

**State of Kerala Vs. Williams**

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**Court :** Kerala

**Decided On :** Jan-18-2002

**Reported in :** 2002CriLJ1984; 2002(82)ECC727

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

**Acts :** [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 42, 42(2), 43, 43(2), 50 and 50(1)

**Appeal No. :** Crl. A. No. 897 of 1995

**Appellant :** State of Kerala

**Respondent :** Williams

**Advocate for Def. :** A.R. Usha, (SB)

**Advocate for Pet/Ap. :** L. Alocious Thomas, Public Prosecutor

**Disposition :** Appeal dismissed

**Judgement :**

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

1. The question posed by the State in this State Appeal is whether the acquittal entered by the 1st Additional Sessions Court, Ernakulam, acting as a Special Court for trial of N.D.P.S. cases, acquitting the accused is justified and proper.

2. The allegation was that pursuant to information received at 10.45 a.m. on 11.10.1994, PW.7, who was the Circle Inspector of Police, proceeded to the spot mentioned in the information viz., Njarakkal Market and found the accused there and on search of his body seized 75 grams of ganja.

3. The trial court considered the acceptability of the prosecution case in the light of the evidence of PWs. 1 to 7, Exts. P 1 to P 10, D 1 to D 4 series and MOs 1 to 3 and found that there was no necessity to comply with Section 50 of the N.D.P.S. Act in view of the fact that the information received by PW.7 related to availability of contraband with a person standing in a public place; that in any case there is sufficient evidence for compliance with Section 50 of the N.D.P.S. Act and that in view of the violation of Section 42(1) and 42(2) of the N.D.P.S. Act the trial is vitiated.

4. Learned Additional Public Prosecutor submitted that the findings in the impugned judgment are unsustainable, that there was no question of applying Section 42 to the facts of the present case in so far as the information received by PW. 7 related to availability of contraband in a public place and that in the circumstances the acquittal has to be set aside.

5. According to Smt. A.R. Usha, State, Brief, there is no justification for upsetting the decision of the trial court in so far as there is violation of Section 50 of the N.D.P.S. Act and no useful purpose will be served even if the matter is remitted.

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

1) Whether there was violation of Section 42 of the N.D.P.S. Act?

2) Whether there is proper compliance with the requirements of Section 50 of the N.D.P.S. Act? And

3) Whether the acquittal has to be reversed?

7. Point No. 1: PW.7 has deposed that he received information from PW. 5 that a person by name Williams had been detained with ganja near Njarakkal market and he therefore went over to the spot, found the accused and in the body search that

ensued ganja weighing 75 grams was recovered. The information obviously related to availability of contraband in public place and in view of the decision in Abdul Azeez v. State of Kerala (2001 (1) KLT 805), there is no need for complying with Section 42(2) of the N.D.P.S. Act in such a case. While discussing Point No. 1, the trial court has found that the search was conducted in a public place coming under Section 43 and not in a private place coming under Section 42. In view of the said finding and in view of the decision in Abdul Azeez's case it necessarily follows that the search and seizure effected in this case are not vitiated by non-compliance with Section 42(2) of the N.D.P.S. Act.

8. Point No. 2: PW. 7 deposed before Court that after the accused was apprehended at about 10.45 a.m. on 11.10.1994 he was asked whether presence of any Gazetted Officer was required for the purpose of body search and that the accused answered that such presence was not necessary. I have perused Ext. P 1 seizure mahazar as also Ext. P 10 F.I.R. both of which have reached the trial court on the very next day after the occurrence. There is no mention in either of these documents to the effect that any option was given to the accused to have the search in the presence of a Gazetted Officer or Magistrate. In such circumstances it has to be seen whether there is atleast corroboration forthcoming from the oral evidence of any other witness with regard to compliance with Section 50. PW. 5 is the Head Constable who had detained the accused and passed on the information to PW. 7. He deposed that after the Circle Inspector arrived the accused was questioned and PW. 7 asked whether there was any objection to a body search by PW. 7 himself or whether the accused wanted the presence of a Gazetted Officer and that the accused replied that PW. 7 himself could make the search.

9. As already mentioned, such a version is not there is any of the contemporaneous documents. Further, even the deposition of PW. 5 as above is an embellishment in so far as he admitted that he had not stated about the questioning under Section 50 when he was questioned under Section 161 of the Cr.P.C.

10. PW. 2 is the other independent witness examined to prove the prosecution case. He mentioned that PW. 7 had mentioned about the prospect of taking the

accused to some officer. The said statement is vague and does not satisfy the requirements of Section 50 of the Act. Further the said version is also an embellishment. His C.D. statement does not contain any such statement. The other witness examined in the matter is PW. 1. He was the person who weighed the ganja allegedly seized in the case. In Chief examination he did not mention about any option being given to the accused before his body was searched. In cross examination he made the position further clear that the search was immediately after the Circle Inspector reached the spot. In these circumstances there is no sufficient evidence to conclude that there was compliance with Section 50 of the N.D.P.S. Act.

11. The trial court has found that the search is proper under Point No. 1. But that was based on the decision of this Court in *Muhammed v. State of Kerala* (1995 (1) KLT 24), which takes the view that when the search is under Section 43 of the Act, compliance with Section 50 was not mandatory. I have perused the said decision and what is evident is that the said finding was based on certain observations contained in the decision in *State of Punjab v. Balbir Singh* (AIR 1994 SC 1872). However, the need for strict compliance with Section 50 of the N.D.P.S. Act arose for consideration in *State of Punjab v. Baldev Singh* (1999) 6 SCC 172. It was found that personal search in N.D.P.S. Act cases is a critical means of obtaining evidence of possession and it is therefore necessary that the safeguard provided in Section 50 are observed scrupulously; that the duty to inform the suspect of his right to be searched in the presence of a Gazetted Officer or a Magistrate is a necessary sequence for enabling the person concerned to exercise that right under Section 50 and that the investigating agency must follow the procedure envisaged by the statute scrupulously. The failure to do so will be viewed by the higher authority seriously. In para 57 of the judgment it was categorically mentioned that when an empowered officer or a duly authorized officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under Section 50(1) of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search and that if the requirement is violated, it would render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law where the conviction is recorded only on the basis of possession of the illicit article

recovered from him through search conducted in violation of the provisions of Section 50. In view of the said position the dictum in Muhammed's case (supra) is no more good law and the finding of the trial court that there is no violation of Section 50 of the Act only because the search was under Section 43(2) of the Act cannot be accepted as correct. Section 50 has to be followed even in case of body search under Section 43(2) of the Act.

12. Point No. 3: The trial court in its wisdom has found the accused not guilty and acquitted. For reversing that decision strong evidence indicating a fair chance of conviction has to be available. As already mentioned, in this case the evidence available with regard to compliance with Section 50 of the N.D.P.S. Act is totally unsatisfactory. remand of the case would only lead to unnecessary waste of time for all concerned.

In the circumstances the appeal is found to be without merit and is dismissed.

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