

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.1071 OF 2021

Ms. Cremancia Sophia Basikoro

...Appellant

vs.

1. Intelligence Officer, Narcotics
Control Bureau

2. The State of Maharashtra

...Respondents

Mr. Advait Tamhankar i/b Shekhar Bhandary for the Appellant.

Mr. Shreeram Shirsat with Shekhar V. Mane, Advocate Tanvi Mate,
Advocate Tanveer Khan for Respondent No.1-NCB.

Ms. S. S. Kaushik, APP for Respondent No.2-State.

CORAM : KISHORE C. SANT, J.

RESERVED ON : 4th JANUARY, 2024

PRONOUNCED ON : 23rd JANUARY, 2024

P. C. :

1. Heard learned Advocates for the parties.

2. This Appeal arises out of the judgment and order dated 29th October 2021, passed by learned Sessions Judge, Greater Mumbai at Mumbai, in NDPS Special Case No.93 of 2016.

3. Learned Judge by way of the impugned judgment and order has held accused/applicant guilty for the offences punishable under Section 8(c) read with 21(c), 23, 28 and 29 of the NDPS Act and sentenced the accused to suffer rigorous imprisonment for ten years and to pay fine of Rs.1,00,000/- and in default to suffer

rigorous imprisonment for six months.

4. The facts in short giving rise to this appeal are that the accused, a citizen of Zimbabwe, traveled to India and landed at Airport, Mumbai on 23rd November 2015. The Intelligence Officer, Narcotics Control Bureau, Mumbai (PW 2) received instructions from the Superintendent that there is information received from another Intelligence Officer that one person i.e. accused having passport DN-416775 was suspected of carrying with her contraband substance covered under the NDPS Act. On receiving such information the RMO was directed to search her belongings and person. On receiving instructions, the Investigating Officer along with other three members i.e. Investigating Officer, one Shipoy and one Assistant went to Airport. On reaching at CSI, Airport at around 1.30 am, he approached customs PRO Desk on Terminal-II of Airport and collected copy of flight manifesto of flight and other details from said PRO. After completing formalities and taking search by the team of customs they proceeded further. After arrival of the flight the accused was taken to Custom's Rest Room by Narcotics Control Bureau. However, inspite of search nothing was found.

5. Though nothing was found at the Airport, the Investigating Officer (PW 2) believed that she must be carrying contraband in her body. The lady duty doctor was therefore, called on Airport for physical examination. Doctor on primary physical examination referred the suspect to Government Hospital for detailed physical examination. The suspect was therefore brought to Government Hospital in Mumbai. An application was filed in the Esplanade Court seeking permission to conduct extensive physical and medical examination of the suspect at J. J. Hospital. After permission the suspect was brought to J. J. Hospital and was taken to casualty ward in presence of two women constables. There the doctor suspected existence of some foreign objects in abdomen of lady. It was ultimately found that suspect had 78 number of oval shaped pellets released from abdomen. After conducting further investigation it was found that material contained in the pellets was cocaine weighing around 1 kg. On taking two representative samples of 5 grams each, substance was sent for testing purpose. The report was thereafter received confirming that there was cocaine carried by the accused weighing 936 gms.

6. After trial and after recording evidence, the learned

Special Judge found that the prosecution has proved its case. He therefore recorded conviction and sentenced the accused.

7. On the background of these facts and evidence, the learned Advocate mainly argued on non compliance of procedure under Sections 52A of the NDPS Act.

Section 52-A reads as below :

52A. Disposal of seized narcotic drugs and psychotropic substances.

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized

and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the 4[narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of [such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section

(2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 or the Code of Criminal Procedure, 1973, every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under subsection (2) and certified by the Magistrate, as primary evidence in respect of such offence.

8. It is submitted by the learned advocate for the Appellant that it was necessary for the prosecution to apprise accused of right to get examined in presence of the Magistrate or Gazetted Officer. In the present case, the accused was not made aware of such right and examinations were conducted. It is submitted that examination at Airport ends with drawing of panchnama of search. Search at J. J. Hospital is another incident independent and unconnected with search at Airport. So at that stage again it was necessary to make her aware of her right. Non observance of this procedure at the hospital has resulted into non compliance of Section 50.

9. He submitted that samples were not drawn in the presence of Magistrate. No inventory Panchanama was prepared by

the Magistrate certifying correctness of samples drawn in his presence.

While disposing off samples no permission from the Magistrate was obtained. For non-compliance of this requirement prosecution is vitiated. In support of his submission the Appellant relied upon various judgments. From the evidence of Investigating Officer, he submits that it is seen that no such procedure was followed by P.W.2. The entire process is thus carried out in absence of Magistrate's order.

10. In support of submission, learned Advocate for the Appellant relied upon judgment reported in case of ***Union of India Vs. Mohanlal and Another***¹. He relied more particularly on paragraph 31.1 wherein Hon'ble Apex Court has held that the officer concerned should approach the Magistrate with application under Section 52-A(2) of the Act which shall be allowed by the Magistrate as soon as may be required under sub-section (3) of Section 52-A. The sampling shall be done under the supervision of the Magistrate as discussed in the said judgment. He submitted that this exercise is not done in presence of Magistrate and, therefore, seizure and sample cannot be read into evidence. He thereafter relied upon the judgment of the Hon'ble Apex Court in case of ***Bhothilal vs. Intelligence Officer***,

¹ 2016(3) SCC 379

Narcotics Control Bureau². The Hon'ble Apex Court has recorded in the said matter, based on Mohanlal judgment by quoting relevant paragraphs 15 to 17 from the said judgment. In that case in view of non observance of the procedure as laid down in Mohanlal's case, it was held that a serious doubt is created about prosecution's case that substance recovered was contraband. Next judgment, he relied upon is the judgment in case of ***Simranjit Singh vs. State of Punjab***³. In that case also drawing of sample at the time of seizure was not in conformity with the law laid down by the Hon'ble Court in the case of ***Mohanlal***. The conviction and sentence was set aside by allowing the appeal of the accused.

11. Next judgment relied is in case of ***Mangilal vs. State of Madhya Pradesh***⁴. In that case the trial Judge had permitted the prosecution to produce seized material in police station at later point of time. The Hon'ble Apex Court observed that this itself was sufficient communication that the mandate of Section 52-A had not been followed. In the said case, no explanation for non production of seized material or manner in which these were disposed of was

² 2023 SCC Online SC 498

³ 2023 SCC Online SC 906

⁴ 2023 SCC Online SC 862

offered. It was held that there was contravention of Section 52-A. He further relied upon the judgment of the Apex Court in case of ***Yusuf @ Asif vs. State***⁵. The Hon'ble Apex Court again by considering Section 52-A held that it was necessary to bring on record evidence to the effect that procedure prescribed under sub-sections (2), (3) and (4) of Section 52-A of the NDPS Act was followed. In that case, at the time of seizure and drawing of samples, the said inventory was not certified by the Magistrate. In that case also, it was held that conviction was not proper. In all these cases, the Hon'ble Apex Court has considered the judgment in case of ***Mohanlal***. As regards non compliance of Section 50 & 52A, learned Advocate clarified that the judgment of this Court in case of ***Ahmed Adeyinka Adebayo vs. Narcotics Control Bureau***⁶, it is held that intimation of right to have search taken in presence of the Magistrate or Gazetted Officer was must. In the present case, he submits that there was no information given of such right till accused purged oval shaped pellets. At last, he submits that accused is suffering from HIV. She should be given benefit of being a lady.

12. Learned advocate for Respondent No.1, NCB submitted

⁵ Criminal Appeal No.3191 of 2023

⁶ Criminal Appeal No.1186 of 2022

that in the judgment in case of *Mohanlal*, (supra) the Hon'ble Apex Court laid down uniform procedure about search and seizure, in view of the fact that in different States, different procedures were followed. In that view, directions were issued laying down uniform procedure. The judgment in case of *Mohanlal* was delivered on 28th January 2016. In the present case, search and seizure was carried on 24.11.2015. The law laid down in *Mohanlal's* case is subsequent to search and seizure in the present case. No suggestion was given to accused during trial about giving information of the right to be examined in presence of the Magistrate or Gazetted Officer. He relied upon judgment reported in case of *Hitendra Thakur and Others. vs. State of Maharashtra and Others* ⁷. The Hon'ble Apex Court has spelled out the ambit and principles with regard to amending Act and its retrospective operation. This lays down that a procedural Statute should not generally speaking be applied retrospectively, where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished. Further, it is held that a Statute which not only changes the procedure but also creating a new rights and liabilities, shall be construed to be prospective in operation, unless otherwise provided, either expressly

⁷ AIR 1994 Supreme Court 2623

or by necessary implications. He submits that as in matter of fact permission was taken from learned ACCM, Esplanade Mumbai for medical examination. Medical examination was conducted at JJ Hospital only after such permission and in presence of two lady constables. As such, there is compliance of procedure under Section 50. After preparing Panchanama and formalities report was placed before superior office under Section 57.

13. After hearing the parties and going through the judgments relied upon by the parties, this Court has to consider the case in hand. About factual aspects, there is no much dispute and in view of the same, the same question needs to be considered is as to whether the prosecution has proved its case. The second more important question is whether the prosecution has followed the mandatory provisions of Section 52A. His arguments is based the mandatory nature of Section 52A and non-compliance of procedure given in the said Section.

14. This Court in earlier paragraphs has considered the judgment on Section 52A in the case of *Mohanlal (cited supra)*. In the said judgment, various guidelines are given. It is held that compliance of Section 52A is mandatory. The latest judgment on this point is the

judgment in the case of *Yusuf @ Asif (cited supra)*. In view of both these cases, it is clear that the provision of Section 52A needs to be scrupulously followed and thus now the law is well settled on this point.

15. So far as the arguments of learned advocate for Respondents is concerned, he has stressed his point stating that in the *Mohanlal's (cited supra)* case, for the first time the Hon'ble Apex Court has framed the guidelines. In this case, the search and seizure is prior to the judgment in the case of *Mohanlal (cited supra)*. The judgment will have prospective operation. He relied upon the judgment in the case of *Hitendra Thakur (cited supra)*, to show the operation of law is prospective. However, in the said case, the question was in respect of the retrospective operation of the amending Act. In the present case, there is no case that the examination in the presence of Magistrate is made mandatory in view of the judgment in the case of *Mohanlal (cited supra)*. The provision of Section 52A is in statute books even prior to the search in this case. The argument of the learned advocate for the Respondents cannot be thus accepted. This position is more clearly seen from the judgment of *Yusuf @ Asif (cited supra)*. With the above legal position, I have to consider the effect of

non-compliance of Section 52A, in the present case. From the evidence of the Investigating Officer, it is seen that the present accused was apprehended at the Airport on the basis of information received. Though at that stage she was given to understand that she has a right to get examined in the presence of Magistrate or Gazetted Officer, where she said 'no'. However, at the search on Airport, nothing was found. Since the suspicion was still there in the mind of the Investigating Officer, she was brought to the hospital. Thus at the Government Hospital, she was brought on information. The argument of the Respondents cannot be accepted that the search or purging of the pellets in the hospital was not on information. If this was the position, it was necessary to examine the accused again in the presence of Magistrate. This Court finds that this is not done by the prosecution.

16. This Court finds that from the evidence of PW-2, Investigating Officer, it is clear that no compliance was followed as required. In view of the prosecution has failed to establish it's case, the accused needs to be acquitted for want of compliance under Section 52A. The benefit has to go to the accused. Hence, the following order :-

ORDER

- (i) The Appeal stands allowed.
- (ii) The judgment and order dated 29th October, 2021 convicting the Appellant is hereby quashed and set aside.
- (iii) The Accused/Appellant stands acquitted of the charges i.e. offence under Section 8(c) r/w 21(c), 23, 28 and 29 of the NDPS Act.
- (iv) Bail bond stands cancelled.
- (v) Fine amount, if any, paid shall be refunded to the accused.

[KISHORE C. SANT, J.]