

**Palayan Vs. State of Kerala**

**Palayan Vs. State of Kerala**

**SooperKanoon Citation :** [sooperkanoon.com/720737](http://sooperkanoon.com/720737)

**Court :** Kerala

**Decided On :** Jan-09-2002

**Reported in :** 2002CriLJ4454; 2002(83)ECC869

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

**Acts :** Narcotic Drugs and Phychotropic Substances Act, 1985 - Sections 41, 42(1) 42(2), 43, 50, 52, 52(2), 52(3), 55 and 57

**Appeal No. :** Crl. A. No. 691 of 2000

**Appellant :** Palayan

**Respondent :** State of Kerala

**Advocate for Def. :** P. Alocious Thomas, Public Prosecutor

**Advocate for Pet/Ap. :** Alexander Skaria,; Abraham Chalamadom and; Grashious Kur

**Judgement :**

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

1. The appellant was undergoing sentence imposed in S.C. 73/99 by the Special Court for trial for N.D.P.S. cases, Thodupuzha at the time when this appeal was filed challenging the conviction under S. 20(b)(i) of the N.D.P.S. Act and the

sentence of Rigorous Imprisonment for three years and fine Rs. 10,000/- (in default R.I. for one year) imposed therefor. He was subsequently released on bail pursuant to the order of this Court passed in Crl.A. 318/01 on 8.2.2001.

2. The learned counsel for the appellant submitted that there is gross violation of the provisions contained in Sections 42(2), 50, 52, 55 and 57 of the N.D.P.S. Act and that the accused, in the circumstances, is entitled to get an acquittal. It was also pointed out by him that there was no sufficient evidence to find that the accused was in possession of 2 kg. of ganja carried in a big shopper bag while he was standing at the veranda of AVM Anna Malai Vessels shop at Munnar at about 11 p.m. on 23.11.97 as alleged.

3. On the arguments advanced in this case the points that arise for decision are:

(i) whether there is violation of Section 42(2) of the N.D.P.S. Act entitling the accused to get acquittal? (ii) Whether there is violation of Section 50 of the N.D.P.S. Act entitling acquittal? (iii) Whether the alleged violation of Sections 52, 55 and 57 are sufficient to grant the acquittal to the accused?

Point (i): PW3 who was the Head Constable working in the Special Branch of the Police Department at Idukki deposed that he got information that a person belonging to Cape Comorin had arrived from a place called Koviloor on 23.11.97 and that he was roaming about in Munnar town area with ganja in his hand. He pursued the matter and got specific information that the person was standing in front of 'AVM Anna Malai', which was a shop dealing in vessels at Munnar town. He conveyed the information to PW4 who was the Sub Inspector of Munnar Police Station.

4. PW4 has deposed confirming the receipt of the said information and according to him he recorded the information in the G.D. of the station and sent copy to the Circle Inspector of Police and thereafter reached the premises of the aforesaid vessel shop; found the accused there, ascertained his details and on questioning him the accused admitted that there was ganja in the big shopper bag held by him. PW4 therefore told the accused that he had a right to be searched in the presence of a gazetted officer and also asked whether he needed such presence. The

accused replied that bringing of a gazetted officer was unnecessary and thereupon PW4 himself made the search of the bag and the body of the accused. It was then that 2 kg of ganja was found and seized from the bag. After weighing the same, samples were prepared and after preparation of the seizure mahazar which was attested by other witnesses the contraband and arrested accused were removed to the police station and steps proceeded with.

5. It is pointed out by the learned counsel for the appellant that there was failure on the part of PW4 to strictly comply with the requirements of Section 42(2) in so far as the information and the search were both after sun set and before sun rise. According to him merely forwarding copy of the FIR to the superior officer was insufficient and under Section 42(2) PW4 was bounded to forward a copy of the information recorded by him as received from PW3 forthwith and in the absence of such evidence the accused is entitled to an acquittal.

6. Even though a number of authorities were cited in support of the above contention, I think would be sufficient if the decision in Abdul Azeez v. State of Kerala (2001 (1) KLT 805) is referred to. The reason is that all the other decisions mentioned by the learned counsel for the appellant have been considered by me in the said decision which was upheld by the Apex Court notwithstanding challenge in SLP (Cri.) No. 3120/01. The finding in the aforesaid decision is that Section 42(2) would be applicable only in cases where the information received by the officer relate to availability of the contraband in a building, conveyance or enclosed place and that if the information relates to availability of contraband in a place other than these three, say, in a public place, Section 42(2) would not be applicable.

7. What is clear from the evidence of PW3 and PW4 is that the information related to availability of a person carrying in front of a vessel shop in Munnar. The explanation under Section 43 clearly shows that a hotel, shop or other place intended for use by or accessible by the public shall be deemed to be a 'public place'. The portion in front of a shop cannot come within the scope of the words 'building' or 'enclosed place'. Since the information did not relate to availability of contraband in one of the three places mentioned in Section 42(1) there was no

need for PW4 to comply with the requirements of reducing the information to writing other than in the form of GD entry. In the circumstances, the alleged violation of Section 42(2) does not entitle the accused to get an acquittal.

Point (ii) : As already mentioned, evidence of PW4 is to the effect that he made the accused aware of his right to be searched in the presence of a gazetted officer and that the accused opted against such search when the choice was given to him. What is recorded in the contemporaneous documents viz., Ext. P1 seizure Mahazar and Ext. P6 FIR, both of which have reached the trial Judge on the very next day was that the accused was asked about his option to be searched in the presence of a gazetted officer. There was no reference to the fact that any option was given for search in the presence of a Magistrate. According to the learned counsel for the appellant this is fatal and amounts to failure to strictly comply with the requirements of Section 50.

8. During hearing counsel for the appellant placed reliance on the decision in *K. Mohanan v. State of Kerala* (2000) (10) SCC 222) wherein the finding is that where an accused is merely asked whether he requires to be searched in the presence of a gazetted officer or a Magistrate, it cannot be treated as communicating to him that he has a right under law to be searched so and that hence there will be violation of Section 50 of the N.D.P.S. Act in such a case. The said decision was rendered by a Bench of two judges as against which there is a Bench of three judges in *Joseph Fernandez v. State of Goa* (2000 (1) SCC 707). Therein the narration 'if you wish you may be searched in the presence of a gazetted officer or a Magistrate' was found to be sufficient compliance of the requirements of Section 50. *N.S. Giri v. Corporation of City of Mangalore and Ors.* ((1999) 4 SCC 697) is authority for the proposition that when different Benches of the Supreme Court have expressed different opinions on a point the proper course for a Subordinate Court or authority is to follow the opinion of the larger of those benches. '*Joseph Fernandez*' has therefore to take precedence over '*K. Mohanan*'. Of course in the present case the reference in the question put to the accused was only to gazetted officer and not to the Magistrate. The question then arises whether the mention of only one of the two opinions violates the law. This aspect is covered by the Bench decision of this Court in *Marakkar v. State of Kerala* (2001

(3) KLT 539). It was found that in the absence of evidence of prejudice the failure to mention one of the options by the police officer would not tantamount to violation of Section 50.

9. In the present case the evidence of PW4 and the contents of the contemporaneous mahazar show that option for search in the presence of gazetted officer was in fact given. Hence there is no scope for acquittal on the ground of violation of Section 50.

Point (iii): Though serious arguments were advanced by the learned counsel for the appellant based on requirements of Sections 52 and 55, I do not think that these sections have much relevance in the present case. First of all these sections are not mandatory in character. That apart, unlike the case of Gurbax Singh v. State of Haryana (2001 (3) SCC 28) relied on by the Appellant the seizure in the present case is made by the officer in charge of the Police Station himself directly. On arrest the accused was removed to the police station and after completion of the procedural formalities he was produced before the trial judge without delay, alongwith all records. Unlike the deficiency pointed out in the above case, in the present case the sealing was with the official seal of the Sub Inspector himself and the witness was not allowed possession of the seal. It is clear from Section 52(3) of the Act that the Section is applicable only to cases where the arrest and seizure are by empowered officers other than the officer in charge of the Police Station. As far as arrest and seizure by the officer in charge of the Police Station is concerned it is sufficient if the accused and the seized contraband are produced before the Magistrate as directed in Section 52(2) of the Act. In this regard the following observation of the Apex Court in Karnail Singh v. State of Rajasthan (2000 (7) SCC 632 (para 10) are relevant.

'With the application of Section 51 read with Sections 52 and 53 of the Act, the officer required to affix the seal etc., under Section 55 of the Act would be 'the officer-incharge of the nearest Police Station' as distinguishable from an officer-incharge of police Station empowered under Section 53 of the Act. If resort is had to the procedure prescribed under sub-section (3)(a) of Section 52, the applicability of Section 55 of the Act would be attracted but if the arrested person and the

seized articles are forwarded under Clause (b) of Sub-section (3) of Section 53 of the Act, the compliance of Section 55 cannot be insisted upon. The distinction between the officer-in-charge of the nearest Police Station and the officer empowered under Section 53 of the Act is distinct and clear. The distinction is apparently based a reasonable object, because as in case the person and the seized articles are referred to the 'officer-in-charge of the nearest police station', a distinct agency, than the 'officers contemplated under Section 53 of the Act, comes into the picture which requires the taking of sufficient safeguards to protect the seized property in the interests of the arrested persons. The distinction is also evident from Section 52-A(2) of the Act. Keeping in view the multifarious activities and the duties cast upon the officer in-charge of the Police Station under the Code of Criminal Procedure and he being apparently busy with the duties under the Code, the officers mentioned in Section 53 of the Act have been mandated to take action for disposal of seized narcotic drugs and psychotropic substances by filing application which, when filed, has to be allowed by the Magistrate as soon as may be'.

10. In these circumstances, I do not think that there is any violation of Section 52 or 55. In any case these are provisions of directory nature and can justify acquittal only if prejudice is caused. Such evidence is absent here.

11. Section 57 of the N.D.P.S. Act directs that whenever any person makes any arrest or seizure under the Act he shall, within 48 hours after such arrest or seizure, make a full report of the particulars of such arrest or seizure to his immediate superior officer. In the present case PW4 has stated that he passed on the information to his official superior. Even assuming that there has been no strict compliance with the requirements under Section 57, that is a ground for acquittal, the reason being that Section 57 is only directory and there is no evidence to show that the Accused was prejudiced by the failure to comply with the Section. On a perusal of the evidence in this case I am satisfied that there is sufficient corroboration to the evidence of PW4 forthcoming from PW3. PW1 and PW2, though they turned hostile, have admitted their signatures in the seizure mahazar. The facts recorded in contemporaneous documents which have reached the trial Judge on the very next day also provides corroboration to the evidence of PWs 3

and 4. Ext. P9 chemical analysis report shows that the sample seized from the accused was genuine ganja. In the circumstances the conviction entered against the accused for the offence under Section 20(b)(i) of the Act deserves to be confirmed. I do so.

12. As regards sentence it is pointed out, based on the provisions of the Act as they stand amended as per Act IX of 2001, that the sentence deserves to be reduced as the quantum seized is not commercial quantity. The said Section 41 reads as follows:-

Application of this Act to pending cases:-

(1) Notwithstanding anything contained in Sub-section (2) of Section 1, all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the Principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence: Provided that nothing in this section shall apply to cases pending in appeal.

(2) For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this Act has not come into force.

It is clear from the Section that the reduction in sentence would be applicable only to cases which are pending trial and not to a case pending before appellate court in appeal as it happens here. Here sentence to be passed in this case is strictly to be in accordance with the provisions contained in the Act before it was amended as per Act IX of 2001. The ganja seized in the case is not a small quantity. The maximum sentence for the offence under Section 20(b)(i) is imprisonment which may extend upto a period of 5 years and fine which may extend to Rs. 50,000/-. The trial court has chosen to give imprisonment for a period of three years and fine of Rs. 120,000/-. Considering the circumstances of the case I am of the view that

the accused is entitled to some reduction in the substantive term. The period of sentence is accordingly reduced from three years to two years. There will be no change in the fine amount or in the alternative term.

13. With the said reduction in sentence the appeal is disposed of. The trial court will enforce the punishment imposed as above.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**