

Job Vs. State of Kerala

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Court : Kerala

Decided On : Jan-02-1991

Reported in : 1991CriLJ2180

Judge : B.M. Thulasidas, J.

Acts : Abkari Act, 1077 - Sections 15C, 30, 31, 32, 33, 34, 34(2), 34(3), 35, 36, 55, 57 and 58; Code of Criminal Procedure (CrPC) - Sections 99, 100, 100(4) and 103

Appeal No. : Criminal Revn. Petn. No. 460 of 1990

Appellant : Job

Respondent : State of Kerala

Advocate for Def. : V. Bhaskara Menon, Public Prosecutor

Advocate for Pet/Ap. : P. Vijaya Bhanu, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

B.M. Thulasidas, J.

1. Petitioner concurrently stands convicted Under Section 55(a) of the Abkari Act and sentenced to suffer simple imprisonment for 3 months and to a fine of Rs.

500/-; in default to S.I. for 3 weeks by judgment of the Judicial 1st Class Magistrate, Kunnampulam, in S.T. No. 10 of 1987 as confirmed in CrI. Appeal No. 4 of 1989 of the Sessions Judge, Trichur. Reportedly, he was found in possession of 60 grains of 'ganja' by the excise patrol party, Kunnampulam, on 20-12-1986 at about 6 p.m. near the Baiju Theatre, Kunnampulam.

2. P.Ws. 1 and 2 detected the offence. They proved Ext. P1 mahazar for the recovery of 60 grams of 'ganja' from the petitioner. The sample of the contraband was examined by the Chemical Examiner whose report, Ext. P-3 showed that it was genuine 'ganja'. Exception was not taken to the report. The evidence of P.Ws. 1 and 2 was rightly believed. There were no circumstances to disbelieve them.

3. Counsel for the petitioner assailed the conviction and sentence on the basis of the decision of this Court in Ramachandran Nair v. State (1990) 1 Ker LT 44 where it was held that in the matter of search, provisions of Section 36 of the Abkari Act had to be complied with and if there was failure to do so, which remained unexplained to the satisfaction of the court, the seizure and search would be vitiated. It was held:

'Section 99 of the Code says that the provisions in the sections enumerated therein shall, so far as may be, apply to all search warrants issued under the Code. Section 100(4) of the Code enjoins a duty on the officer who makes the search to call upon two or more independent and respectable inhabitants of the locality to attend and witness the search. The decisions are a legion to the effect that mere non-compliance with the provisions will not vitiate the search unless prejudice is caused to the accused. But the wording of the proviso to Section 36 of the Act is different. The words 'persons called upon to attend and witness such searches shall include at least two persons' indicate the legislative insistence for strict compliance with the proviso. When the statute uses expressions such as 'at least', it must be understood that it denotes the minimum number required for its performance when it falls below the minimum number the officer who makes the search has a duty to explain the reason for not adhering to the minimum requirement. If such explanation is acceptable to court, the seizure of search may not get vitiated.'

4. General provisions relating to searches are contained in Section 99 and 100 Cr. P.C. The provisions are made applicable for searches under the Abkari Act by Section 36, where by the proviso it is stated that the persons called upon to attend and witness such searches shall include at least two persons neither of whom is an Abkari, Police or Village Officer. Under Section 30 of the Act, any Magistrate can issue a search warrant on application in connection with the suspected commission of an offence Under Sections 55, 57 or 58 of the Act. Under Section 31, power is given to certain Abkari or police officers to search houses etc. without warrant. Under Sections 32 and 33, power is also given to the Commissioner of Excise or any Abkari Officer not below the rank of Preventive Officer or any police officer duly empowered, to enter and inspect any place of manufacture and sale of intoxicating drug and to use force to enter in cases of resistance. Under Section 34 any officer of the Excise Department or the police department may arrest without warrant in any public thoroughfare or open place other than a dwelling house, any person found committing an offence punishable Under Section 15-C or Section 55 or Section 57 or Section 58 and in any such thoroughfare or public place may --

'(a) seize and detain --(i) any liquor or intoxicating drug;

(ii) any material, still, utensil, implement or apparatus;

(iii) any receptacle, package or covering; and

(iv) any animal, cart, vessel or other conveyance, which he has reason to believe to be liable to confiscation under this Act;'

Sub-sections (2) and (3) of Section 34 are not relevant for this case. Under Section 35 arrest can be made of a person who may be accused or reasonably suspected of committing an offence and who, on demand refused to give his name and address or who gives a name or residence which such officer or person has reason to believe to be false.

5. The decision reported in Local Govt. v. Nainsukh Teli (1933) 34 Cri LJ 721 (Nag), dealt with a case where the accused from whom a certain quantity of charas was seized was acquitted on the ground that there was deliberate failure

by the excise authorities to comply with the law relating to searches. It was held:

'Section 103, Criminal P.C. refers only to the search of places and not of persons. An officer intending to search the person of a suspect cannot issue an order in writing to any inhabitants of the locality directing them to remain at a place until the suspect arrived.'

6. In *Sunder Singh v. State of U.P.* AIR 1956 SC 411 : (1956 Cri LJ 801), the Supreme Court held that Section 103, Cri. P.C. (which corresponds to Section 100(4) of the new Code) applies when a search has to be made of a place. It does not apply to the search of a person. In that case the Sub Inspector of Police seized the bloodstained shoes worn by the accused while he was with him in the presence of certain witnesses and it was argued that those witnesses 'were not respectable inhabitants of the locality in which the place of search is situated', as required by Section 103, Cr. P.C. It was held :

'On the face of it, Section 103 would not apply to the seizure of the shoes which were being worn by the accused at the time he was with the investigating police officer. The section applies when a search is to be made of a place. It does not apply to the search of a person. In this case, the Sub Inspector, saw the accused putting on the pair of shoes and he seized them. There is no question of search either of a place or of a person.

Hence it was not necessary strictly in accordance with the provisions of Section 103 of the Code that there should have been two independent search witnesses. But the Sub Inspector out of abundant caution asked these two rickshawwallahs to be present as they were the persons most easily available.'

7. This decision was followed by the Allahabad High Court in *Parmeshwar Singh v. State* 1963 (1) Cri LJ 342. In *Kajaji v. State*, 1960 Cri LJ 331, the Gujarat High Court held that in a case of search of person, the provisions of Section 103, Cri. P.C. would not apply and therefore it was not obligatory to keep witnesses during such search.

8. Ramachandran Nair v. State (1990 (1) KLT 44) must be understood in the light of the above decision of the Supreme Court and could apply to search of place and not of person. Indeed, even in the matter of search of place, non-compliance of the proviso could be explained to the satisfaction of the court. I hold that search of the petitioner and seizure of the contraband from him did not offend the proviso to Section 36 of the Abkari Act.

9. As observed already, the evidence on record was sufficient to prove the search and seizure of the contraband from the petitioner as alleged. He was rightly found guilty Under Section 55(a) of the Act, convicted and sentenced. There are no grounds to interfere. Cri. R.P. is dismissed.

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