

Kalem Tumba vs State Of Maharashtra And Anr on 16 September, 1999

Equivalent citations: AIR 2000 SUPREME COURT 402, 1999 AIR SCW 4544, 1999 (6) SCALE 529, 1999 (8) SCC 257, 1999 SCC(CRI) 1422, 1999 (8) ADSC 714, 2000 (1) UJ (SC) 22, 2000 (1) LRI 1164, (2000) 1 KER LT 67, 2000 CALCRILR 52, 1999 ADSC 8 714, (1999) 8 JT 293 (SC), 1999 (10) SRJ 260, (1999) 4 CURCRIR 144, (2000) 2 ALLCRILR 368, (1999) 3 CALLT 55, (1999) 4 CRIMES 352, (1999) 4 RECCRIR 575, (2000) SC CR R 466, (1999) 3 MAH LJ 483, 1999 BOM LR 3 913, 1999 ALLMR(CRI) 2 2017, 2000 CRILR(SC MAH GUJ) 38, 2000 CRILR(SC&MP) 38, (2000) 115 ELT 38, (2000) 1 EASTCRIC 69, (2000) 88 ECR 766, (2000) 1 EFR 34, (2000) 18 OCR 45, (1999) 3 SCJ 384, (1999) 9 SUPREME 179, (1999) 26 ALLCRIR 2398, (1999) 6 SCALE 529, (1999) 37 ALL LR 645, (2000) 1 CHANDCRIC 3, (1999) 4 ALLCRILR 671, (2000) 5 BOM CR 545, (2000) BOM CR 264

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Bench: S.N. Phukan

CASE NO.:

Appeal (crl.) 817 of 1998

PETITIONER:

KALEM TUMBA

RESPONDENT:

STATE OF MAHARASHTRA AND ANR.

DATE OF JUDGMENT: 16/09/1999

BENCH:

G.T. NANAVATI & S.N. PHUKAN

JUDGMENT:

JUDGMENT 1999 Supp(2) SCR 670 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 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 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 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 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.