Sao Paulo to Mumbai. He had also booked a ticket for her from Mumbai to Goa and arranged for her hotel stay.

4. The prosecution led evidence and examined ten witnesses. The accused No.1 also adduced her oral evidence by examining herself on oath. Learned Court on holding trial found accused No.1 guilty. The Court recorded that prosecution has failed

to prove the charges against accused No.2 and acquitted him. It is thus the Appellant/accused No.1 has now approached this Court by filing the present Appeal. Most of the facts are not seriously disputed by the Appellant. The main ground in the appeal and argument of the Appellant is non-compliance of mandatory provisions of Section 52A of the said Act.

5. Learned advocate Mr. Ajaz Khan has taken this Court through the evidence of material witnesses i.e. PW-2, who reduced information in writing, PW-3, Intelligence Officer who conducted raid, PW-9 and PW-10, the panch witnesses.

6. It is submitted that no sample of the contraband was taken in presence of Magistrate. While destroying the article, no procedure was followed. The destruction certificate produced by prosecution in this case cannot be accepted in evidence. There is no CA report in respect of sample K5-1. The bulk was not produced. Panchmana was not prepared in presence of Panch. On Panchnama signatures of Panch witnesses were already taken. The photographs were not shown to the witnesses. There are certain omissions in the evidence. Search and seizure was carried out after sunset in closed premises in absence of gazetted officer. No order of the Magistrate was obtained before destroying the contraband. He relied upon the judgments in the case of **Union of India Vs. Mohanlal & Anr.**¹, **Abdul Rashid Ibrahim Mansuri Vs. State of Gujarat**², **State of Rajasthan Vs.**

1 (2016) 3 SCC 379.

2 (2000) 2 SCC 513.

Chhaganlal³, and Noor Aga Vs. State of Punjab⁴ in support of his submission.

7. Learned advocate Mrs. Aruna Pai for Respondent/NCB vehemently opposes the Appeal. She submits that prosecution has proved its case beyond reasonable doubts by leading evidence. The procedure is rightly followed and there is no violation of any of the provision. The compliance of Section 52A is not necessary in this case, as the contraband was found in bag in public place and therefore it is Section 43, which will be applicable in the present case and not Section 50. All the requirements are fulfilled by sending information to the superior officer within 72 hours. The inventory sampling photographs were placed before the Magistrate and thereafter those are destroyed. There is certificate under Section 52A. The certificate of destruction was obtained on 29.05.2019 and thus compliance of Section 52A is done. She submits that in this case even the chemical analyzer is also examined. She submits that the procedure of disposal is followed. She relied upon the judgment in the case of **Narayanaswamy Ravishankar Vs. Asstt. Director, Directorate of Revenue Intelligence⁵**.

8. In rebuttal, learned advocate for the Appellant submits that accused was intercepted at the Airport, however, the place where search was taken was not a public place, as she was taken for

³ Airoline 2014 SC 260.

⁴ (2008) 16 SCC 417.

⁵ AIR 2002 SC 3658.

search in closed room i.e. cabin of custom officer and which cannot be said to be a public place and no officer from custom is examined.

9. After hearing the submissions, this Court has been the evidence of the witnesses and also documentary evidence. In the evidence of PW-1, the Chemical Analyzer has proved the sample to be that of Cocaine. There is no much dispute on this aspect.

10. PW-2, is the Intelligence Officer, who had received the information about the accused No.1 coming to the Airport with the contraband material. From his evidence, it has come that he reduced the said information on paper in his own handwriting and passed the said information to his immediate senior and Superintendent, NCB Mumbai. When he received the information at about 08:30 p.m. on 05.11.2017, he was in Navi Mumbai. The superior officer discussed the information with Zonal Director on telephone and as per the directions, the Superintendent directed one Anupkumar Gupta to take necessary action as per law. He further stated that he was also part of team when the raid was conducted.

11. In the cross-examination, it is stated that the information was received by him when he was not in the office and also not at his residence. It is stated that this witness informed his immediate superior and not the Zonal Director. There was no independent

gazetted officer in the team at the time of raid. He could not state what were other articles found in the check-in bag. In the cross-examination by accused No.2, he accepted that immigration hall of arrival at the Airport is closed place. He could not state whether the said area is restricted area and that they entered the Airport after sunset and before sunrise. It is stated that he had not prepared any papers for authorization to enter the Airport prior to sunrise. He denied the suggestion that the handwritten documents can be prepared with back dates. It is taken that the Exh.37 that is note does not reflect as to when the informer contacted him. It also does not reflect the meeting time of the informant. This witness proved the information note Exh.37.

12. PW-3 is another Intelligence Officer, namely Anup Kumar Gupta, who was directed to form a team for search of the suspect. He stated in his evidence that on 06.11.2017 at around 04:00 a.m., the team reached Airport near arrival gate of immigration. There he approached two persons revealing his identity and asked their identity. Those two persons informed their names as Ms. Devyani Triveni and Merwyn Lobo. He shared the information received by the team to those persons and requested them to act as Panchas. On giving consent to act as Panchas, he offered the search of team members to Panchas. Panchas noticed nothing incriminating on the person of the team members. Panchas also searched the seized articles. Nothing objectionable was noticed. He stated about as to how he caught the accused by following her

and how he interacted with her with the help of Google Translate Application in his phone taking of a search of suspect and her check-in bag by giving her idea about her right to be searched under Section 50 of NDPS Act. The accused consented for search by the team. He also offered search of the members of the team to her, however, she refused to the same. The Custom Officer was requested for giving a room for conducting search of the check-in bag of the accused. The accused was therefore taken to the room. There search and seizure procedure was carried out in presence of Panch. Though initially nothing was found in the bag, the empty check in bag was inspected by this officer from bottom side. It was found that the bag was unusually heavy. On opening bag, he found white coloured powder in one polythene packet. It was found to be Cocaine. This entire process was witnessed by Panchas and the suspect. The suspect herself informed that the said powder of Cocaine. She also informed that she was to deliver the powder to accused No.2.

In the cross-examination, it has come that the sample S-1 was kept in brown envelope. It was closed sealed by lac with NCB seal No.3. The second sample S-2 contraband was kept in brown envelope and marked as S-2. One more envelope was prepared and sealed by lac with NCB seal No.3. On that the signatures of the suspect, the officer and the Panchas were put along with dates. He also apprised the accused of her rights of personal search under Section 50 of the said Act.

13. It was further taken that at the time of search and seizure, there was no gazetted or lady gazetted officer in the team. He could not tell as to whether there are many lady government officers working at the Airport including the Assistant Commissioner of Customs. The two persons whom he met at the arrival gate were working with Celabi as passenger service agent at the Airport. He could not tell as to whether the lady Hawaldar in team was present as per the NDPS Act. He could not tell the name of the Custom Officer and his designation to whom request was made to make available a room to search the accused. He also collected CCTV footage. He denied that the contraband was not found in the check in bag. It is further taken that the sample was not taken in front of Metropolitan Magistrate. The cross-examination by accused No.2 is not material, for the purpose of present case, as the accused No.2 is now acquitted. This witness proved Panchanama dated 06.11.2017, the certificate under Section 65B of the Evidence Act, application for pre-trial disposal of drug, the permission granted by the Metropolitan Magistrate dated 29.03.2019 and certificate under Section 52A(2) of the said Act. Further the certificate of destruction dated 29.05.2019 depositing the samples in the godown etc. PW-5 is Spanish Interpreter. He stated in his evidence that on 06.11.2017, he was called by NCB for interpreting questions and to put the said questions in Spanish language to the accused and then to interpret the answers into English at the time of interrogation with the accused.

14. PW-6 is the Travel Agent at Siolim, Goa. He proved that he booked tickets for accused No.1 and that the said booking was done at the request of Nigerian i.e. accused No.2. PW-7 is Intelligence Officer at the relevant working with NCB, Mumbai, who was sent to Goa by the Superintendent, NCB, who made inquiry with accused and arrested him. This evidence is not material for the present case. PW-8 is Superintendent, NCB, who was at the relevant time posted at Goa. He acted at the request of Superintendent, NCB, Mumbai.

15. PW-9 is again a material witness i.e. Superintendent of NCB to whom the information was sent in writing by PW-2. He stated about receiving of the information note and directing PW-3 to form a team. He proved that on 06.11.2017, PW-3 informed that this accused was to come to Goa and through whom the tickets were booked and where she was told to deliver the contraband. He proved the seizure memo forwarded by PW-3 Exh.57. He accepted the Muddemal i.e. two samples S-1 and S-2 in sealed condition bearing seal number Exh.2. On 07.11.2017, two arrest reports were placed before him in respect of arrest of accused Nos.1 and 2 on the basis of that he prepared the report Exhs.59 and 60. He proved the search and seizure report Exhs.61 and 62 and that those were forwarded to Zonal Director by fax as well as by hard copy. He was not cross-examined much by the present accused.

16. PW-10 is Mr. Melwyn Lobo, Panch at CSI Airport. He

stated about the search and seizure of the check in bag of the accused and how she was interacted with the help of translator etc. He deposed about sampling of Cocaine powder in two packets of 5 grms. each and keeping those in envelope and drawing of Panchanama etc. Though the question was asked in the cross-examination by the present accused that signature on Panchanama was taken forcibly and that nothing was seized from the accused same is denied. This was the evidence of the prosecution.

17. The accused preferred to get herself examined on oath in defence. She only stated that her boyfriend sent her a ticket for India when she was in Brazil. Her brother-in-law had brought clothes, jeans for her boyfriend and the same was kept in luggage bag. She was not aware of the contents of the luggage. In the cross-examination she denied that she had admitted that the drug was to be delivered to the accused at Goa. She further denied that she was in need of money and for that she agreed to carry Cocaine.

18. From all these evidence, this Court has to see the submissions of the parties and consider the judgments cited before this Court. The first submission is that the sampling was not done in presence of the Magistrate and that the sample was not destroyed without permission of the Magistrate. It is seen that the prosecution has proved Exh.25, wherein an application was made to the Court to take the Muddemal/articles/Exhibits on record and be kept in safe custody of the Court. On that the order was passed by the Court

on 18.01.2021 directing Registrar (Senior) to accept the same. The prosecution has further proved the depositing of the original certificate proceeding, inventory photographs and representatives of above case prepared during the proceedings under Section 52A of the said Act. The prosecution has also proved the destruction certificate dated 29.05.2019. The prosecution has also by examining Chemical Analyzer has proved the sample as Cocaine, as there is no dispute that the drug which was found was Cocaine. This Court has to consider the submission as to whether the procedure was followed. However, looking to the evidence of PW-3 and PW-10, it is seen that the entire procedure was followed. The main argument is about the non-observance of procedure under Section 52A. The Appellant has mainly relied upon the judgment in **Mohanlal (cited supra)**. The Apex Court in the said case has considered the provisions of Section 52A of the said Act and issued certain guidelines. It is directed to all the authorities concerned to ensure that appropriate applications are made by the officers competent to do so under the notification. It is held that non-compliance of Section 52A is fatal to the prosecution and in case prosecution fails to prove the compliance of Section 52A, the accused needs to be acquitted. The another judgment relied upon is the judgment dated 26th April, 2023 in Criminal Appeal No.451 of 2011 in the case of ***Bothilal Vs. The Intelligence Officer NCB.***

19. In Mohanlal's case, it was held that the prosecution failed to prove that the substance recovered was contraband for

want of compliance under Section 52A(2). It was held that the prosecution case is not free of suspicion. The prosecution has not proved beyond reasonable doubt that the Appellant in those Appeals were in possession of the contraband or that they brought contraband to the hotel and the judgment of conviction was converted into acquittal. In Criminal Appeal No.1651 of 2023 in judgment dated 12th July, 2023, the Hon'ble Apex Court again by considering the mandate of Section 52A of the Act held that the same was not followed. There was no explanation for non-production of the seized materials or the manner in which they were disposed of. There was no order passed by the Magistrate allowing the application on this ground, the Court held that the conviction cannot be sustained and allowed the Appeal by setting aside the order of conviction recorded by the Sessions Judge and confirmed by the High Court in Appeal. Learned advocate further relied upon the judgment of the Apex Court in Criminal Appeal No.3191 of 2023 in the case of **Yusuf @ Asif Vs. State**. The Hon'ble Apex Court again specifically held that failure to comply with Section 52A is fatal and the conviction needs to be set aside.

20. There is thus no doubt when there is non-compliance of Section 52A of the Act, it is to be taken that the prosecution has failed to prove the guilt of the accused. The question therefore now as to whether in this case where it was necessary to show compliance of Section 52A in view of submission of the Respondent that in this case the judgments are not applicable as Section 52A has

no application. Learned advocate for the Respondent relies on the judgment in the case of **Narayanaswami Ravishankar (cited supra)**. The submissions is that in this case, the search and seizure was not conducted on person the accused and therefore, Sections 50 and 42 would not applicable. In the said case, the seizure had taken place at the Airport, a public place. In view of this, provisions of Section 43 of the Act are applicable. She further submits that even otherwise in the present case, there is compliance of Section 52A(2). As per Exhs.25 and 26 in her submission, it is proved that the inventory sampling photographs were placed before the Magistrate and therefore those were destroyed. The order of destruction is dated 29.03.2019. There is also a certificate of destruction. This certificate was in view of notification GSR-38E dated 16.01.2016 issued in view of the judgment of Supreme Court in the case of **Mohanlal (cited supra)**. She submits that even the arrest report is proved at Exh.57. The search and seizure Panchama is also proved at Exh.51. This Court finds that there is substance in the argument of learned advocate for the Respondent, though the Appellant has also tried to submit that the information was not immediately given to the superior by showing certain admitting of receipt of information. This Court finds that those are not material affecting the merits of the case, as the prosecution has proved that proper procedure was followed under Section 52A of the said Act.

21. So far as the argument that the place, where the search of the bag was taken place, was closed premises is concerned, this

Court has considered Section 43 of the said Act. In the explanation to Section 43 provides that for the purposes of this Section, the expression “public place” includes any public conveyance, hotel, shop, or other place intended for use by, or **accessible to, the public**. This Court therefore is not impressed by the submission of learned advocate for the Appellant that in the present case search and seizure was taken place in closed premises. There is nothing to show that the cabin of the Excise Officer was not accessible to public.

22. In this case, it is found that there is evidence of PW-2 of sending the information to the immediate superior. The Superintendent is also examined, who deposed that he had received the information on that PW-3 was directed to form a team.

23. This Court finds that there is no merit in the Appeal and same deserves to be dismissed and is hereby dismissed.

24. In view of disposal of the Appeal, pending Interim Application also stands disposed of.

[KISHORE C. SANT, J.]