

Maheswari Vs. Jaideep

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Court : Kerala

Decided On : Jun-03-2004

Reported in : 2004(3)KLT88

Judge : K.A. Abdul Gafoor, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 21, 23, 42, 50 and 57

Appeal No. : Crl. A. No. 49 of 2002

Appellant : Maheswari

Respondent : Jaideep

Advocate for Def. : P.S. Sreedharan Pillai, S.C.G.S.C and; Sujith Mathew Jose, Public Prosecutor

Advocate for Pet/Ap. : M.K. Chettiar,; K. Mohan and; P.V. George, Advs.

Judgement :

K.A. Abdul Gafoor, J.

1. The appellant is the accused in Section C.No. 1289/2000 on the file of the Special Judge (for trial of cases under the NDPS Act), Thiruvananthapuram. She has been charged with offences punishable under Sections 20(b)(ii), 21 and 23 of

the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (for short 'the Act'). She was found guilty and was convicted under those counts.

2. The occurrence was on 27.9.2000, before the enforcement of the amendments as per Act 9/01, but the conviction was on 16.11.2001, after such enforcement. The quantity of the psychotropic substances (cannabis plant and hashish oil) involved violating Section 20(b)(ii) of the Act was 158 grams, whereas the quantity of heroin, a narcotic drug, to invite punishment under Section 21 was 100 grams. The interception of the accused was at Thiruvananthapuram Airport, while she was proceeding overseas from Trichy to Maldives. She did possess Exts. P1 to P4 air tickets and other travel documents to show that she had to fly on the same day to Maldives. Therefore, she had attempted export of the said drug and psychotropic substance; thereby committing an offence under Section 23 of the Act. Considering the evidence on record and adverting to the points of defence including violation of the provisions contained in Sections 42, 50 and 57 of the Act, the Court below convicted the accused as mentioned above.

3. The contraband articles were concealed inside the panties worn by the accused. The panties were not produced. This was also one among the arguments of the defence. That was also considered by the court below. There is a further contention before me that the gazetted officer, in whose presence the search was made, was also not examined. Again it is contended that though the proceedings before the court below terminated after the enforcement of Act 9/01 amending the NDPS Act, 1985, the benefit of the amended provision was not given to the appellant/accused.

4. Going by the amended Act, the maximum penalty provided is rigorous imprisonment extending to 10 years. It need not always be 10 years. It can be for a shorter term as well, taking into account the quantity involved and in the circumstances of the case.

5. First of all, I will consider whether there is violation of Section 42 of the Act in this case. Section 42 says that where an officer takes down any information about the commission of the offence under the Act in writing or records grounds for his belief,

'he shall, forthwith, send a copy thereof to his immediate official superior'.

In this case, it was not done. It is a mandatory provision for the protection of the persons implicated in the case.

6. PW.1 is the officer concerned. He got information from the Intelligence Officer at Trichy that one lady passenger was arriving in Thiruvananthapuram International Airport, concealing narcotic drugs in her panties. There is evidence in this case that PW1 informed his superior immediately. His immediate superior was at Calicut, about 500 km. away from Thiruvananthapuram. He telephoned his superior and then proceeded to the Airport. It is also in evidence that his immediate superior, PW.5, had informed him then and there itself, that he was proceeding to Thiruvananthapuram immediately for other purposes as well. It is also in evidence that PW.5 had arrived at Thiruvananthapuram at 11 P.M. on 27.9.2000 and at that time Ext.P13 report has been handed over to him by PW.1. On the other hand, if Ext.P13 report had been sent to PW.5 in his Calicut address, it would not have reached him even in another 48 hours. When PW 1 the officer concerned did have the information that his immediate superior told telephonically that he had been coming over to meet him also in connection with this case and when Ext.P13 report was kept by him for handing it over to him directly, in a case of this nature, it cannot be taken that there was any violation of Section 42, because the report has reached the hands of the superior officer, far earlier than the time when it would have reached, had it been sent by post. There is substantial compliance with the provisions of Section 42 of the Act in this case. No prejudice is also caused to the accused/appellant.

7. Next, I will consider whether there is any violation of Section 50 of the Act. When an officer interdicts a suspect and intends to cause search of his body, necessarily, the Officer has to inform the suspect about his right to be searched in the presence of a Gazetted Officer or a Magistrate. In this case, the appellant/accused was informed that he shall be entitled to be searched in the presence of a Magistrate/Gazetted Officer. Accordingly, Smt. Madini, an Officer attached to the Customs Department in the Airport, was brought to the spot to conduct the search. In the meanwhile, as the accused showed willingness to hand

over the contraband, it was not necessary to conduct a search on the body. Thus, the search was conducted in accordance with law.

8. The evidence of PWs. 1 and 2 discloses that she had expressed her willingness to hand over the contraband articles in her possession and on expressing that information, she was taken to the ladies room where she had voluntarily brought down her panties till her knee and took out the contraband articles in the presence of PW.2 and the gazetted officer Madini. Thereafter, a further search was conducted on the body in the presence of Madini, the Gazetted Officer, but nothing could be found out. The contraband articles in this case contained in 4 packets had been thus taken over from the panties by the accused herself voluntarily and handed over to PW.2. When one voluntarily takes out the contraband articles, there arises no question of the body being searched. So, in this case, there was no violation of Section 50 also. There was no need for the said Madini being examined in this case because upon the body search made in her presence, nothing was seized. Therefore, there was no violation of the provisions of Section 50 in this case.

9. Yet another point is whether there was violation of Section 57 of the Act. Section 57 provides that when a seizure or arrest under the Act has been made, within 48 hours, the officer concerned shall 'make a full report of all particulars of such arrest or seizure to his immediate officer superior'. Of course, this is not a mandatory provision, but only directory. But, it is not an empty formality even. It is something to be complied with. The obligation on the part of PW.1 was to report the matter within 48 hours. Within 24 hours, the said officer was with him and the entire information was made known to him and Ext.P13 report was also handed over to him. In such circumstances, there was substantial compliance with the provisions in Section 57.

10. Now, I will examine whether it was obligatory for the prosecution to produce the panties, with which the contraband articles had been kept touching her own body. The articles were kept on the body covered with the panties worn by the appellant/ accused. As already mentioned, the accused volunteered to take it and to hand it over to the officers concerned, as she was sure that her body would be

searched in the presence of a Gazetted Officer. Therefore, while in the ladies' room, she drew out her panties to her knees, as spoken to by PW.2 and took out the contraband articles from the panties, two packets which ultimately contained 4 packets of the narcotic drugs and psychotropic substances in question. It was not tied or hidden in the panties. With the help of panties, it was lighted with the body. In such circumstances, the panties was not a relevant piece of evidence. Moreover, as is disclosed by PW.1 in his evidence, the accused did have only one undergarment and therefore, with a humanitarian consideration that was not seized and allowed to be worn by the accused. Therefore, in such circumstances, the non-production of the panties worn by the accused in no way affects the prosecution case.

11. PW.3 is an independent witness. He is a trolley puller in the Airport in whose presence the mahazar was prepared and he has also attested it evidencing seizure. In such circumstances, this is a case where there was complete evidence from PWs.1 to 3 that the accused was in possession of 114 grams of hashish oil, a psychotropic substance, thereby committing an offence under Section 20(b)(ii) of the Act and was in possession of 100 grams of heroin, a narcotic drug, thereby committing an offence under Section 21 of the Act. Exts.P1 to P4 reveals that she has been travelling by air to Thiruvananthapuram and was proceeding to Maldives, a foreign country. Necessarily hiding the said substances inside her panties, she was attempting to export the same to other countries, thereby committing the offences under Section 23 read with Section 28 of the Act. Consequently, the impugned conviction, in every respect, is justified and is consequently sustained.

12. Of course, the case has been disposed of after the enforcement of Act 9 of 2001, amending NDPS Act. The accused is entitled to the benefit of sub Clause (B) of Section 20(b)(ii), Clause (B) of Section 21 and Clause (B) of Section 23 of the Act. The said provisions provided that for the offence now proved against the appellant, the imprisonment may extend to a term of 10 years, and fine which may extend upto Rs. 1 lakh (Rupees One Lakh only). The maximum term of imprisonment of 10 years and the maximum fine of Rs. 1 lakh have been imposed in this case.

13. Taking into account, the quantity involved and the circumstances of the case, and the new provisions as amended, I am of the view that there shall be interference with respect to the sentence.

Accordingly, appeal is disposed of as follows:

(1) The conviction under all the said three counts is confirmed.

(2) But, sentence is modified as follows:-

For the said offences found against the appellant, she shall undergo rigorous imprisonment for a period of 7 years each and shall pay a fine of Rs. 50,000/- each. The substantive sentences of imprisonment shall run concurrently. If there is default in payment of fine, there shall be further simple imprisonment for six months each. She will be entitled to set off, under Section 428 Cr.P.C., the period already undergone by her in custody during the investigation of the case, pending trial or pending appeal against the imprisonment ordered hereinabove.

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