

Subash Vs. State of Kerala

Subash Vs. State of Kerala

SooperKanoon Citation : sooperkanoon.com/722623

Court : Kerala

Decided On : Jan-25-2001

Reported in : 2001(1)ALT(Cri)253; 2001CriLJ1945; 2001(77)ECC615

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

Acts : Narcotic Drugs & [Psychotropic Substances Act, 1985](#) - Sections 2, 20, 24, 25, 42(2), 43 and 50

Appeal No. : C.R.A. No. 352 of 2000

Appellant : Subash

Respondent : State of Kerala

Advocate for Def. : Noble Mathew, Public Prosecutor

Advocate for Pet/Ap. : B. Suresh Kumar and; C.G. Preetha, Advs.

Disposition : Appeal Allowed

Judgement :

M.R. Hariharan Nair, J.

1. The challenge is with regard to the conviction entered by the Special Court for trial of Narcotic Drugs & Psychotropic Substances Act cases, Kollam for the offence under S. 20(b)(i) of the N.D.P.S. Act and the sentence of rigorous

imprisonment for one year and fine of Rs. 10,000/- (in default rigorous imprisonment for three months)imposed therefor.

2. The appellant, who was the 1st accused, was tried along with 4 other accused. The case against the 2nd accused was split up. After trial, accused Nos. 3, 4 and 5, who were the alleged persons in possession of ganja and available at the back seat of Autorickshaw driven by the appellant and who had escaped some time before the occurrence, were acquitted.

3. The prosecution version was that on 29.7.1995 PW. 6 received telephonic information that ganja was being transported in an autorickshaw driven by the 1st accused from Vellarvattom to Chadayamangalam; that PW. 6, who was the Police Sub Inspector, accompanied by Police Constables thereupon rushed to the place of occurrence; that at about 5.50 p.m. they saw the autorickshaw at a distance of about 100 metres and that on seeing the Police party the driver stopped the autorickshaw, turned it back and proceeded in the reverse direction. The vehicle was stopped and at the time the 4 persons who were in the back seat, got down and escaped. On approaching the autorickshaw it was found that there was a gunny bag on the platform in front of the back seat. On questioning, the appellant stated that the contents of the gunny bag was ganja. It was opened and after fulfilling other formalities like weighing and sampling, it was removed to the police station along with the arrested accused and the case proceeded with.

4. The learned counsel for the appellant submitted that the appellant is entitled to get an acquittal for the following reasons:-

i) There is failure on the part of PW.6 to record the information received over phone and to send it to the Superior Officer as envisaged in S. 42(2) of the N.D.P.S. Act and since the said provision is held to be mandatory, the appellant is entitled to that benefit.

ii) There is no positive evidence adduced by the prosecution to show that the item seized is actually ganja. In that regard, it is the admitted case of the prosecution that the sample forwarded to the Forensic Science Laboratory was destroyed in an explosion that took place in the laboratory and that consequently there is no report

of the Forensic Science Laboratory produced in the case.

iii) The offence that should have been invoked against the appellant is under S. 25 of the N.D.P.S. Act which specifically refers to person in possession of vehicle in which contraband is found and what is alleged against the present appellant is, instead, the specific offence under S. 20(b)(i) of the N.D.P.S. Act which relates to possession of ganja.

iv) There is violation of S. 50 of the N.D.P.S. Act in so far as the prosecution has no case that the appellant was informed of his right to be searched in the presence of a Gazetted Officer or a Magistrate or that when asked about his option, the accused had given a negative reply.

v) Lastly, it is contended that in any event, the punishment already undergone together with the period of detention undergone during investigation and trial exceeds 9 months and that in the circumstances, the appellant might be given the benefit of reduced punishment so that he can be released from the prison straight away.

5. The learned Public Prosecutor, who was heard, submitted that the ganja was found in a public conveyance and that in view of the explanation under S. 43 the said conveyance has to be treated as a public place and hence the requirement under S. 42(2) of the Act is not attracted. With reference to the contention based on S. 50 it was submitted that the section applies only to seizure of contraband from the body of the offender and not to a case where it was found in a bag as it happens in this case. According to him, S. 50 is not applicable to a seizure as it happens in the instant case at all.

6. It is true that explanation to S. 43 clarifies that 'public place' includes a public conveyance as well. Prima facie, i.e., at first blush, there would appear to be some merit in the version of the learned Public Prosecutor that an autorickshaw might also be a public conveyance. Though S. 2(viii) of the N.D.P.S. Act defines 'conveyance' as a conveyance of any description whatsoever and including any aircraft, vehicle or vessel, the term 'public conveyance' is not seen specifically defined. A public transport or stage carriage will certainly be a public conveyance;

but whether it will apply to a 'contract carriage' does not appear to have been specifically considered in any precedent.

7. According to me, there is a distinction between a contract carriage and a public conveyance and explanation to S. 43 would take in only a public conveyance like stage carriage and not a contract carriage. There is some indication in support of the above view in the decision in *Abdul Rashid Ibrahim Mansury v. State of Gujarat* (AIR 2000 SC 821) which is a case decided by a three member Bench of the Apex Court. That was also a case where the police had sighted an autorickshaw driven by the appellant in the case and when it was stopped and checked it was found that four gunny bags placed inside it contained Charas. In para 19 of the judgment the court went into the question whether S. 42 of the Act would apply to a case where Charas is seized from the vehicle. It was held that non-recording of information received with regard to the availability of the contraband inside the autorickshaw had in fact deprived the appellant as well as the Court of the material to ascertain what was the precise information which PW.2 got before proceeding to stop the vehicle; that value of such information, which was the earliest in point of time, for ascertaining the extent of the involvement of the appellant in the offence, was of a high degree and that a Criminal Court cannot normally afford to be ignorant of such a valuable information. No doubt, PW-2 stated before Court about the details of the information; but it was found unacceptable for the reason that the examination was after a long lapse of time and the oral vibration of the Police Officer is insufficient in that regard. In other words, the aforesaid case is a precedent where S. 42 was found applicable to a case of recovery from an autorickshaw as though it is a 'conveyance' within the meaning of S. 42(1) of the Act. Even though the explanation to S. 43 was not specifically considered in the decision, the fact remains that an autorickshaw was not considered to be a public conveyance and dealt with as such in the said case.

8. The learned Public Prosecutor submitted that in view of the nature of information received over phone there was no time left for PW-6 to record the details of information or to forward the same to the Superior Officer and that he had to rush up to the spot. The explanation is unacceptable. S. 42(2) is to be strictly applied and total non-compliance thereof would certainly cause prejudice to

the accused. In the circumstances, I am of the view that as held in the aforesaid decision, the failure to comply with the requirements in S. 42(2) is a material defect which justifies acquittal of the appellant.

9. There is also merit in the contention of the appellant that there is no positive evidence to conclude that what is seized is ganja. What was forwarded to the laboratory was only the sample. Even if it is assumed that examination of the particular sample became impossible in view of the incident of explosion that took place in the Forensic Science Laboratory, there was nothing which prevented the prosecution from moving the court for sending a portion of the remaining ganja which was very much available in court. In the absence of any such motion the prosecution cannot be heard to contend that the court should have accepted the mention in the seizure mahazar that the accused had stated to the Police that what was inside the bag was ganja. The contention of the defence in the matter is also upheld.

10. In the instant case, it is the case of the appellant that the bag was left by the persons, who had hired his autorickshaw and who had made good their escape before the vehicle was examined by the Police. It is also pertinent in this regard that the trial court has acquitted the said occupants. There is no positive evidence to show that the bag of ganja involved in the present case was that of the appellant and the circumstances show otherwise. In the circumstances, the accused is certainly entitled to get the benefits of doubt.

11. Since the seizure in the instant case was not on any body search, the appellant's contention that there is violation of S. 50 of the Act as well does not appeal to me.

12. In view of the other findings aforementioned, the appellant, however, would certainly be entitled to get an acquittal. The judgment impugned in this case is accordingly set aside and the appellant is acquitted. He will be set at liberty forthwith, unless wanted in connection with some other case.

13. Appeal is allowed.

