

Mohanan Vs. State of Kerala

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Court : Kerala

Decided On : Dec-02-1994

Reported in : 1995(1)ALT(Cri)236; 1995CriLJ2325

Judge : K.P. Balanarayana Marar, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 41(2), 42, 42(1), 42(2) and 50

Appeal No. : Criminal Appeal No. 450 of 1994

Appellant : Mohanan

Respondent : State of Kerala

Advocate for Def. : Franklin Cheliath, Public Prosecutor

Advocate for Pet/Ap. : B. Raman Pillai, Adv.

Disposition : Appeal allowed

Judgement :

K.P. Balanarayana Marar, J.

1. The accused in S. C. No. 120 of 1992 before the Sessions Court, Thodupuzha is the appellant. He was convicted for the offence under Section 20(b)(i) of the Narcotic Drugs & Psychotropic Substances Act (for short the Act) and sentenced

to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs. 25,000/- and in default to undergo rigorous imprisonment for a further period of eight months.

2. The prosecution case is that the Sub Inspector of Police, Rajakkad while he was on patrol duty on 20-11-1991 got some information that the accused had kept concealed Ganja in a sack in the land adjoining a shed near his house. The police party reached that place and noticing some loose soil near the shed searched that place and found a plastic sack. On opening the same, it was found to contain Ganja. A mahazar was prepared and a crime was registered. After investigation, report was filed before the Sessions Court. Thodupuzha.

3. The accused pleaded not guilty to the charge. The Court below found him guilty, convicted him and awarded the sentence referred above. Hence this appeal by the accused.

4. Heard counsel for appellant and Public Prosecutor.

5. The main argument advanced by learned counsel for appellant is that the trial is vitiated for non-compliance of the mandatory provisions contained in Sections 42 and 50 of the Act. The information alleged to have been received by PW.4, the Sub-Inspector of Police was not recorded and a copy of the same was not sent to the immediate official superior. The accused was also not informed of his right to get the article searched in the presence of a Gazetted Officer or a Magistrate. The Supreme Court in *State of Punjab v. Balbir Singh* AIR 1994 SC 1872 : (1994 Cri LJ 3702) held that the provisions contained in sub-sections (1) and (2), of Section 42, are mandatory. The empowered officer if he has a prior information given by any person, that should necessary be taken down in writing. If any information has been taken down in writing he should forthwith sent a copy to his immediate official superior. These provisions are held to be mandatory and non-compliance thereof affects the prosecution case. PW.4 had not spoken about recording of any information whereas he only stated that he got some secret information and it was on that basis that he proceeded to the property and conducted the search. He did not record that information in writing since information used to be received from several persons and it would not be possible to ascertain which information was

true. The question arises whether a vague information received should be reduced into writing and whether that should be sent to the immediate official superior. In the decision in *Suraimal Kania Lal Soni v. State of Gujarat* (1994 SCC (Cri) 1229) the Supreme Court is of the view that such vague information is not required to be reduced into writing. In that case only some vague information was passed on to the Police Inspector which he did not reduce into writing. No information as such came and gave the information which as per the relevant Section was to be reduced into writing. The name of the person who furnished the information or the details of the information received are not spoken to by PW.4 The requirement of Section 42 to reduce the information into writing arises only if information has been given by any person meaning thereby that the information should be an authentic information. True, P.W.4 has stated that he has received secret information. In the absence of details spoken to-by him nor brought out in cross-examination, it can only be said that the information received by him was vague which he is not bound to reduce into writing. The sending of a report to the immediate official superior does not therefore arise. The plea of non-compliance of the requirement in Section 42, of the Act is therefore not available to the appellant..

6. The Supreme Court further held that the empowered officer or the authorised officer while acting under Section 41(2) or Section 42, should comply with the provisions of Section 50, of the Act before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a Gazetted Officer or a Magistrate. It is observed that it is obligatory on the part of such officer to inform the person to be searched. The Supreme Court further held that failure to inform the person to be searched and if such person so requires, failure to take him to the Gazetted Officer or the Magistrate would amount to noncompliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial.

7. The prosecution has no case that the provisions of Section 50 had been complied with. True no request might have been made by the accused that he should be produced before the nearest Gazetted Officer or the nearby Magistrate. But in view of the law Said down in *Balbir Singh's case* (1994 Cri LJ 3702) (SC), it is obligatory of the part of PW 4 to inform the accused of his right to be searched

in the presence of a Gazetted Officer or a Magistrate, Admittedly. PW 4 has not informed the accused of his right to be produced before a Gazetted Officer or a Magistrate. Nothing is seen spoken to by him on this aspect. The requirement of Section 50, having been held to be mandatory, the non-compliance vitiates the trial. For that reason the conviction entered against the appellant has to be set aside.

8. The conviction is also not sustainable for another reason. The article is stated to have been dug out from a place near a shed attached to house No. 253/VII. The house is stated to be one belonging to the accused. But the house tax assessment register was produced at the instance of the accused to show that he is not the person in possession of that house. Ext. XI assessment register shows that the house is assessed in the name of one Janardhanan. Number of the house possessed by the accused is 254. This according to the prosecution is a mistake. But the evidence on the side of the prosecution is to the effect that the article was taken out from a spot near the shed attached to house No. 253. Since that house is registered in the name of the Janaradhanan and accused being in possession of another house nearby, the plot adjoining the house (No. 253) cannot be said to be in the possession of the accused so as to fasten a liability on him for the article taken out from that plot. Witnesses were no doubt examined to speak about possession of the property adjoining the house. An extent of 1.04 acres of land adjoining the house is stated to be in the possession of the accused. But the question as to the identity of the property possessed by the accused has to be determined. Since he is in possession of house No. 254 of Ward VII as per the assessment records the prosecution has to show that the spot from where the contraband article was dug out lies adjoining that house and is in his possession. Mere possession of a property in that area will not enable the prosecution to contend that the article was taken from the property of the accused. More so, when house No. 253 is found to be in the possession of another person and the article seized from a place near that house. The prosecution has therefore failed to prove that the article was taken out from the property adjoining the house of the accused. For that reason also the conviction is Unsustainable.

9. In view of the findings in the above paragraphs, it is unnecessary to consider the marks of the other contentions advanced on behalf of the appellant.

10. The appeal is allowed and the conviction and sentence against appellant are set aside and he is acquitted of the charge under Section 20(b)(i) of the N.D.P.S. Act and set at liberty. Fine, if any, realised shall be refunded. Appellant shall be released forthwith, if not required in other cases.

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