

Jayaraj Vs. State of Kerala

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Court : Kerala

Decided On : Jun-18-2001

Reported in : 2001(2)ALT(Cri)193

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

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20, 22, 41, 42, 43 and 50; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 220(1)

Appeal No. : Cri.A. 613 of 1996

Appellant : Jayaraj

Respondent : State of Kerala

Advocate for Def. : V.K. Mohanan, Public Prosecutor

Advocate for Pet/Ap. : Alexander Skaria, Adv.

Disposition : Appeal dismissed

Judgement :

M.R. Hariharan Nair, J.

1. The challenge in this appeal is with regard to the conviction entered by the Special Court for trial of N.D.P.S. Act cases (Sessions Judge), Thodupuzha for the offences under Ss. 20(b)(i) and 22 of the Narcotic Drugs and Psychotropic

Substances Act, and tem sentence of (i) rigorous imprisonment for two years and fine of Rs.10,000/- (in default rigorous imprisonment for three months) and (ii) rigorous imprisonment for ten years and fine of Rs.1,00,000/- (in default rigorous imprisonment for one year) respectively imposed for the said two offences.

2. It was the prosecution case that based on information that trafficking in narcotic drugs was going on in buses that ply between Kumili and Kottayam, PW-4 Circle Inspector of Excise Narcotic Enforcement Squad, Adimali and his party made check of transport vehicles operating in the route on 6.3.1996 in the course of which at about 1.15 p.m. a K.S.R.T bus bearing Regn. No. KL 15/1314, of which PW-1 was the Bus Conductor, was also stopped and checked and that during the search, the present accused was found near the Conductor's seat holding an air bag on his shoulder. On examination, the said bag was found to contain 500 grams of dried ganja. The accused was brought down from the vehicle and after complying with the requirement of S. 50, his body was searched further and it was found that he was holding 10 capsules of 'Dormin-10' which was subsequently identified as a psychotropic substance called 'Nitrazepam'. The trial court accepted the prosecution version based on the evidence of PWs. 1 to 4.

3. Sri. Alexander Skaria, who appeared for tem appellant, contended that the conviction is improper and illegal in so far as S. 50 of the N.D.P.S. Act has been violated in the matter of search and seizure. It is pointed that the accused was not all informed of his rights to be searched in the presence of a Gazetted Officer or a Magistrate before his bag was searched and the alleged ganja of 500 gms. seized therefrom. It was also argued that when there was such major defect in the initial search, the subsequent information conveyed to the accused and the body search conducted thereafter is also vitiated. Reliance was placed in this regard on the unreported decision of this Court on 11.8.2000 in Basheer v. State of Kerala (Crl.A.724/98).

4. Learned Public Prosecutor submitted that S. 42 is not attracted in the matter of seizure of ganja in this case as it was not done pursuant to any information coming within the scope of S. 41 or 42 of the N.D.P.S. Act. It is true that the check of vehicles was done pursuant to information that trafficking in drugs was going on;

but that did not specifically pertain to the accused herein or to the particular vehicle in which it was going on. According to the learned Public Prosecutor, this is a vague information which did not require to be recorded under S. 42 and for that reason PW-4 was also not bound to comply with S. 50 before the bag carried by the accused was opened and contents verified.

5. On the arguments advanced in the case the points arise for decision are:-

- 1) Whether there is violation of S. 50 of the N.D.P.S. Act in the matter of search conducted by PW-4?
- 2) Whether the search and seizure made in this case are vitiated for want of compliance with S. 50 of the Act?
- 3) Whether a single trial held for seizure two items from different places is vitiated?
- 4) Whether the conviction and sentence entered against the accused warrant any modification?

6. Point Nos. 1 and 2: These are considered together. It will be useful to quote S. 50 of the N.D.P.S. Act herein.

'50. Conditions under which search of persons shall be conducted:-

- (1) When any officer duly authorised under S. 42 is about to search any person under the provisions of S. 41, S. 42 or S. 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in S. 42 or to the nearest Magistrate.
- (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-s (1).
- (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.
- (4) No female shall be searched by anyone excepting a female.

7. It is clear from the aforesaid section that it has operation only to cases where search of a person is carried out under the provisions of Ss. 41, 42 and 43 of the N.D.P.S. Act. The evidence of PW-4 is to the effect that he conducted check of vehicles on the particular day pursuant to information that ganja was being transported through buses operating in the Kumili-Kottayam route. It is also his case that he recorded the information and sent a search memo to the court and forwarded copy thereof to the Assistant Commissioner, who was his Superior Officer. The information in question specifically referred to transport of ganja. The seizure in question atleast falls under S. 43 of the Act. In the circumstances, I am of the view that the provisions of S. 50 of the Act are attracted as far as body searched made by PW-4 is concerned.

8. The seizure made in the case runs in two parts. As regards the first part, the item seized is ganja which on subsequent weighment was found to be of 500 gms. This was found inside a bag which, according to PW-4, was carried by the present accused, who was a passenger of the bus in question, being held at his shoulder. He has no case that before the bag was seized and its contents were verified any information was conveyed to him with regard to the rights under S. 50 or that his option was asked for as to whether the search should be in the presence of a Gazetted Officer or a Magistrate.

9. *Basheer v. State* (supra) relied on by the appellant was a case where 8 packets of ganja weighing 5 grams and a larger packet containing 500 grams of ganga were seized from a plastic bag held by the appellant in that case in his hand. The contention raised was that S. 50 of the Act would have operation only when a body search as such is made and not to a case where something is seized from the hand of the accused. Based on the decisions in *State of Punjab v. Balbir Singh* (AIR 1994 SC 1872) and *State of Punjab v. Baldev Singh* (1999) 6 SCC 172) as also some other decisions, this Court held on the facts of that case that the failure of the Seizing Officer to comply with S. 50 entitles the accused get an acquittal.

10. In *Balbir Singh's* case, the following propositions were laid down: If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of

investigation into an offence or suspected offence as provided under the provisions of Cr.P.C. and when such search is completed, at that stage, S. 50 of the N.D.P.S. Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the N.D.P.S. Act. If the Seizing Official happens to be an empowered officer also, even then, from that stage onwards, he should carry out the investigation in accordance with the other provisions of the N.D.P.S. Act.

11. As regards the consequence of violation, it was 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 non-compliance of S. 50, which is mandatory and thus it would affect the prosecution case and vitiate the trial.

12. The matter looked into in more detail in *State of Punjab v. Beldev Singh* (1999 (6) SCC 172). It was found therein that the right to be searched before a Gazetted Officer or a Magistrate, if the suspect so requires, is an extremely valuable right which the legislature has given to the person concerned having regard to the grave consequences that may entail the possession of illicit articles under the N.D.P.S. Act; that the provision was incorporated in the Act keeping in view the severity of the punishment and that there is no justification for the empowered officer, who goes to search a person, on prior information, of not informing the person concerned of the existence of his right to have his search conducted before a Gazetted Officer or a Magistrate, so as to enable him to avail of that right. It was further found that the question whether the safeguard in S. 50 was observed, however has to be determined by the Court on the basis of evidence led at the trial and that finding on that issue, one way or the other would be relevant for recording an order of conviction or acquittal.

13. The requirements were summed up in the same decision as follows:-

i) An empowered officer or duly authorised officer, acting on prior information before he effects search of a possession, is duty bound to inform the person concerned of his right under S. 50(1).

ii) The failure to inform the person concerned as above would cause prejudice to an accused.

iii) Search made by competent officer on prior information without compliance with S. 50 may not vitiate the trial; but would render the recovery of the illicit article suspect and vitiate the conviction and sentence where the conviction is entered solely on the basis of the possession of the illicit article.

iv) Whether S. 50 is mandatory or directory, the failure to comply with the same may render the recovery of the contraband suspect and the conviction and sentence of the accused bad unsustainable in law.

14. The position emerging from the said two decisions is that failure of the officer to conduct search of the person of an accused is fraught with serious consequences. But then, the question arises whether the search in the present case was done on the person of the accused? *Gurbax Singh v. State of Haryana* (2001) 3 SCC 28) deals with a similar case. The prosecution allegation in the case spoken to by the relevant witness was that on 12.1.1986 PW-2-Sub Inspector, who was present in Platform No.1 of Karnal Railway Station for checking smuggling and to look for anti-social elements found, when the Kalka passenger train arrived at Karnal and halted in Platform No.1, that the accused therein, who was sitting in the compartment, became panicky and left the train from the door towards the side of engine carrying a gunny bag on his left shoulder. On suspicion, he was nabbed in the presence of the witnesses and it was found that he was carrying poppy straw. The search and seizure were effected without compliance with S. 50 of the Act. The question whether S. 50 can apply to such a case where seizure is made from a bag carried by the accused was considered in the light of the decisions in *Beldev Singh* as also a later decision in *Kalema Tumba v. State of Maharashtra* (1999) 8 SCC 257) where it was held that only when the person of an accused is to be searched, the requirement of compliance with S. 50 would arise. That was also a case where the contraband was recovered from the bag held by the

accused. The court held that S. 50 was not attracted to such a seizure. However, there was no evidence in that case adduced by the prosecution to show that the Chemical Analyst received the sample with seals intact which created a doubt whether the sample sent to the analyst was the same as seized from him. The accused was given the benefit of doubt and acquitted.

15. In view of the said decisions (Kalema Tumba and Gurbax Singh aforementioned) it is clear that requirements in S. 50 will come into play only when the search of a 'person' is carried out and not in cases where it is from a bag which is held by him. Viewed from that perspective, it cannot be said that the failure of PW-4 to comply with S. 50 of the N.D.P.S. Act before search of the bag carried by the present appellant would vitiate the seizure or the subsequent trial.

16. Point No. 3: It is true that separate cases were not registered for the two offences; but since the seizure in question took place in quick succession and the accused also being one and the same person, there was nothing improper in having a single trial for the two offences. Here is a case of two acts, so connected together as to form the same transaction, which are committed by the same person. One trial is sufficient for the two acts in such a case in view of S. 220(1) of the Cr.P.C.

17. The decision in Balbir Singh and Beldev Singh make it clear that once an officer comes to know that there is possibility of contraband being held by the accused, he has to comply with the requirements of S. 50 of the N.D.P.S. Act before conducting body search. PW-4 has complied with this. After the bag in question was seized, the accused was brought down to the road and there he was informed of his right under S. 50 and regular body search was conducted. It was thereupon that 10 capsules of 'Dormin 10' were seized. This, when analysed by PW-2-Chemical Analyst, was found to be psychotropic substance 'Nitrazepam', shown as item 64 of the schedule of the N.D.P.S. Act. The analyst has also confirmed that the other item seized is ganja (see Ext.P13). The evidence of PW-4 with regard to the seizure of the aforesaid item from the shirt pocket of the accused finds proper corroboration from PW1, who was the Conductor of the K.S.R.T.C. bus in which the accused was travelling just before the search and

seizure took place. There is nothing to suspect that tem item seized was not the same as examined in the laboratory. So is the case of ganja coming within the scope of S. 20(b)(i) of the NDPS Act.

18. In the circumstances, the court below was right in finding that there was seizure of ganja from the bag held by the accused besides seizure of psychotropic substance 'Nitrazepam' from the person of the accused. It follows that the convictions entered by the Court below for offences under Ss. 20(b)(i) and 22 of the N.D.P.S. Act are fully justified.

19. As far as the offence under S. 22 of the N.D.P.S. Act is concerned, the sentence imposed is the minimum prescribed by law. As far as the offence under S. 20(b)(i) of the Act is concerned, the sentence imposed is rigorous imprisonment for a period two years and fine of Rs. 10,000/- as against the maximum of rigorous imprisonment for five years and fine of Rs. 50,000/-.

In the circumstances, I find no merit in the present appeal. Dismissed.