

**Ashraf Vs. State of Kerala**

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**Court :** Kerala

**Decided On :** Jan-10-2002

**Reported in :** 2002(1)ALT(Cri)417; 2002CriLJ1456

**Judge :** M.R. Hariharan Nair, J.

**Acts :** [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 50

**Appeal No. :** Cri. A. No. 88 of 2001

**Appellant :** Ashraf

**Respondent :** State of Kerala

**Advocate for Def. :** T.K. Latiff, Public Prosecutor

**Advocate for Pet/Ap. :** V.R. Gpou (SB), Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**M.R. Hariharan Nair, J.**

1. The challenge in the appeal is with regard to the conviction entered against the appellant, who was the accused in S.C. No. 198/2000 of the Special Court for the trial of the NDPS Act Cases, Vadakara, for the offence under Section 20(b)(i) of the NDPS Act and the sentence of rigorous imprisonment for 18 months and fine or

Rs. 10,000/- (in default, simple imprisonment for 9 months) imposed therefor.

2. The prosecution case that at about 3.10 p.m. on 23.9.1999 PW.1, who was the Sub Inspector of Koylandy Police Station, in the course of his patrol, found the accused standing near the Koilandy Girls High School Junction; that on seeing the police party, the accused tried to run away; that he was chased and apprehended and that the accused then revealed the contents of the bag held by him as ganja when it was opened on instructions from PW.1, found acceptance by the trial court as it was corroborated by PW.2, who is an independent witness, and also by the contents of Ext.P1 seizure mahazar and Ext.P12 FIR.

3. The appellant was represented by Advocate Sri. V.G. Gopu engaged on State brief. It is stated that the appellant is still undergoing imprisonment as directed in the judgment under appeal.

4. The learned counsel for the appellant submitted that the conviction is unsustainable for more than one reason. According to him, PW.1, is incompetent to effect the search and seizure in so far as he was not the S.H.O. of the Station. It is also pointed out that there is violation of a mandatory provision viz. Section 50 of the NDPS Act.

5. On the arguments advanced in the case, the points that arise for decision are:

(1) Whether the search was by a competent official?

(2) Whether there is sufficient evidence to conclude that the accused was found in possession of 255 grams of ganja as alleged?

(3) Whether there is violation of Section 50 of the NDPS Act entitling the accused to get an acquittal?

(4) Reliefs and costs.

6. Point No. 1:- It is seen from the evidence of PW.1 that as on the date of occurrence viz. 23.9.1999, he was the Sub Inspector of Police, Koyilandy. The argument of the learned counsel for the appellant that in the absence of proof that he was S.H.O. of the Station he was incompetent to make the search is built upon

the decision has been in *Soumini v. State of Kerala* (2001 (2) KLT 546). The said decision has been overruled by a Bench of this Court in the decision in *Sasi v. State of Kerala* (2001)(3) KLT 396). It was further found that all officers of the rank of Sub Inspector of Police are competent to effect search and seizure under Section 42 of the NDPS Act as far as this State is concerned. The defence contention based on *Soumini's case* (2001 (2) KLT 546). has therefore to fail.

7. Point No. 2:- PW. 1 has deposed that on seeing the police party led by him while near Girls High School Junction at about 3.10 p.m. on 23.9.1999, the accused, who was walking along the western side of the road, turned back and ran away. He was chased in the police jeep to some distance and could be apprehended when he fell down. Thereafter, he was questioned and asked about the contents of the bag held by him. The accused did not answer. He was then directed to open the bag and to reveal the contents. There was a black plastic packet inside the bag. On further directions from P.W. 1, the said packet was also opened and it was found that there was dry ganja therein. P.W. 1 thereafter wanted to make a body search to see whether any further contraband was concealed on his body. At that stage the accused was alerted about his right under Section 50 of the NDPS Act and his option asked for. On the negative answer given by the accused, his body was searched by P.W.1 himself; but nothing was found concealed on his body. PW. 1 also about the procedural formalities followed by him in the matter of preparing the samples, seizure mahazar and the like. The above evidence of PW. 1 is sufficiently corroborated by PW. 2, who is an independent witness. According to him, while he was going along with one Sasi towards Koyilandy, he saw that the accused had been kept under detention West of Balakrishna Mandiram and East of the Railway Station. When he went over to that spot, he saw the accused opening the bag held by him and revealing its contents pursuant to the directions from P.W. 1. The Sub Inspector after verifying the contents, stated that it was ganja. P.W. 2 also gave details of the procedural formalities followed by P.W. 1 in the matter of his asking for option of the accused regarding body search and of the negative answer given by the accused. He has also supported P.W. 1 in the matter of evidence relating to preparation of samples and seizure mahazar etc.

8. The learned counsel for the appellant submits that the evidence of the two witnesses is unacceptable in view of the contradiction appearing between their versions in the matter of the time taken for completing the formalities. P.W. 2 stated that it took more than half an hour for the steps to be completed, whereas P.W. 1 stated that it took about 1 1/2 hours. I do not think that this discrepancy is sufficient to reject the evidence of these witnesses. It is pertinent in this regard that even P.W. 2 stated that he was available at the spot until P.W. 1 left the place on completion of the procedural formalities. The sampling, preparation of mahazar etc., is bound to take considerable time and P.W. 2 may not be correct in his statement that the whole procedure was completed in half an hour. Whatever that be, with regard to the material aspects, there is no contradiction and the version of P.W. 1 is fully supported by the contents of contemporaneous document viz., Ext. P1 seizure mahazar and Ext. P2 FIR, both of which have reached the trial court on the very next day of the occurrence. The finding of the trial court that the accused was found in possession of 255 grams of the material which on examination by the expert was found to be genuine ganja as certified in Ext. P7 report has therefore to stand.

9. It is true that the accused was questioned about his option in the matter of search only after the contraband in question had already been revealed by the accused. The appellant has a contention that even before directing the bag to be opened, P.W. 1 was duty bound to alert the accused of his right under Section 50 of the N.D.P.S. Act and to call for his option. There is no merit in this contention. *Jayaraj v. State of Kerala* (2001 (2) KLT 936) is authority for the proposition that the requirements of Section 50 of the NDPS Act would come into play only when the search of a person is carried out and not in the case where it is seized from a bag by him. In the present case, on being asked to open the bag, the accused himself opened the bag and revealed the contents. No body search as such was involved in the process. After finding the contents of the bag, P.W. 1 thought it fit to make a body search as well and at that stage he followed the requirement of Section 50 of the NDPS Act. In the circumstances, I do not think that there is any procedural violation in the matter of the seizure effected in the case.

10. Point Nos. 3 and 4:- In view of my finding on the aforesaid points the conviction entered against the appellant is not liable to be interfered with. The quantum seized is not a small quantity. When the quantum is considered, the sentence imposed, namely, rigorous imprisonment for 18 months and fine of Rs. 10,000/- also does not appear to be excessive.

The appeal, in the circumstances, is found to be without merit and it is dismissed.

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