

Dharman Vs. State of Kerala

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Court : Kerala

Decided On : May-31-2002

Reported in : 2003CriLJ1586; 2002(83)ECC885

Judge : M.R. Hariharan Nair, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20 and 50

Appeal No. : Crl. A. No. 271 of 2000

Appellant : Dharman

Respondent : State of Kerala

Advocate for Def. : L. Aloshyous Thomas, Public Prosecutor

Advocate for Pet/Ap. : Saira Ravikumar, State Brief

Judgement :

M.R. Hariharan Nair, J.

1. The challenge in this jail appeal is with regard to the conviction entered against the appellant as accused in SC 186/1998 of the Sessions Court, Thrissur (Special Court for trial of N.D.P.S. Act Cases) for the offence under Section 20(b)(i) of the N.D.P.S. Act and the sentence of R.I. for 3 years and fine of Rs. 5000/- (in default

R.I. for three months) imposed therefor.

2. The prosecution case that at about 8 P.M. on 26.2.1997 the accused was found in possession of 120 gms. of ganja by PW1-Circle Inspector of Police at the portion of the road in front of Thushara Bar at Triprayar found acceptance with the trial court based on the evidence of PWs. 1 to 5 and Exts. P1 to P7 and MOs. 1 to 5.

3. Smt. Saira Ravikumar, who appeared for the appellant on State Brief submitted that there is violation of Section 50 of the N.P.P.S. Act in the matter of the seizure; that the material object continued to be in the custody of the seizing official until 24.10.1997 and that in the circumstances there is no guarantee that what was produced before the Court after 8 months of seizure and sent over for analysis was the very same object allegedly seized from the accused. Lastly the counsel submitted that in any event, the sentence imposed in the case is highly excessive when the quantum of ganja allegedly seized is taken into account.

4. On the arguments advanced in the case the points that arise for decision are:-

1. Whether there is sufficient evidence to find the accused guilty of the offence under Section 20(b)(i) of the N.D.P.S. Act?

2. Whether there is violation of Section 50 of the N.D.P.S. Act in the matter of search and seizure justifying acquittal of the accused?

3. Whether the belated production of material object justifies an acquittal?

4. Whether the conviction and sentence imposed in the case warrant any modification?

5. Point No. 1: The evidence of PW. 1 - Circle Inspector of Police, Valappad is to the effect that while engaged in patrol within his jurisdiction along with police party at about 8 P.M. on 26.2.1997 he found accused walking along the road from east to west near Thushara Bar at Triprayar; that on seeing the police party the accused tried to cover up his face with a portion of his dhoti which act roused suspicion on him pursuant to which the accused was stopped and questioned.

There was a conspicuous protrusion at the left side at the waist portion of the accused as something was kept there underneath the dhoti worn by him. PW1 suspected that the accused was carrying some stolen property and questioned him about the protrusion aforementioned. The accused answered that some chilly alone was kept there. To verify the correctness of the said answer PW1 seized the aforesaid item and it was found to be a packet covered with a piece of paper. On opening it, it was discovered that ganja was inside kept in a plastic cover.

6. On finding that further proceedings have to be continued under the provisions of N.D.P.S. Act, PW1 decided to make body search of the accused and therefore questioned the accused with regard to the need for taking him to a Gazetted Officer or a Magistrate. The accused answered that there was no such need. Therefore, he proceeded to make body search; but nothing more was found on his body. PW1 then prepared two samples each of 20 gms. He also packed up the remaining ganja of 80gms. in another packet and all the items were sealed and details entered in Ext. P1 seizure mahazar. The accused was removed to the police station and further proceedings continued.

7. The evidence of PW1 as above is corroborated fully by PW3, who was one of the police constables in the patrol party led by PW.1, PW.2, who is an independent witness, has also corroborated the aforesaid evidence to a substantive extent. He was present at the spot even at the time when the police arrived there. He witnessed verification of the contents of the packet taken out from the waist portion of the accused. He also corroborated the version of PWs. 1 to 3 that the accused originally gave the excuse that the contents were items of grocery. He also spoke about the preparation of Ext. P1 wherein his signature was affixed at the spot.

8. The cross examination of PWs 1 to 3 has not brought out anything to suspect the veracity of their evidence and in the circumstances the trial court was right in concluding that seizure of the item took place.

9. The samples produced before the Court were sent for chemical analysis in due course and Ext. P7 report obtained certifying that the sample contained genuine ganja. There was reduction of weight in the samples, as 15.32 and 14.69 gms respectively. Was the weight at the time when the items were examined in the

laboratory on 26.2.1998. This reduction in weight, obviously, is the result of loss of moisture from the sampled ganja during the six months period that transpired in between the seizure and the analysis. No suspicion arises from this loss of weight. In the circumstances, I am of the view that the Court below was right in concluding that there was sufficient evidence to find that the accused has committed the offence under Section 20(b)(i) of the NDPS Act.

10. Point No. 2: The learned counsel for the appellant submitted that PW1 has put the cart before the horse in the matter of the questioning under Section 50 of the N.D.P.S. Act. He searched the waist of the accused; took out the ganja and then only questioned the accused whether he wanted body search to be done in the presence of a Gazetted Officer or a Magistrate.

11. Though the above argument would look plausible at the first blush, there is no actual merit therein in so far as this is not a case where the police party went to detect the offence based on any prior information coming under Section 42 of the Act. PW1 was making routine patrol. It is clear from his evidence that at the time when the accused was stopped, his suspicion, on finding that something protruding at the waist, was only that he was hiding some stolen property, and not that it was something coming under the purview of the NDPS Act. It was therefore that he proceeded to seize the item from the waist portion and proceeded to examine it. Once he found that the contents was ganja, he decided to make thorough body search of the accused for which he questioned the accused with regard to the option to be searched under Section 50 of the NDPS Act. The fact that he was questioned as above is clear from Ext. P1 seizure mahazar as also Ext. P2 F.I.R., both of which have reached the learned special Judge on 28/2.1997 itself.

12. That failure to comply with Section 50 does not justify acquittal in cases where the detecting officer is unaware that there was possibility of contraband under the NDPS Act being available with the accused is clear from the decision in Gurubax Singh v. State of Haryana (2001) 3 SCC 28. That was a case where the Sub Inspector of Police on duty at the railway platform noticed that in the train that arrived at the relevant time the accused was sitting in a compartment and that he

became panicky on seeing the police party. He left the train towards the side of engine carrying a gunny bag on his left shoulder. On suspicion, he was chased and nabbed in the presence of the witness and when the bag was opened it was found that he was carrying poppy straw weighing 7 kg. therein. It was contended before the Apex Court that the seizure of the said item was violating Section 50 of the NDPS Act in so far as the search was not done after alerting the accused of his rights under Section 50 of the NDPS Act and after getting his option. The contention was not accepted.

13. Compliance with Section 50 would be attracted once the officer gets suspicion that the contraband under the NDPS Act might be available with the suspect and not in a case of accidental exposure without any such foresight. In view of the said position, I do not find any merit in the contention of the appellant that the appellant is entitled to get acquittal on the ground of violation of Section 50 of the NDPS Act.

14. Point No. 3:- The items seized in the case were sent over for analysis only in October, 1997. The reason for delay is clear from Exts. P4 and P5. The items seized were presented before the learned Sessions Judge on 28.2.1997; but it was returned with endorsement

'mode of presentation is not in proper manner, hence returned'.

Thereafter the investigating officer was busy with other cases, the details of which are divulged in Ext. P5 report. He was included in a special investigation team in connection with investigation of particular cases, and hence he could reproduce the returned items only on 24.10.1997. Soon thereafter it was sent over for analysis. What is evident from the above is that this is not a case where the seized objects were purposefully withheld from production in court. Of course it was available in the possession of the officer in the police station for nearly 8 months; but then it has to be remembered that the items were in sealed condition and the court and the analyst found the seals to be intact. No circumstance has been brought out to show that the seized items were tampered with during the aforesaid period. In the circumstances, the belated production of MOs. in the case does not arouse any suspicion.

15. Point No. 4:- In view of my findings in points 1 to 3 the conviction entered against the appellant for the offence under Section 20(b)(i) of the NDPS Act is fully justified and it is confirmed.

As far as sentence is concerned, I find that the accused is entitled to some leniency. The quantum of ganja seized in the case is only 120 gms. In the nature of this case R.I. for a period of two years would meet the ends of justice. The substantive term is hence reduced from R.1, for 3 years to R.1, for 2 years. The alternative term with regard to fine of Rs. 5,000/- is also reduced from 3 months to 2 months. The accused has already undergone the said period by now.

16. In the circumstances, it is directed that the accused be released from jail forthwith unless his continued detention is necessary in connection with some other Case. With this modification in sentence the appeal is disposed of.

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