

Rajamma Vs. State of Kerala

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Court : Kerala

Decided On : Jan-19-2001

Reported in : 2001CriLJ1572

Judge : M.R. Hariharan Nair, J.

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

Appeal No. : Crl. A. No. 889 of 1998

Appellant : Rajamma

Respondent : State of Kerala

Advocate for Def. : C.M. Suresh Babu, Public Prosecutor

Advocate for Pet/Ap. : P. Vijayabhanu, Adv.

Disposition : Appeal allowed

Judgement :

M.R. Hariharan Nair, J.

1. The appellants are accused Nos. 2 and 3 in S.C. No. 111/96 tried by the Additional Special Court for trial of NDPS Act Cases, Kottayam.

2. The prosecution alleged that based on prior information. House No. 431 in Ward No. 16 of Kottayam Municipality, which is within the area of Muttambalam Village, owned by the 3rd accused and occupied by accused Nos. 1 and 2 as building tenants was searched at about 4.30 p.m. on 10.10.1996 and 135 grams of dry ganja made into 201 small packets concealed inside a wooden box which was kept near the northern wooden screen of the southern room of the said house was seized.

3. The learned Special Judge on appraisal of the evidence adduced by PWs. 1 to 5, DW.1 and Exts. P1 to P7 and with reference to M.Os. 1 to 17 series, found that though the attempt on the part of the accused to show that the first accused was residing in the house of DW. 1 did not inspire confidence of the court; there was nothing to show that the 1st accused was residing with accused Nos. 2 and 3 in the particular house either; that the evidence of PW. 1 that the accused Nos. 2 and 3 were residing in one and the same house is beyond reproach; that there is also evidence of other witnesses that at the time of search, accused Nos. 2 and 3 were present in the southern room of the said house and that there is thus uncontroverted evidence to the effect that the contraband was seized from the southern room of the said house which was in the possession of the accused Nos. 2 and 3 jointly. In the absence of any evidence to show that the 1st accused was residing in the house, he was acquitted and accused Nos. 2 and 3, who are the appellants herein, were convicted and sentenced to undergo rigorous imprisonment for 2 years each and to pay a fine of Rs. 20,000/- (in default, rigorous imprisonment for one more year).

4. The 2nd accused was in custody during investigation and trial of the case i.e., right from 10.10.1996 and as such she has completed the term. As far as 3rd accused is concerned, during investigation, she was in custody only from 10.10.1996 till 25.12.1996 and she has been in prison right from the date of conviction, namely, 28.4.1998. It appears, she has a few more days to go to complete the term, unless she has earned some remission.

5. The learned counsel for the appellant, during hearing, laid stress on the fact that there is violation of mandatory provision contained in S. 42(2) of the NDPS Act in

so far as there is nothing to show that any report as contemplated in the provision was sent over to the official superior of PW.5. S. 42(1) of the NDPS Act provides that any empowered officer, 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 enter into and search any such building and inter alia, seize such drug or substance and also detain and search and if he thinks proper, arrest any person whom he has reason to believe to have committed any offence available under Chapter IV. Under the proviso, if the officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise also after recording the grounds of his belief.

6. In the instant case, such search is said to have taken place at about 4.30 p.m. PW. 5, who is the searching official, stated in his evidence that at about 4.00 p.m. on 10.10.1996 he got reliable and confidential information that ganja was being kept in a house near the Goods Shed at Nagampadom and after informing the matter to the Deputy Superintendent of Police and after forwarding search memo to the court, he proceeded to the house in question and made the search which revealed the existence of M.O.1 box inside the southern room of the house. On opening of M.O.1 and making further search, ganja was found therein. In cross-examination, PW.5 admitted that he has not produced any record before Court to show that he had informed his official superior - Dy.S.P. about the information received by him and that the matter is, however, recorded in the General Diary of Police Station.

7. S. 42(2) of the NDPS Act provides that where an officer takes down any information in writing under sub-s. (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. There is total absence of evidence in the present case to show that PW.

5 has complied with the said requirement of S. 42(2). He has not produced before court a copy of the report allegedly sent to the Dy.S.P. Nor has the prosecution examined the Dy.S.P. or the custodian of the records of his office to show that any such report was sent over to the Dy.S.P.

8. *State of Punjab v. Balbir Singh* ((1994) 3 SCC 299) is authority for the proposition that the empowered officer if has a prior information given by any person, should necessarily take it down in writing; that if he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences under the NDPS Act are concealed in any building, conveyance or enclosed place, may carry out the arrest or search without a warrant between sunrise and sunset and the provision does not mandate that he should record his reasons of belief. But under the proviso to S. 42(1) if such officer has to carry out such search between sunset and sunrise, he must record the grounds of his belief and to this extent the provisions are mandatory and contravention of the same would affect the prosecution case and vitiate the trial. S. 42(2) of the NDPS Act was also held to be mandatory to the extent where there is total non-compliance of the provision. However, if there is delay in the matter of report and the question is whether it was undue delay or whether the delay is explained or not, it will be a question of fact in each case.

9. The above principles were reiterated in *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* (AIR 2000 SC 821). It was held that a criminal court cannot normally afford to be ignorant of such a valuable information obtained by an empowered officer under S. 42(1) and it is not enough that police officer was able to recollect and speak from memory when he is examined in court after the lapse of a long time as to what information he got before he proceeded to the scene. For failure to furnish a copy of the information sent under S. 42(2) of the NDPS Act, the accused in the said case was acquitted.

10. In the instant case also there is total non-compliance with the provisions in S. 42(2) of the NDPS Act. As already held, the provision is mandatory and the violation thereof entitles the accused to get an acquittal.

11. In the circumstances, the appeal is allowed and the appellants are found not guilty of the offence and acquitted. If the 3rd accused is still in prison, she will be released therefrom forthwith unless her continued detention is necessary in connection with some other case.

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