

A

KALEM TUMBA

v

STATE OF MAHARASHTRA AND ANR.

SEPTEMBER 16, 1999

B

[G.T. NANAVATI AND S.N. PHUKAN, JJ.]

*Narcotic Drugs and Psychotropic Substances Act, 1985—Sections 8 (c), 21, 23, 28 and 50.*

C

*Search and seizure—Requirement of information to accused—That he has a right to be searched in the presence of a gazetted officer or a Magistrate—Held, applicable to search of a person and not to search of a baggage.*

D

*Foreigner arriving in India—Search of his baggage by Officers of Narcotic Department—Recovery of heroin—Admission by accused that seized packet contained heroin—Corroboration of evidence—Held, conviction was valid.*

*Customs Act, 1962 : Sections 108 and 135.*

E

*Accused—Statement recorded under section 108—Admissibility of.*

F

**The appellant, a Zaire National, arrived at the Sahar Airport, Bombay on 22.11.1990. The officers of the Narcotics Department, PWs 1, 2 and 5, searched his baggage and recovered 2 Kgs. heroin from his bag. All the formalities were completed in the presence of two panch witnesses. In his statement under Section 108 of the Customs Act, 1962 the appellant admitted that packets seized from his bag contained heroin. After obtaining the report of the Chemical Analyser the appellant was prosecuted and convicted for offences under Section 21 read with Section 8(c) and Section 23 read with Section 28 and 8(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985. He was also convicted under Section 135(i)(a) read with Section 135(i)(ii) of the Customs Act, 1962. On appeal, the High Court confirmed his conviction but the sentence awarded in default of payment of fine was reduced.**

G

**In appeal to this Court it was contended on behalf of the appellant that**  
H (i) the mandatory requirement of Section 50 of the Narcotic Drugs and

Psychotropic Substances, Act, 1985 was not complied with because before the search by the officers of the Narcotic Control Bureau the appellant was not told that he had a right to be searched in the presence of a gazetted officer or a Magistrate; (ii) no reliance could be placed on the report of Chemical Analyser because it was cryptic.

Dismissing the appeal, the Court

**HELD: 1.** Only when a person of an accused is to be searched then he is required to be informed about his right to be examined in presence of a Gazetted Officer or a Magistrate. If a person is carrying a bag or some other article with him and narcotic drug or the psychotropic substance is found from it, it cannot be said that it was found from his 'person'. [673-B-D]

**2.** The High Court was right in relying upon the evidence of witnesses and the statement recorded under section 108 of the Customs Act and in confirming the conviction of the appellant. The contention that the report of the Chemical Analyser had no evidentiary value is untenable. [673-F-G]

**3.** Apart from the evidence of the officers of the Narcotics Department there is evidence of an employee of the Hotel where the appellant had stayed 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 words 'received copy' written by the appellant. Therefore, the contention that no reliance should have been placed upon the statement signed by the appellant which was recorded under Section 108 of the Customs Act as it was not made by the appellant voluntarily for he did not know what was written in it in English, while he knows only French, cannot be accepted.

[674-A-C]

*State of Punjab v. Baldev Singh*, [1999] 4 SCC 595, relied on.

*State of Punjab v. Jasbir Singh & Ors.*, JT, (1995) 9 SC 308, overruled.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 817 of 1998.

From the Judgment and Order dated 16.1.98 of the Bombay High Court in Crl. A. No. 401 of 1994.

Mrs. M. Qamaruddin for the Appellant.

A S.S. Shinde and G.B. Sathe for the Respondents.

The Judgment of the Court was delivered by

- NANAVATI, J.** The appellant, a Zaire National, arrived at the Sahar Airport (Bombay) by Ethiopian Airlines flight on 22.11.90. Mr. Anil Menon, Intelligence Officer in Narcotic Control Bureau had received information that one Zaire National, Kalema Tumba (the appellant), was to arrive by that flight and was likely to carry sizeable quantity of heroin. That information was reduced into 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, Asst. 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 colour rexine bag with brown strips. It was found locked. 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 packets 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 Kgs. The customs officers thereafter completed all the formalities in 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 charge-sheeted and prosecuted in the Court of the Special Judge (NDPS) for Greater Bombay in NDPS Case No. 84 of 1991 for commission of offences under the NDPS Act and the Customs Act.
- The learned Judge relying upon the evidence of P.W. 1 Mr. Menon, P.W-2 Mr. Rohatgi, P.W. 5- Mr. Dange and the evidence of Panch witness held that the appellant had brought 2 kgs. 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 (i) (a) read with Section 135 (i) (ii) of the Customs Act, 1962.

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.

Ms. M Qamaruddin, learned counsel for the appellant, submitted that the mandatory requirement of Section 50 of the NDPS Act was not complied with and 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 presence of a Gazetted Officer or a Magistrate. This contention deserves to be rejected because only when a person of an accused is to be searched then he is required to be informed about his right to be examined in 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] 4 SCC 595 this Court has held that the requirement of informing the accused about his right under Section 50 comes into existence only when person of the accused is to be searched. The decision of this Court in *State of Punjab v. Jasbir Singh & Ors.*, 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 presence of a Gazetted Officer or a Magistrate, now stands overruled by the decision in *Baldev Singh's* case (supra). If a person is carrying a bag or some other article with him and narcotic drug or the 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 presence of a Gazetted Officer or a Magistrate.

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 heroin. 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.

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 English language. He knows only French language. In his examination under

- A Section 313 Cr.P.C., he had stated that the statement was obtained by force and that he was beaten by the officers of 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 the Jewel Hotel where the appellant had stayed from 16th to 22nd November, 1990, who has proved some of the entries made in English by the appellant
- B himself in the register maintained by the hotel. The panchnama, also contains 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 he had stated that he did not know English. Therefore, this contention
- C also cannot be accepted.

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 rejecting them. In our opinion, the High Court was right in relying upon the evidence of aforesaid witnesses and the statement recorded under Section

D 108 of the Customs Act and in confirming the conviction of the appellant. As we do not find any substance in this appeal, it is dismissed.

T.N.A.

Appeal dismissed.