

Ruben Joseph Vs. State

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Court : Kerala

Decided On : Mar-04-1993

Reported in : 1993CriLJ2138

Judge : L. Manoharan, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 2, 21, 52A, 76 and 76(2); [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 293(4) and 447; Narcotic Drugs and Psychotropic Substances Rules, 1985 - Rule 2; Code of Criminal Procedure (CrPC) , 1974 - Sections 161, 293, 293(4) and 313

Appeal No. : Crl. Appeal No. 303 of 1992

Appellant : Ruben Joseph

Respondent : State

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

Advocate for Pet/Ap. : S.V. Rajan, Adv.

Judgement :

L. Manoharan, J.

1. Criminal Appeal No. 303 of 1992 is by the third accused and Criminal Appeal No. 463 of 1992 is by the second accused in Sessions Case No. 268 of 1991 of

the Court of the Second Additional Sessions Judge, Thiruvananthapuram. Four accused persons were charged under Section 21 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (for short 'the Act') and Section 447 read with Section 34 of the I.P.C. Learned Second Additional Sessions Judge found accused 1 and 4 not guilty and they were acquitted; but found accused 2 and 3 guilty of the offences punishable under Section 21 of the Act and Section 447 read with Section 34, I.P.C. and sentenced accused 2 and 3 each to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1,00,000.00, in default of payment of fine to undergo rigorous imprisonment for a further period of two years for the offences under Section 21 of the Act, and to undergo simple imprisonment for three months for the offences punishable under Section 447 read with Section 34, I.P.C. with a direction that the sentences shall run concurrently.

2. According to the prosecution, the four accused persons committed criminal trespass into the University College compound at about 1.30 p.m. on 21-7-1990 in furtherance of their common intention to sell morphine, a narcotic drug. They were found in possession of the said morphine, a narcotic drug for the purpose of sale. The office bearers of the College Union, PWs. 2, 3, 5 and others who were members of the anti-drug addiction squad, finding the accused persons in suspicious circumstance near the Chemistry Department apprehended them and took them to the office room of PW 1, the Principal. According to the prosecution, they were in possession of MO-4 bag containing MO3 hat, 4 viles of morphine injection ampoules two used viles of the same substance, MO-6 paper stand and MO-7 needle cover. PW 1 informed PW 6, Sub-Inspector of Police and on getting information PW 6 came to the office room of PW 1; found four accused persons and PWs. 2, 3, 6 and others in the office room of PW 1. He seized the material objects found on the table under Ext. P-1 mahazar. He also prepared Ext. P-2 inventory. The four viles of injection were packed in MO-1 envelope, sealed the same and obtained the signatures of PWs. 1 to 3, 5 and the accused. PWs. 1 to 3 and 5 are also attestors to Exts. P-1 and P-2. PW 6 also seized Yazdi Motor bike which was brought by the 2nd accused to the college compound. He arrested the accused and took them and the material objects to the police station. Thereafter he registered a crime as Crime No. 119 of 1990 as per Ext. P-6 First Information Report. The sealed ampoules in MO-1 envelope and the two empty ampoules

were sent to the Court.

3. PW 4, the successor of PW 6 prepared the draft charge which was approved by PW 7, Circle Inspector of Police and thereupon PW 4 laid the charge before Court.

4. The four ampoules packed in MO-1 envelope and the two empty viles seized under Ext. P-1 were forwarded to the Court by PW 6 from where it was sent to the forensic Science Laboratory, Thiruvananthapuram for chemical examination. PW 8, Assistant Director of Chemistry, Forensic Science Laboratory after examination sent Ext. P-8 report wherein he certified that the injection viles contained Bupremorphine, a derivative of the baine which is an opium alkaloid, and the empty ampoules contained traces of the same substance Bupremorphine.

5. On the accused pleading not guilty to the charge, the prosecution examined PWs. 1 to 8, produced Exts. P-1 to P-8 and identified MOs. 1 to 10 series. On the side of the defence Exts. D-1, a portion of the statement of PW 2 under Section 161, Cr. P. C. was marked.

6. Learned counsel for the appellants contended that the evidence will not show that the substance in question is a narcotic drug, that the Analyst PW 8 is not competent to analyse or certify whether the substance is a narcotic drug and that, there is nothing to connect the accused with the offences.

7. The first question to be considered is whether the seized article was a narcotic drug. Ext. P-8 and the evidence PW 8 would show that the substance was Bupremorphine, a derivative of thebaine. The opinion of PW 8 is the ampoules in item No. 1 contained Bupremorphine a derivative of thebaine which is an opium alkaloid. Traces of Bupremorphine was detected in the MO in item No. 2. Item No. 1 in Ext. P-8 was the sealed envelope containing four viles of injection ampoules and item No. 2 was two broken glass ampoules; these were seized under Ext. P-1.

8. Learned counsel's first contention is that, the baine is being a phenanthrene alkaloid is not opium alkaloid. PW 8 was recalled by this Court and was further examined on this aspect. He said opium alkaloids are classified into two general groups; one is isoquinoline alkaloid and the other is phenanthrene alkaloid. From

the said expert's opinion itself, it can be seen that phenanthrene is also an opium alkaloid. Section 21 of the Act attracts punishment for contravention in relation to manufactured drugs and preparations. Manufactured drug is defined under Section 2(xi) of the Act. Section 2(xi) of the Act reads :

2. Definitions.-- In this Act, unless the context otherwise requires,--

xx xx xxxx xx xx(xi) 'manufactured drug' means--

(a) all coca derivatives, medicinal, opium derivatives and poppy straw concentrate;

(b) any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug, but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug;

So opium derivative also is a manufactured drug. Opium derivative is defined under Section 2(xvi)(c) of the Act. Section 2(xvi)(c) of the Act reads:

2(xvi) 'Opium derivative' means--(a) & (b)....

(c) phenanthrene alkaloids, namely, morphine, codeine, thebaine and their salts.

Therefore, opium derivative would take in phenanthrene alkaloid namely thebaine also. Thus, as per the statute itself thebaine being a phenanthrene alkaloid is an opium derivative and opium derivative as per Section 2(xvi) of the Act is a manufactured drug. An attempt was made to contend thebaine being dimethyle ether of morphine, and PW 8 having made no attempt to find out the percentage of morphine, the substance is not opium derivative within the meaning of Section 2(xvi) of the Act. The assumption that substance is a preparation containing morphine does not appear to be correct. PW 8 is positive that demethyle morphine is not morphine but is thebaine and that the substance is a preparation of thebaine

which is a component of opium. Thus the substance is opium derivative as per Clause (c) of Section 2(xvi) of the Act. In the circumstance Clause (c) of Section 2(xvi) of the Act has no application. The contention of the learned counsel for the appellants that thebaine is not an opium derivative is destined to fail.

9. The next contention is that PW 8 is not competent to analyse or certify as to the nature of the substance for the purpose of the Act. According to the learned counsel for the appellant as per Rule 2(c) of the N.D.P.S. Rules, 1985 'Chemical Examiner' means the Chemical Examiner, Government Opium and Alkaloid Works Neemuch or, as the case may be, Ghazipur. Since the said Rules are framed as per Section 76 of the Act, only the Chemical Examiner mentioned in the Rules is competent to certify as to the substance for the purpose of the Act. He made reliance to Section 76(2)(a) of the Act. A reading of the said Section itself would show that, the Rules may provide for the method by which percentages in the case of liquid preparations can be calculated for the purposes of Clauses (v), (vi), (xiv) and (xv) of Section 2 of the Act. So, the Rule is not intended to control the competency of Chemical Examiner to certify as to the nature of the substance. Adding to that, the learned counsel could not point out any Section or Rule which expressly provides that the Chemical Examiner mentioned in Rule 2(c) of the N.D.P.S. Rules alone is competent to examine and certify as to the nature of the substance. Thus, the argument is unsustainable.

10. PW 8 is the Assistant Director of Chemistry, Forensic Science Laboratory, Thiruvananthapuram. He is an expert who comes under Section 293(4)(e) of the Cr.P.C. Therefore, in the absence of any specific provision in that regard in the N.D.P.S. Act PW 8 is competent to analysis and certify as to the nature of the substance and his opinion can be used as an evidence under Section 293, Cr.P.C. Adding to that PW 8 has given evidence in support of Ext. P8. Thus, Ext. P 8 having been validly proved it has to be found that the ampoules contained 'manufactured drug' within the meaning of N.D.P.S. Act. A contention also was raised to the effect that there was violation of Section 52A of the Act. The Section has no application to the facts of this case, as it is not a case where the substance was forwarded to the officer-in-charge of police station, instead the officer PW 6 himself seized the substance.

11. Now coming to the case of the appellants that, they have absolutely no connection with the substance which is seized by PW 6, the prosecution mainly relies on the evidence of PWs. 1 to 3, 5 and 6 in support of the prosecution case. As noticed, the prosecution case is that, on 21-7-1990 at about 1.30 p.m. PWs. 2, 3 and 5 saw the four accused persons in a suspicious circumstance near the Chemistry Department of the University College, Thiruvananthapuram. They were found to be having MO 4 bag; they were brought to the office room of PW 1 and on information received from PW 1 as to the apprehension of the accused with narcotic drug PW 6 reached the office room of PW 1, seized the said bag and its contents under Ext. P1 mahazar. He also prepared Ext. P 2 inventory. PWs. 2, 3 and 5 turned hostile to the prosecution. Naturally, therefore, the prosecution mainly relies on the evidence of PW 1 to prove the prosecution version.

12. PW 1 said, at about 1.30 p.m. on 21-7-1990 while he was in his office room, four accused persons were brought to his room by PWs. 2, 3, 5 and others, that they told him that the accused were having narcotic drungs. At his instance the bag was opened. Then four viles containing four ampoules for injection, MO 3 hat and MO 5 series empty ampoules were found. On seeing this, he informed PW 6. According to him PW 6 on reaching there he seized the material objects under Ext. P. 1 and also prepared Ext. P2 inventory. PW 1 said, he and the witnesses signed Ext. P 1 and P2. PW 1 also has stated that, four viles were packed in MO 1 envelope and was sealed. PW 6 said, on reaching, the police station he registered the crime and then he sent the material objects to the court. One of the contentions is, though the seizure was on 21-7-1990 the same reached the court only on 23-7-1990. But the delay was explained by PW 6. He said, 22-7-1990 was Sunday and that during the period the material objects were in his custody, The delay, thus is satisfactorily explained, and the delay, in the circumstances, cannot be said to have caused any prejudice. PW 1 said the four viles were packed in MO 1 envelope and he has also signed on the envelope. Apart from the same injection ampoules had labels, and ordinarily the same cannot be able to be tampered with. Thus the objection raised by the counsel for the appellants in this regard cannot be sustained.

12A. What is seriously contended by the learned counsel for the 3rd accused is that, neither the 2nd accused nor the 3rd accused, is proved to have any connection with the bag. Learned counsel for the 3rd accused pointed out that, PW 1 swears only as to what happened after the accused persons were taken to his room. True, it is important as to who was in possession of the bag which contained the four viles which is discovered to be a narcotic drug.

13. PWs. 2, 3 and 5 who claim themselves to be the members of the antidrug addition squad of the college and who according to the prosecution apprehended the accused turned hostile to the prosecution. As observed by the learned Second Additional Sessions Judge, these persons admitted to their having received rewards from the Government for detecting narcotic drugs. PW 1's evidence cannot be taken to be of no relevance on this aspect because he is competent to swear as to who carried the bag into his room and PW 1 said, it was the second accused who was carrying the bag when they reached his room. PW 5 says that, when these accused were apprehended the 2nd accused was having MO 4 honda bag. Simply because, a witness is declared hostile, that does not mean that the whole evidence of the said witness should be banished from consideration. Such of the portions of the said witness which inspire confidence to be acted upon, can be relied on. PWs. 2, 3 and 5 being students of the college particularly workers of the College Union, there is every probability of their presence as they said, on the date of occurrence they had convened a meeting of their organisation in the college. What is maintained by the second accused is that, while he was riding a Yazda Motor Bike that developed trouble and he happened to be in the college just for parking the motor bike in the college compound. First of all, the explanation itself is quite improbable inasmuch as if as a matter of fact the motor bike developed trouble, one cannot conceive that the suitable place for parking such a vehicle is a college compound. Apart from the same, the evidence of PW 1 that, when the accused persons were taken to his room the second accused was seen carrying MO 4 bag which contained narcotic drug lends strong support to the conclusion that, it was the second accused who brought the bag into the college, the said conclusion is reinforced by the evidence of PW 5. Thus, the evidence clearly proves that, the second accused was in possession of the narcotic drug as he was carrying the bag from which the narcotic drug was discovered. He (2nd

accused) came to the college with the bag. With due regard to the implements that were also seized from the bag his object was to commit the offence and therefore his entry into the college compound is criminal trespass.

14. Now, as regards the 3rd accused, the learned counsel said, there is absolutely no legal evidence to show that he has any connection at all with the offence.

15. PW 1 only said that, the 3rd accused was one among the four accused who were brought to his room on that particular day. Except that he was brought along with the three other accused persons, no incriminating circumstance against the 3rd accused could be discerned from the evidence of PW 1. The fact that when PW 6 seized the articles from the bag, the 3rd accused also was present in the room of PW 1 by itself cannot; be a circumstance to infer that the 3rd accused had any common intention to commit any crime or that he was in possession of the narcotic drug. All that PW 2 said is that,, he saw the accused standing in front of the Chemistry Department. He said that they had a bag; but he does not know who among them held the bag.

16. PW 3 said that, he saw accused 2 and 3 sitting in the corridor leading to the Chemistry Laboratory, and MO 4 bag was placed in front of them. All that PW 5 said is that the 3rd accused was one among the persons whom they apprehended, and as noticed, he said the bag was with the second accused.

17. Thus, the only piece of evidence against the 3rd accused is that of PW 3 to the effect that he and the 2nd accused were seen sitting in the corridor leading to Chemistry Department and the bag was kept near them. The question for consideration is, whether the 3rd accused could be treated to have been in possession of the narcotic drug kept in the bag or at least could be attributed with any common intention along with the 2nd accused.

18. Learned counsel for the 3rd accused contended that there is absolutely no legal evidence to hold that the 3rd accused was in possession of the narcotic drug nor to his having had any common intention with the 2nd accused. In the statement of the 3rd accused under Section 313, Cr.P.C. he explained the reasons for his presence in the college compound on that day. He said that he wanted to

get certain certificates attested by Dr. Sasidharan, a Research Scholar of Botany Department and that it was to meet him that he came to the college on that day. His mere presence in the College that day by itself cannot generate any incriminating circumstance particularly when PW 1 said even during holidays the said Dr. Sasidharan used to attend the botany department.

19. Reliance was placed by the learned counsel for the 3rd accused on the decision in *Moideen Koya v. State* 1990 Cri LJ 2761 in support of his contention that unless there is acceptable evidence as to the possession or ownership of the narcotic drug no conviction can be made. He relied on the decision in *Pritam Singh v. State*, AIR 1967 Punj 50 : (1967 Cri LJ 254) to contend that, to constitute possession, there must be conscious knowledge. He also relied on the decision in *Sahendra Singh v. Emperor*, AIR 1948 Pat 222 : (1948 (49) Cri LJ 445) to contend that, possession should mean conscious possession and actual control for the purpose of the Act. *Sahendra Singh's case*, AIR 1948 Pat 222 : (1948/ 49 Cri LJ 445) arose under the Arms Act, 1878 wherein it was held that: 'Possession and control' mean conscious possession and actual control.

20. Here, the charge is under Section 21 of the Act. Under the said Section whoever, in contravention of any provision of this Act, or any rule or order made or condition of licence granted thereunder manufactures, possesses, sells, purchases, transports, imports inter-State exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug is liable to be punished. All that the prosecution evidence could disclose is that the second accused was in possession of the narcotic drug with certain implements. There is no case that any of the accused used any manufactured drug. As noticed, the only piece of legal evidence against the 3rd accused is that he (3rd accused) and the 2nd accused were found sitting in the corridor and MO 4 bag was placed near them. According to PWs. 1 and 5 the bag was seen being carried by the second accused. Therefore, the second accused has to be attributed with possession of the bag. But in the circumstances simply because the 3rd accused was also seen sitting in the corridor, that by itself cannot imply that he was in joint possession with 2nd accused. To constitute possession, there should be animus to possess also. Unless, there is evidence or circumstance indicative of the animus to

possess, one cannot infer joint possession or even constructive possession, the evidence as regards this aspect against the 3rd accused is too feeble and sketchy, there is also nothing in evidence to infer that he had common intention with the second accused to sell the drug. Even if the circumstances may cause grave suspicion as to his complicity, under law, suspicion however strong or grave, cannot take place of evidence. The type of evidence against the 3rd accused being as indicated above, in my view, it is not possible in the circumstance to find him guilty of the offence alleged against him, he is at least entitled to the benefit of reasonable doubt.

In view of the above, the finding, conviction and sentence rendered against the 3rd accused are set aside. The 3rd accused is found not guilty, and he is acquitted. Crl. Appeal 303 of 1992 is allowed. The 3rd accused shall be set at liberty forthwith, if his continued detention is not required in connection with any other case.

The finding, conviction and sentence awarded to the 2nd accused by the learned Second Additional Sessions Judge are only to be confirmed and the same are hereby confirmed and Crl. Appeal 463 of 1992 is dismissed.

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