

Ali Vs. State of Kerala

Ali Vs. State of Kerala

SooperKanoon Citation : sooperkanoon.com/725267

Court : Kerala

Decided On : Mar-15-2001

Reported in : 2001(2)ALT(Cri)25

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

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 Sections 21; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 233 and 313

Appeal No. : C.R.A. No. 229 of 1998

Appellant : Ali

Respondent : State of Kerala

Advocate for Def. : T.C. Ulahannan, Public Prosecutor

Advocate for Pet/Ap. : P.V. Kunhikrishnan, Adv.

Disposition : Appeal Allowed

Judgement :

M.R. Hariharan Nair, J.

1. These two appeals arise from one and the same judgment passed by the Special Judge for trial of Narcotic Drugs and Psychotropic Substance Act cases, Vadakara in S.C.No. 32/97. The two appellants are accused 1 and 2 respectively

in the aforesaid case involving offence under S. 21 of the N.D.P.S. Act.

2. The prosecution alleged that at about 5.30 p.m. on 5.7.1996 PW.7 Sub Inspector of Panniyankara Police Station received information that a person dressed in white shirt and dhoti had another person in brown pants and striped shirt and aged about 30-35 years were engaged in the sale of brown sugar near Meenchanda Railway Gate at Kozhikode. After recording the information and sending a report to the Circle Inspector of Police, who is the Official Superior, he proceeded to the spot along with other policemen. On the way, they also took PW-3 and PW-6, two independent witnesses along with them. On reaching the portion near the northern side of the Railway Gate, Meenchanda, the two accused were spotted standing in front of the 'Appu's Hotel'. On seeing the Police, they tried to slip away; but they were stopped and questioned.

3. It is the prosecution case that to the question put by PW-7 as to the option of the accused with regard to the proposed search, both answered in the negative and that thereupon body search was effected. On searching the body of the 1st accused M.O.3 towel was found on his hand. When that was opened, a polythene cover which in turn contained six small polythene packets of brown sugar (M.O.1) was detected. Similar search on the body of the 2nd accused showed that at the waist fold of the dhoti worn by him a polythene packet covered with newspaper and containing brown sugar (M.O.2) was available. After preparing necessary seizure mahazar, the contraband and the accused were removed to the Police Station and Crime No. 76/96 was registered vide Ext. P8 FIR. The Circle Inspector of Police - PW-8 took over the investigation and ultimately charge was laid by PW-5.

4. The learned counsel for the appellants argued only three points. According to him, there is no guarantee that the article allegedly seized from the spot was the same as that reached the Forensic Science Laboratory for chemical analysis. The second point argued is a procedural lapse on the part of the Court. Though the accused were questioned under S. 313 Cr. P.C. on 27.10.1997, there was no direction to the accused thereafter to enter their defence. Instead the case was merely adjourned to 28.10.1997 for arguments, after recording that there was no

defence evidence. According to the learned counsel, sufficient opportunity should have been given to the accused to enter their defence and to adduce defence evidence and an entry that there was no defence evidence should not have been made on the same day. The last point argued is that there was procedural irregularity in having a single trial with regard to the seizures of different quantity of contraband from the two accused.

5. According to the learned Public Prosecutor, there is no procedural irregularity or doubtful circumstances.

6. The points that arise for decision are:

(1) Whether sufficient evidence exist to find the accused guilty of the offence under 21 of the N.D.P.S. Act? and

(2) Whether there are procedural lapses enabling the accused to get an acquittal.

7. Points 1 and 2 : These are considered together for the sake of convenience. PW.7, who is the seizing official, stated that after the seizure made at the scene of occurrence, the seized contraband was covered and sealed at the spot. The 6 packets found in the hand of the 1st accused were covered in brown paper and marked B1. The plastic cover in which the said packets were kept was also covered with brown paper and affixed the label marked P1. Likewise, the plastic cover seized from the 2nd accused including the brown sugar was covered with brown paper and marked B2 and the piece of the newspaper (Malayala Manorama) using which the brown sugar had been covered, was seized and labelled P2. Thereafter, the items in the same conditions were removed to the Police Station and after registration of the case and other legal formalities, these items were kept in the Police Station under the observation of PW-8 Circle Inspector. He also stated that it was the Circle Inspector, who produced the items before Court, subsequently.

8. PW-8 Circle Inspector, in his evidence, stated that he took over the investigation on 6.7.1996; that is, on the date after the alleged seizure. According to him, PW-7 had shown the seized items to him on 5.7.1996 and he gave direction to PW-7 to

continue custody of the article. PW-8 took over the seized items only on 6.7.1996. Thus, there is conflict between the version of PWs. 7 and 8 as to the person in custody of the article itself on 5.7.1996. It was PW-8, who produced the articles before the Special Court along with Ext. P10 forwarding note. The seal of the court in page 2 thereof shows that it was produced only on 8.7.1996. Page 3 of Ext.P10 contains the specimen impression of the seal affixed to the samples in question. No officer of the court was examined to explain the manner in which the contraband was dealt with in court until it was forwarded to the Forensic Science Laboratory. Nor was the expert or anyone connected with the Forensic Science Laboratory examined to show the condition in which the articles were received there.

9. It is true that the report of analysis can be accepted in evidence even without such an examination. But then, certain discrepancies remain to be explained. It is stated in the portion under the head 'description of articles', contained in Ext. P12 analysis report that the parcel was in blue coloured paper packets, tied with twine and sealed and that the seal impression on the packet tallied with the specimen seal impression given in the forwarding note. The said note is Ext. P10. As already mentioned, the specimen impression of the seal given in the forwarding note is that of the Police Station and not that of the Court. If it was the packets prepared at the scene of occurrence that reached the Forensic Science Laboratory, there is no explanation as to how the packets made of brown paper turned into blue colour as stated in Ext. P12. The above discrepancy, coupled with the absence of reliable explanation as to the manner in which the contraband was kept in the Police station until 8.7.1996, throws some doubt with regard to the authenticity of the sample that reached the laboratory; that is, whether it was the very same article allegedly seized from the accused that ultimately reached the Forensic Science Laboratory.

10. State of Rajasthan v. Daulat Ram ((1980) 3 SCC 303) deals with a more or less similar case. That was a case where the samples changed several hands before reaching the analyst. The persons who dealt with the articles were not examined in court to prove that while in their custody the article was not tampered with. It was held that the inevitable effect of this omission is that the prosecution failed to rule out the possibility of the samples being changed or tampered with

during the interim period which is a factor that has to be affirmatively proved by the prosecution. The acquittal of the accused was confirmed by the Supreme Court in the said circumstances.

11. *Valsala v. State of Kerala* (1993 Supp (3) SCC 665) was a case where there was delay in sending the seized article to the analyst. The Chemical Examiner opined that the sample received was brown sugar; but there was no reliable evidence to show that during the long period of over three months between the seizure and production, the seized article was in the custody of the Officer in charge of Police Station and that it was kept under seal. The Apex Court held that there was merit in the contention that it was doubtful whether the very article that was seized was examined by the Chemical Examiner, and on that basis, the accused was found entitled to get the benefit of doubt and acquitted.

12. Here is a case where the offence alleged against the accused attracts a minimum punishment of rigorous imprisonment for ten years besides the minimum fine of Rs. one lakh. It is well settled that the nature of the evidence to be insisted upon will be proportionate to the gravity of offence.

13. I am of the view that in the aforesaid circumstances, the accused deserved to be acquitted on the grant of benefit of doubt. There is also some merit in the contention of the petitioner that there was procedural irregularity on the part of the court. After examining the accused under S. 313 Cr.P.C. on 23.10.1997, the trial court was expected under S. 233 Cr.P.C. to call upon the accused to enter their defence and to adduce any evidence that they might have in the matter. Instead of doing so, the trial court merely recorded that there was no defence evidence on the day when the accuseds' questioning was completed and merely adjourned the case for hearing. *Sivamani v. State of Kerala* (1992 (2) KLT 227) and *Bhadran v. State of Kerala* (1993 (2) KLT SN 13- Case No. 13) are authority for the proposition that the court has a duty to inform the accused of his right to enter his defence and also to call upon him to enter his defence.

14. A Bench of this Court has found in *Jomon v. State of Kerala* (1988 (1) KLT SN 31 - Case No. 27) that once the court finds, after questioning the accused, that there was no justification for acquittal under S. 232 Cr.P.C., it is bound to adjourn

the case for defence evidence in terms of S. 233.

In view of this and also the circumstances already discussed supra, I am of the view that the conviction entered against the accused in these cases are unjustified. The accused are entitled to get the benefit of doubt. The appeals are allowed and the accused are acquitted. They will be released from custody forthwith unless wanted for some other case.

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