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Court : Kerala

Decided On : Jan-13-1995

Reported in : 1995(1)ALT(Cri)449; 1995CriLJ2974

Judge : K.P. Balanarayana Marar, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 20, 43 and 50; Code of Criminal Procedure (CrPC) , 1974 - Sections 161, 162 and 162(1)

Appeal No. : Cri. Appeal No. 462 of 1992

Appellant : Ali

Respondent : State of Kerala

Advocate for Def. : Public Prosecutor and; K.I. Abdul Rasheed, Adv.

Advocate for Pet/Ap. : T.D. Robin, Adv.

Disposition : Appeal dismissed

Judgement :

K.P. Balanarayana Marar, J.

1. The accused in Sessions Case 80 of 1991 before Second Additional Assistant Sessions Judge, Ernakulam is the appellant. He was convicted under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act (Act for short) and

sentenced to undergo rigorous imprisonment for a period of 11/i years. The prosecution case is that the accused was found possessing 7.6 grams of ganja for purpose of sale near Naval Base Ernakulam Gate at about 5 p.m. on 7-5-1991. The Sub Inspector of Police, Harbour Police Station found 7 small packets of ganja. The accused had no valid permit or licence to possess the article. The article was recovered from his possession and he was arrested. The accused and the contraband article were taken to the Police Station and crime was registered under Section 20(b)(i) of the Act. After trial the Assistant Sessions Judge found the accused guilty of the offence charged against him convicted him and awarded the sentence referred above. Hence the appeal.

2. Heard counsel for the appellant and public prosecutor.

3. The main contention advanced by learned counsel for the appellant is that inadmissible evidence was permitted to be adduced by the Assistant Sessions Judge. This plea is presumably raised in view of the statement of PW1 in cross-examination that before he was examined the policeman had read over to him the statement recorded under Section 161 of the Code. It was so stated by PW. 3 also. According to counsel, the statement can be used only for the purposes mentioned in Section 162 of the Code and not for any other purpose. Narration of the facts in the statement to the witnesses amounts to making use of the statement at the time of trial, according to counsel and that is prohibited by Section 162 of the Code. Reliance is placed on the decision of the Madhya Pradesh High Court in Ramvilas v. State of M. P., 1985 Cri LJ 1773. A Division Bench of the Madhya Pradesh High Court held that where the statement made by the witness to the police was narrated to him not when he was in the witness-box but shortly before entering the witness-box, the evidence of such witness would be inadmissible in view of Section 162 because the fact remains that it was narrated to him for the purpose of giving evidence at the trial. The Madhya Pradesh High Court has followed the Privy Council decision reported in AIR 1947 PC 75, Zahiruddin v. Emperor. But the matter is seen to have been considered at length by a Full Bench of the Gujarat High Court in Nathu v. State, : AIR1978 Guj49 . The following questions were referred to the Full Bench for a decision (at p 449 of Cri LJ).

1. Is the evidence of a witness whose statement recorded in the course of investigation under Chapter XII of the Criminal P. C. if read over to him before the witness steps into witness box becomes inadmissible or such as would be of no value whatsoever?

2. Does such contravention of Section 162(1) affect admissibility or probative value of the evidence of such a witness?

3. Docs reading over of such statement to a witness before he enters witness box amount to use of such statement contrary to Section 162(1)?

4. Since the questions referred are of general importance and needed a final and authoritative answer based on the correct interpretation of the prohibition against the use of police statement enacted in Section 162(1) of the Code the Full Bench had surveyed all the decisions on that topic including the Privy Council decision in AIR 1947 PC 75. The Full Bench answered the questions in paragraph 27 of the judgment at p. 60 thus (at p. 45) of Cri LJ):

'(1) The evidence of such witness does not become inadmissible; its probative value has to be judged in the circumstances of each case. No hard and fast rule can be laid down that in all such cases the evidence of such witness will be of no value whatsoever.

(2) Reading over of the police statement to the witness before he enters the box does not amount to contravention of the prohibition contained in Section 162(1). But the fact of reading over of the statement may affect the probative value of the evidence of the witness.

(3) Reading over of such a statement to the witness before he enters the box does not amount to use of such statement contrary to Section 162(1).'

5. I am in respectful agreement with the views expressed by the Gujarat High Court in the Full Bench decision aformentioned. As observed therein the user contemplated in Section 162 of the Code is actual user in Court proceedings and not user dehors the Court proceedings. The Court proceedings begin when the Court starts hearing a case and end when the Court stops the proceedings and

adjourns them to some other day. The section docs not prevent user of a police statement outside the Court proceedings. That is manifested from the words 'be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation.' The prohibition is only for using such statements in proceedings before Court. It was for that reason that the Privy Council in Zahiruddin's case (AIR 1947 PC 75) (supra), held that evidence of the witness is inadmissible. In that case the evidence was rendered inadmissible for two reasons (1) he had previously given a signed statement to the police and (2) the statement was made use of by the witness while giving evidence to prompt his memory. The ratio of the decision of the Privy Council cannot therefore be extended to the present case. The result is that the testimonies of PWs. 1 and 3 do not become inadmissible for the reason that the police had read out the statement to them before they entered the witness box. There is thus no contravention of the prohibition contained in Section 162(1) of the Code. The reading of the statement to the witnesses does not therefore amount to use of such a statement contrary to the provision contained in Section 162(1) of the Code. Still the reading over of the statement may affect the probative value of the evidence of the witness which the Court has to judge in the circumstances of each case.

6. In the light of the principles enunciated in the foregoing paragraphs the reading over of the statement to PWs. 1 and 3 does not make their evidence inadmissible. But the Court has to consider the evidence given by these witnesses carefully for deciding the probative value of such evidence in the light of the facts and circumstances of the case.

7. Both PWs. 1 and 3 were declared hostile by the Public Prosecutor and cross-examined. The Assistant Sessions Judge has relied on the testimony of these two witnesses only on some of the facts spoken to by them to find corroboration in the evidence of the police officers. The offence was detected by the Sub Inspector, PW8 on getting information that ganja was being sold at the Ernakulam gate of the Naval Base while PW8 along with PWs. 5 and 6 were in the course of investigation of other crimes, he along with the policemen went to that place, apprehended the accused, searched his body, found the contraband article, arrested him and

produced him along with the contraband article to the police station. Before that, one of the police constables had brought PW4, a goldsmith to that place with a balance. The seven small packets recovered from the person of the accused were weighed and the weight ascertained. PW l is a nearby tea shop owner. Though he had not supported the prosecution in full he had seen the accused being restrained by the police and had also seen a bundle in the hand of the accused. PW3 also has been the accused being restrained by the police. He also has seen a bundle in the hand of the accused. This according to him happened near the Ernakulam Gate of the Naval Base. He was not in a position to say whether the bundle possessed by the accused contained ganja. The testimony of these two witnesses regarding the apprehension of the accused and the seizure of an article from him can therefore be relied upon. The recovery of the article has been spoken to by PW8, the Sub Inspector and PW4, the goldsmith who weighed the ganja recovered from the accused. The article on analysis was found to be ganja. The prosecution has therefore succeeded in proving that the accused was found possessing ganja and that it was intended for sale.

8. The conviction is assailed by the appellant on the ground that the mandatory provisions contained in the Act had not been complied with. In particular it is pointed out that the accused was not produced before a gazetted officer or a Magistrate as required under Section 50 of the Act. The accused was also not informed of his right to be searched in the presence of a Magistrate or Gazetted Officer under that section. Reliance was placed on the decision of the Supreme Court in Balbir Singh v. State of Punjab, : 1994 CriLJ3702 . But it is spoken to by PW8 that the accused was asked whether he should be searched in the presence of a Gazetted Officer or a Magistrate to which he answered in the negative. This according to the appellant was not recorded in the mahazar prepared and was subsequently introduced by the witness at the time of examination. There is no reason to disbelive PW8 on this aspect. Even if it be that PW8 has not informed the accused of his right under Section 50 of the Act there is no violation of that section. The seizure took place from a public place and has therefore been made under Section 43 of the Act. This Court in the decision in Muhammed v. State of Kerala, (1995 (1) Ker LT 24): (1995 Cri LJ 1171), held that in the case of a seizure under Section 43 of the Act the empowered officer or the authorised officer has no

obligation to inform the accused of his right under Section 50 of the Act whereas he shall be produced before a Gazetted Officer or a Magistrate only if a request comes from the accused. Appellant has no case that such a request was made by him to PW8. There has thus been no violation of Section 50 of the Act.

9. It is then contended that the article analysed by the analyst and the article seized from the accused are different. This contention is raised for the reason that the weight of the article seized was ascertained to be 7.600 grams whereas the weight of the article received by the analyst as per Ext. P4 is shown as 9.500 grams. According to counsel, that raises a doubt regarding the prosecution version and the identity of the article seized. The article was weighed from the place of seizure. PW4 has brought a balance for that purpose. There is every likelihood of some difference when the article is weighed by the analyst. The difference being only 2 grams and in view of the evidence tendered on the side of the prosecution, much cannot be made out from this difference in order to hold that the article analysed by the analyst is different from the article seized. The observation of the Court below that the difference does not assume much importance is therefore justified.

10. The prosecution has thus succeded in establishing the guilt of the accused. The Court below was therefore right in finding him guilty and in convicting him. The sentence awarded is also resonable. By this time appellant has already suffered the sentence. No interference is therefore called for.

For the aforesaid reasons the conviction and sentence against the appellant are sustained and the appeal is dismissed.