

Joseph Vs. State of Kerala

Joseph Vs. State of Kerala

SooperKanoon Citation : sooperkanoon.com/721715

Court : Kerala

Decided On : Jan-28-2002

Reported in : 2002CriLJ3203; 2002(82)ECC55

Judge : M.R. Hariharan Nair, J.

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

Appeal No. : C.R.A. No. 755 of 2001

Appellant : Joseph

Respondent : State of Kerala

Advocate for Def. : T.K. Latif, Public Prosecutor

Advocate for Pet/Ap. : T.K. Sreekala, S.B.

Disposition : Appeal allowed

Judgement :

M.R. Hariharan Nair, J.

1. The appellant, who is presently undergoing sentence as per the judgment of the Additional Sessions Judge, Alappuzha, acting as a Special Court for the trial of the NDPS Act cases passed on 28.6.2001, challenges the legality of the aforesaid

judgment whereby he, as the 2nd accused in S.C. No. 147/98, was convicted for the offence under Section 20(b)(i) of the NDPS Act and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs. 10,000 (in default, simple imprisonment for six months) on the allegation that at about 11.45 am on 28.8.1997 he was found by PW6 Assistant Sub Inspector of Alleppey North Police Station to be in possession of ganja contained in 12 small packets in the company of the 1st accused who, in turn, was having 8 such packets with him. The total weight of the ganja contained in the 20 packets was alleged to be 16.5 grams.

2. As the counsel, who filed the appeal was not available for arguing the case, Smt. T.K. Sreekala was appointed on State Brief to represent the appellant. She submitted that the procedure followed by PW6 is violative of the safeguards enshrined in Section 50 of the NDPS Act; that the manner in which the sample was prepared is also against the requirements of law and that in the circumstances, the accused is entitled to an acquittal.

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

- (1) Whether there has been violation of Section 50 of the NDPS Act?
- (2) Whether PW6, who made the search and seizure, was incompetent to do so?
- (3) Whether there was impropriety in the procedure followed by PW6 in the matter of preparing samples?
- (4) Reliefs.

4. Points Nos. 1 and 2: These are considered together for the sake of convenience. The version of PW6, who was admittedly as Assistant Sub Inspector of Police as on the date of occurrence in the case, was that while on law and order duty on the relevant date and while travelling in the police jeep with other police men, a person signalled the jeep to be stopped and when stopped, conveyed the information to him that two persons were envisaged in the sale of ganja behind the closed shop available in the Co-operative Hospital compound. He informed the matter to the Circle Inspector of Police and proceeded to the spot; found the accused standing there and proceeded to inspect what was available in the packets held by

them. He also deposed that on such search, it was found that 12 small packets held by the appellant contained ganja. An amount of Rs. 50 was also found inside the larger pack wherein the said 12 small packets were found.

5. According to PW6, on finding that the accused was holding ganja in his hand, he proceeded to arrest the accused at 11.45 a.m. and decided that a body search of the accused was also necessary. For that purpose, he informed the accused of his rights to have the body search in the presence of a Gazetted Officer and thereafter got down PW7 Circle Inspector of Police by contacting him over the wireless system. The Circle Inspector of Police reached the spot at 12.30 noon and conducted the body search of the accused; but other than a sum of Rs. 500/- kept by the accused, no other contraband was found. According to PW.6, he mixed the contents of the packets held by the two accused together and the total weight was found to be 16.5 grams. He also prepared two samples out of the said mixture each weighing 5 grams and got Ext.P1 mahazar prepared. After recourse to other procedural formalities, the accused and the contraband were taken to the Police Station and proceeded with further.

6. I find considerable force in the contention of the learned counsel for the appellant that the procedure followed by PW6 was defective and against the provisions of law. First of all, he was an unempowered officer for the purpose of detection under the NDPS Act. As per G.O.(Ms) No. 146/90/TD dated 22.10.1990 the officers of police of and above the rank of Sub Inspector of Police, alone are empowered to act under Section 42 of the NDPS Act. PW6 being an Assistant Sub Inspector of Police, obviously, does not come in that category and he did not have the power to make searches and detections under the NDPS Act. The entire proceedings on his part are vitiated.

7. State of Punjab v. Baldev Singh ((1999) 6 SCC 172) decided by a Constitution Bench went into the procedural safeguards available to the accused and the course of action expected in such matters. It was held as follows:

'If the investigation officer is not an empowered officer then it is expected of him that he must inform the empowered officer under the NDPS Act, who should thereafter proceed from that stage in accordance with the provisions of the NDPS

Act.'

8. It is clear from the deposition of PW6 that even at 11.30 a.m. he had learnt from the person who got the jeep stopped, and thus got the information that the two accused were engaged in the sale of ganja. Being an unempowered officer, he was duty bound to proceed from that stage in accordance with the provisions of the NDPS Act and to get all further matters done by an empowered officer. Of course, he has the right to detain the suspect until the empowered officer arrived; but that is not what PW6 actually did. Without informing PW7 about the finding of the accused at the spot aforementioned, he proceeded to find out the contents of the packets allegedly held by the two accused. He has no case that the ganja was in exposed condition or that the accused, without any direction from PW6, proceeded to expose contents of the packet. On the other hand, the specific case is that he wanted the accused to reveal the contents of what was found in their hands. At this point of time itself PW6 has violated the requirements under the Act and proceeded to do things for which he did not have jurisdiction.

9. The contention that no body search was, in fact, done at that stage and that it was done only after the arrival of the Circle Inspector of Police does not improve the situation in any manner in so far as no contraband was seized by the empowered officer PW.7 Circle Inspector of Police after he arrived. That apart, the version of PW6 is that he himself informed the accused that his body would be searched by the Gazetted Officer and thereafter contacted by PW7, who according to him, was a Gazetted Officer of the Police Department. Here again, it was for the officer, who wanted to proceed with the body search, to inform the accused to his rights under Section 50 of the NDPS Act and to ask him for his option.

10. In fact, in the present case, there was no communication of the rights to the accused by PW6; nor was any proper right of option given to the accused. If PW6 is to be believed, he only stated that the body searched would be held by a Gazetted Officer or a Magistrate and thereafter asked PW7 to reach the spot. In these circumstances, I have no doubt at all in my mind that there has been serious violation of the requirements of Section 50 of the NDPS Act and that the search and seizure are vitiated. The accused is entitled to the benefit flowing from this

situation.

11. Point No. 3: In the matter of preparing the sample also there has been serious violation. What PW6 did was to mix up the contents of the packets allegedly seized from the two accused and then to prepare the samples. In fact no sample was collected exclusively from the packets held by the appellant herein. The weight ascertained was also of the total quantity so mixed up and not separately, with the result that there is nothing to show what exactly was the weight of the ganja seized from the appellant herein. In fact, a situation has been brought about by PW6 whereby it was left to each of the accused to contend that the packet seized from him did not contain ganja and that the ganja was in the packets held by the other. In the nature of the case, it was incumbent upon the empowered officer who makes the search and seizure to weigh the contents of the packet allegedly held by each of the accused separately and to prepare samples from each set. In the circumstances, I find that the preparation of the samples and weighing of the ganja was also done in an improper and illegal manner.

12. Point No. 4: Violation of Section 50 of the NDPS Act which is proved in the case certainly entitles the accused to get acquittal. Consequently the appeal is allowed and the impugned judgment, as far as the appellant (2nd accused) is concerned is set aside. The accused is found not guilty and acquitted. He will be set at liberty forthwith unless his continued detention is warranted in connection with some other case. Fine, if any, paid by him will be refunded.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com