

State Vs. Pappachan

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Court : Kerala

Decided On : Jul-18-1958

Reported in : AIR1959Ker98; 1959CriLJ463

Judge : K. Sankaran and; N. Varadaraja Iyengar, JJ.

Acts : Madras Prohibition Act, 1937 - Sections 34; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 103

Appeal No. : Criminal Appeal No. 4 of 1958

Appellant : State

Respondent : Pappachan

Advocate for Def. : P. Govinda Menon (C), Adv.

Advocate for Pet/Ap. : Public Prosecutor

Disposition : Appeal dismissed

Judgement :

K. Sankaran, J.

1. The State has preferred this appeal against the acquittal of the accused in C. C. No. 1303/1957 on the file of the Sub-Magistrate's court at Kozhikode. The charge against the accused was that he was in illegal possession of about 3/4 lb. of ganja.

On getting information that the accused was in possession of such, a contraband article, Pw. 1, the Sub Inspector of Police at Kozhikode, conducted a search of the-house of the accused where the article was alleged to have been kept, at about 6.15 p.m. on 10-8-1957 and he recovered the article which has been proved and marked as M. O. 2 series of packets. The box in which these packets were kept was also recovered and the same has been marked as M. O. 1. The search list prepared at the time of recovery of M. Os. 1 and 2 has been marked as Ext. P2. Pws. 1 and 2 are the witnesses who have given evidence in support of the search evidenced by Ext. P2. Charge was laid against the accused under Section 4(1)(a) of the Madras Prohibition Act of 1937. On a consideration of the evidence adduced by the prosecution, the learned Sub-Magistrate came to the conclusion that the necessary ingredients of the offence under Section 4 (1) (a) have not been conclusively proved against the accused. The correctness of this conclusion is challenged in this appeal.

2. Unauthorised or illegal possession of intoxicating drugs is an offence made punishable under Section 4 (1) (a) of the Prohibition Act. It is not disputed that the ganja recovered in this case as per the search list Ext. P2 is an intoxicating drug. The question is whether the prosecution has satisfactorily proved that this ganja was in the possession of the accused and that the same was recovered from his possession or custody.

At the outset, we have to point out that the search evidenced by Ext. P2 was not conducted in the manner prescribed by the Act. Section 34 of the Prohibition Act states that

'All searches under the provisions of this Act: shall be made in accordance with the provisions of the Code of Civil Procedure'.

The directions as to the manner in which a house search is to be conducted are contained in Section 103 of that Code, Sub-section (1) of that section states before making a search the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate, to attend and witness the search.

Sub-section (2) states that the search shall be; made in the presence of these witnesses and a list of all things seized in the course of such a search and of the places in which they are respectively found shall be prepared by such officer and signed by such witnesses. In the present case the search list Ext. P2 shows that the search was conducted in the presence of two independent witnesses who are also attestors to the search list.

They are Kandan Chettiar and Gopinathan of whom Gopinathan alone has been examined as witness for the prosecution. He is Pw. 2. It is not known why Kandan Chettiar was not examined as a witness. In view of the non-examination of Kandan Chettiar it is not possible to know whether he is a respectable inhabitant of the locality in which the house of search is situate. All that has come out from the evidence of Pw. 1 is that the two attesting witnesses were procured by the constables who had accompanied Pw. 1 when he went to conduct the search.

The evidence of Pw, 2 has amply demonstrated that he can never be said to be an inhabitant of the locality or a man of respectability. On his own showing, he is an absolute pauper who seeks his livelihood by selling milk to certain shops in the cantonment area at Kozhikode. Even the story that he is a supplier of milk to the shops is open to serious doubt. He has no idea about his alleged customers and he has not been able to specify as to which community or religion these customers belong.

In fact it is clear from his evidence that he was casually met by the constables and was taken with them to the place of search. It has come out from his evidence that he lives more than 3 miles away from the place of search and that he had no occasion to go to this particular locality. He has no idea at all of the situation of the house of search or of its surroundings. The learned Sub-Magistrate was therefore right in discarding the evidence of this witness as thoroughly worthless and unreliable.

The result is that the search evidenced by Ext. P2 stands unsupported by evidence from two or more respectable inhabitants of the locality as required by Section 103 of the Code of Civil Procedure. It cannot be said that there was any difficulty in securing the attendance of such respectable inhabitants to witness the

search. Pw. 1 himself has admitted that the place of search is situated in a crowded locality and that there are any number of shops and houses within a few yards from the house of search. No satisfactory explanation is offered why a few respectable inhabitants from the neighbourhood were not called in to witness the search and to attest the list prepared as a consequence of the search.

3. It was urged on behalf of the State that even in the absence of the evidence of respectable neighbours to prove the search, the evidence of Pw. 1 who conducted the search, can be accepted as true and a conviction entered against the accused solely on the strength of such evidence. We are unable to agree. The evidence of the prosecutor may or may not be reliable. All the same, it cannot be denied that it will be extremely unsafe and risky to convict an accused solely on the strength of the evidence of the prosecutor. This is particularly so in respect of offences under the Prohibition Act.

Under this Act large powers have been conferred on the Prohibition Officers in the matter of conducting house searches and also in the matter of arresting persons found to be contravening the provisions of the Act. The legislature appears to have been conscious of the possible dangers that may follow from a misuse of these powers and that is obviously the reason why a special section like Section 34 was inserted in the Act to regulate the manner in which searches under the Act have to be conducted.

The section requires that all searches under the Act shall be made in accordance with the provisions of the Code of Civil Procedure and, as already stated, every search contemplated by that section should be conducted in the presence of two or more respectable persons of the locality in which the search is to be conducted. As to the respectability of the attesting witnesses, opinions may differ. Even, if a margin is allowed in respect of that matter, the necessity of procuring the attendance of neighbours to the place of search to witness the search and to attest the search list, cannot be dispensed with. The prosecution cannot disregard this very necessary and wholesome provision and ask the court to accept the prosecutor's evidence alone as sufficient proof of the truth of the search.

4. In the present case the evidence of Pw. 2 has been discarded as absolutely unreliable. There remains only the evidence of Pw. 1, the prosecutor himself, & this evidence is hardly sufficient to warrant a conviction of the accused, The evidence of Pw. 1 is not even sufficient to establish the fact that the ganja recovered in this case was really in the possession of the accused. The recovery is seen to have been made from a house named Kottaparamba in Kassaba amsom at Kozhikode. There is no evidence in this case to show that this house belonged to the accused on the relevant date. Pw. 1 has not been able to assert that the house belongs to the accused or that the accused was in occupation of that house as a tenant of it.

Regarding this matter the prosecution has not adduced any independent evidence also. The mere fact that the contraband article was recovered from Kottaparamba house in the presence of the accused, cannot lead to the conclusion that the article was really in the possession of the accused and was recovered from him. Thus in any view of the case the evidence on record is not sufficient to warrant a conviction of the accused. The learned Magistrate's order acquitting him does not therefore call for any interference.

5. The result is that the appeal is dismissed.