

Abdulla Vs. State of Kerala

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Court : Kerala

Decided On : Oct-20-2000

Reported in : 2001(1)ALT(Cri)155

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

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 41, 42, 42(1)and (2), 43and 50

Appeal No. : C.R.A.No. 401 of 1997

Appellant : Abdulla

Respondent : State of Kerala

Advocate for Def. : Noble Mathew, Public Prosecutor

Advocate for Pet/Ap. : C.K. Abdul Rehim, Adv.

Judgement :

ORDER

M.R. Hariharan Nair, J.

1. The challenge herein is with regard to the conviction entered against the appellant, who was the accused in S.C. 34/97 of the Sessions Court which is the special court for trial of N.D.P.S. cases, Manjeri for the offence punishable under

S. 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act on the allegation that the appellant was found in possession of 35 grams of ganja while sitting near the RMS Office at the Railway Platform, Tirur on 11.12.1996.

2. Charge was laid after due investigation and upon trial the accused was found guilty of the offence under S. 20(b)(i) of the N.D.P.S. Act and sentenced on 16.7.1997 to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs. 10,000/- with a default sentence of simple imprisonment for six months.

3. Mr. C.K. Abdul Rehim presented the case of the appellant before me as State Brief. The learned Public Prosecutor also was heard.

4. During hearing, the learned counsel for the appellant submitted that the accused is entitled to get an acquittal, as the seizure was done in violation of the mandatory provisions contained in Ss. 42(2) and 50 of the N.D.P.S. Act. It is pointed out that this is a case where PW-1, who is the Police Officer, admittedly had previous information about the availability of the accused at the particular spot and that there was failure on his part to record the same and to forward a copy thereof to his official superior. It is also argued that there is nothing to show that the accused was made aware of his rights to be searched in the presence of a Gazetted Officer or Magistrate as required under S. 50 of the NDPS Act and that he was also not asked about his option in the matter. In this regard, the absence of any mention with regard to the aforesaid compliance in the seizure mahazar prepared in the case is highlighted. Case law was relied on to contend that unless there is mention in the contemporaneous record regarding details of compliance with S. 50, oral evidence of the seizing official would be insufficient to show that there was compliance with S. 50 of the Act.

5. The points that arise for decision are:-

1) Whether there was failure of compliance with S. 42(2) of the Act resulting in the seizure and trial being vitiated?

2) Whether the mandatory provisions in S. 50 have been violated?

3) Whether the conviction and sentence entered against the accused warrant any interference?

6. Point No. 1:- It was stated by PW-1 in his evidence that while on patrol duty on the night of 11.12.1996 at about 2.30 a.m. he received credible information regarding the fact that a person in possession of ganja had reached Tirur Railway Station and that he was available near the R.M.S. Office. It is also his case that he conveyed the said information to the Dy.S.P., Tirur and thereafter proceeded to the particular spot and found the accused sitting some distance away from the R.M.S. Office towards the south and thereupon he proceeded with the body search in due compliance with the provisions of law and seized the contraband in question after complying with all legal requirements.

7. In cross-examination PW-1 stated that it was over phone that he informed the Dy.S.P. about the information that he received about the offence. He also stated that the telephone call was made from the Station Master's room of the Tirur Railway Station. He had no case that the information received was recorded immediately or that a copy of the same was sent over to the Dy.S.P. The question arises whether the said admission can affect the seizure made in the case. S. 42(2) of the N.D.P.S. Act relied on by the appellant provides that where an officer takes down any information in writing under sub-s. (1) of S. 42 or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. *State of Punjab v. Balbir Singh* (AIR 1994 SC 1872) and *State of Punjab v. Baldev Singh* (AIR 1999 SC 2378) are authorities for the proposition that the requirements in S. 42(2) of the Act are to be scrupulously complied with and that violation thereof would vitiate the seizure and trial. But then the question is whether S. 42(1) of the Act itself is applicable to the facts of the present case.

8. S. 42(1) of the N.D.P.S. Act provides that the empowered officer of the departments mentioned therein including Police department, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed or any

document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset,-

(a) enter into and search any such building, conveyance or place etc.

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance;

9. It is therefore obvious that the section applies only in cases where information and seizure relate to contraband kept or concealed in any building, conveyance or enclosed place and not to possession at a public place. It is S. 43 of the Act which relates to power of seizure and arrest in public places. It is to be noted that unlike in S. 42 there is no requirement in S. 43 for recording the information received by the official relating to the offence or forwarding copy thereof to the official superior.

10. As far as the case in hand is concerned, it is obvious from the evidence of PW-1 as also from Ext. P1 seizure mahazar that the accused was sitting in front of the R.M.S. Office; some distance away therefrom. The particular portion was part of the railway platform and as such a public place.

11. *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* (AIR 2000 SC 821) was a case decided by a Bench of 3 Honourable Judges of the Supreme Court. That was a case where for non-compliance with the requirements of S. 42 the accused was acquitted. But the facts of the case were different. There the information that the seizing official received mentioned that the accused was trying to transport charas in an auto-rickshaw bearing registration No. GTH 3003. As such the information clearly fell under S. 42(1) being of keeping or concealment in conveyance. In the

instant case, the information did not relate to the possession of the contraband by a person in any building, conveyance or enclosed place and as such it cannot be said that PW-1 was bound to record the information and to send copy thereof to the Dy. S.P. before he proceeded to detain and search the appellant.

12. No later authority has been placed before me which deviates from the declaration of law contained in the larger bench decision aforementioned which provides that S. 42(2) would apply only to a case where the seizure is not from a public place, but from building, conveyance or enclosed place. In the circumstances, I do not find any merit in the contention of the appellant that the failure of PW-1 to record the information with regard to the availability of the appellant in a public place and also in not forwarding the copy of such information to Dy.S.P. vitiates the seizure made in the case.

13. Point No. 2:- S. 50 of the N.D.P.S. Act provides that when any officer duly authorised under S. 42 is about to search any person under the provisions of S. 41, S. 42 or S. 43, he shall, if such person so requires, take such person without unnecessary delay, to the nearest Gazetted Officer of any of the departments mentioned in S. 42 or to the nearest Magistrate. The scope and ambit of the said section came up for consideration in Balbir Singh's and Baldev Singh's cases afore-mentioned. It was found that S. 50 is a provision that is to be complied with scrupulously and that the violation of the provision would prejudice the accused entitling him to get an acquittal. As is clear from these decisions the requirements in this regard are firstly that the suspect should be informed of his right to be searched in the presence of a Gazetted Officer or Magistrate and secondly make the search accordingly if he opts for such search. In the instant case, PW-1 has deposed that on approaching the accused, he was told that his body was going to be searched; that he had a right to be searched in the presence of a Gazetted Officer and then asked whether he was desirous of having the presence of any such Gazetted Officer. The answer of the accused was in the negative and it was thereupon that PW-1 proceeded to search his body and on such search he found a packet kept at the waist fold of his dhoti, which on examination was found to be ganja. In cross-examination he reiterated the said version and there was no suggestion that no such questioning took place. It is true that there is no

corroboration forthcoming to the said version from any oral evidence of witnesses. It is also true that in the seizure mahazar prepared at 2.40 a.m. on the night of 11.12.1996 there are no details given with regard to the conversation between PW-1 and the accused as above. Nevertheless, Ext. P2 F.I.R. prepared at 3.35 am on the same night contains recital of the fact that PW-1 had informed the accused of his right to be searched in the presence of a Gazetted Officer, if he so desired and asked him of his option in the matter and that he then answered in the negative. The question arises whether, in the circumstances, the version of PW-1 can be believed in the matter and whether it meet the requirements of law.

14. *Pon Adithan v. Deputy Director, Narcotics Control Bureau, Madras* (AIR 1999 SC 2355) deals with a case where 150 gms. of heroine was seized from the body of a person while he was at a public place. The evidence of the seizing officer was corroborated by a confession statement of the accused alone. It was held on the facts of the case that this was sufficient to accept the version of PW-1 with regard to compliance with S. 50 of the Act. While coming to that conclusion the Court had also considered an earlier finding in *T.P. Razak v. State of Kerala* (1996 SCC (Cri.) 57) where a contrary view had been taken on the facts of that case. That was a case where search of the body revealed a matchbox containing small packets. The version of PW-4, the seizing official with regard to compliance with S. 50 did not find a place in the F.I.R. or in the seizure mahazar. PW-1, who was the other witness examined in the case, also had not supported PW-4 with regard to his version regarding compliance of S. 50.

15. What is clear from a reading of the said two decisions is that no hard and fast rule can be laid down in such matters as regards the extent of corroboration required and everything depends upon the facts and circumstances of each case. If the evidence of the seizing official inspires confidence in Court and finds some corroboration from oral or documentary evidence, the Court would be justified in finding that there was sufficient compliance with the requirements of S. 50 though the mere ipse dixit of the searching official is not sufficient in such matters as clear from *Koluttumotil Razak v. State of Kerala* (2000) 4 SCC 465.

16. Balbir Singh's case is also authority for the proposition that the information regarding rights need not be communicated in writing to the accused and that communication in the presence of reliable witness is sufficient. The fact that the information was conveyed has, however, to be proved before the court before trial. In the instant case, as already mentioned PW-1 had mentioned only of bringing a Gazetted Officer and not of a Magistrate as prospective witness to the search. The question arises whether this lapse is crucial. This Court had occasion to consider the question in *Rasheed v. State of Kerala* (1999 (3) KLT 133). It was found that failure of searching officer to inform the suspect that he is entitled to choose between the two alternatives that is. Gazetted Officer or Magistrate to witness the search is not crucial and even if only one of the two is mentioned to him the search and trial would not be vitiated. In the instant case, as already mentioned, the version of PW-1 finds due corroboration in the F.I.R. prepared soon after the search and arrest. The F.I.R. had reached the Court concerned on the very same day. Further as already mentioned, no question was put to PW-1 that an offer was not given by him before the search was effected.

17. In the circumstances, I am of the view that the contents of the F.I.R. renders adequate corroboration to the testimony of PW-1 in the above matter and that his version that there was compliance with S. 50 of the Act can be safely accepted.

18. The learned counsel for the appellant relied on certain decisions of other High Courts taking a contrary view on the question of corroboration of the evidence of searching official. However, in view of the decisions of the Supreme Court and that of the Kerala High Court as aforementioned, I do not find my way to accept the principles in those decisions as correct.

19. Point No. 3- On a perusal of the evidence adduced in the case, I find that there is reliance evidence to conclude that the appellant was in fact found in possession of 35 grams of ganja as alleged by the prosecution. I find no justification to modify the conviction entered in the case.

20. The maximum punishment for the offence under S. 20(b)(i) of the N.D.P.S. Act is rigorous imprisonment for a term which may extend to 5 years and fine. As far as the quantum of ganja seized in the case is concerned, I feel that the

sentence imposed in the case is excessive. The appellant has already been suffering the sentence imposed in the case from 16.7.1997 onwards. When these aspects are taken into account, I feel that a sentence of Rigorous Imprisonment for two years will be sufficient to satisfy the ends of justice. The sentence imposed in the case is hence modified and reduced from 4 years to a period of two years. There will however be no change in the default sentence, viz. simple imprisonment for six months. If the appellant has already suffered imprisonment as above including periods of set off, he will be set at liberty forthwith.

With this modification in the sentence the appeal is disposed of.

21. Forward copy of this judgment to the trial court so that release warrant can be issued with utmost expedition.

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