

Salahuddin Vs. State of Kerala

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Court : Kerala

Decided On : Jun-21-2002

Reported in : 2002(2)ALT(Cri)411

Judge : M.R. Hariharan Nair, J.

Acts : Narcotic Drugs & [Psychotropic Substances Act, 1985](#) - Sections 20, 41 and 50; Narcotic Drugs & Psychotropic Substances (Amendment) Act, 2001

Appeal No. : Crl. A. No. 1138 of 2001

Appellant : Salahuddin

Respondent : State of Kerala

Advocate for Def. : T.K. Latiff, Public Prosecutor

Advocate for Pet/Ap. : M.K. Dileep Kumar and; T.K. Sreekala, Advs.

Judgement :

M.R. Hariharan Nair, J.

1. The new question that arises in this appeal is as to the notification with reference to which small quantity of contraband under the N.D.P.S. Act has to be assessed; that is, as to whether it is the notification that prevailed on the date of occurrence or the notification that has come into effect under the Amendment Act

9 of 2001 that applies for purposes of the benefit contemplated in Section 41 of the said Amendment Act. Another question of novelty is whether there will be violation of the provisions of Section 50 of the N.D.P.S. Act if the offender is searched in the presence of a Gazetted Officer or Magistrate who is brought to the scene of occurrence instead of the accused being taken to a Magistrate or Gazetted Officer as the accused might opt.

2. The challenge in the appeal is with regard to the conviction entered against the appellant as accused in S.C. No. 318/99 of the special Court for trial of N.D.P.S. Act cases (Sessions Court), Trissur for the offence under Section 20(b)(i) of the N.D.P.S. Act and the sentence of R.I. for 18 months and fine of Rs. 5,000/- (in default S.I. for six months) imposed therefor.

3. The prosecution case was that the accused was found in possession of 600grams of ganja while he was available in front of Libitha hotel near Panchavadi, Trissur, on 29.12.97. He was caught by the Excise Circle Inspector by name K.M. Ismail. Based on suspicion he was stopped and questioned and it was decided to have a bodysearch. When the accused was questioned about his option under Section 50, he wanted the presence of a Gazetted Officer and accordingly PW2 who was the local Tahsildar was summoned to the spot and in his presence the body search was made, when the packet in his hand was found to contain the above contraband.

4. The learned counsel who represented the appellant who was heard today submitted that there is violation of Section 50 of the N.D.P.S. Act in so far as the accused was only asked about the need to bring a Gazetted Officer or Magistrate whereas the said Section stipulates that the option should be with regard to the accused being taken to a Gazetted Officer or Magistrate. The counsel further submitted that there is no reliable evidence to find that the accused was actually possessing the contraband in question. In this regard the fact that the time of occurrence is recorded as 2.10 p.m. in Exts. P3 and P5 and the version of PW2 that he was informed about the detection soon after 1 p.m. and he had reached the spot at 1.30 p.m. to witness the search is relied on. Lastly it was submitted that at least the sentence imposed on the accused might be reduced substantially

taking into account the provisions in Section 41 of the Act 9 of 2001 which came into effect on 2.10.2001.

5. On the arguments advanced in this case the points that arises for decision are:

(i) Whether there is reliable evidence to find that the accused was in possession of 600 grams of ganja as alleged?

(ii) Whether there is violation of Section 50 of the N.D.P.S. Act?

(iii) Whether the accused is entitled to the benefit of Section 41 of Act 9 of 2001 ?

(iv) Whether the conviction and sentence imposed on the accused warrant any modification?

Point (i). Sri. K.M. Ismail, the Circle Inspector who allegedly made the detection was not examined and the learned trial Judge has recorded that that was owing to his illness. PW1 who was an Excise Inspector who had accompanied the aforesaid Circle Inspector was examined instead. He deposed that at 2.10 p.m. when the patrol party led by the said Circle Inspector reached the spot the accused was found coming in the opposite direction; that is from North to South. His perplexity caused a suspicion on the Inspector and accordingly the accused was stopped and questioned. Since he opted for search before a Gazetted Officer, PW2 - Tahsildar was brought to the scene and in the search conducted thereafter the packet held by the accused was found to contain 600 grams of ganja. A sample weighing 25 grams was separated, packed and sealed and the remainder also separately packed and sealed. The details of seizure were recorded in Ext. P3 mahazar. After the proceedings were completed, the arrested accused and the seized contraband were removed to the Excise Office; crime registered and the matter proceeded with.

6. Though PW1 stated in chief examination that the accused was found at 2.10 p.m., he stated in cross examination that the Tahsildar reached the spot at about 1.30 p.m. and that the mention of the time as 2.10 p.m. in chief examination actually referred to the time of preparation of mahazar. Obviously the earlier version was a slip of the tongue as PW2 has clearly stated that he got Ext. P1

requisition at about 1 p.m. and actually reached the spot at 1.30 a.m. I do not think that any suspicion is cast because of the mistake committed by PW 1 in describing the time of seeing the accused as 2.10 p.m.

7. PW2 has corroborated PW1 on all the material aspects. He has admitted receipt of Ext. P1 requisition for the Excise Inspector of the special squad. He also spoke of preparation of a contemporaneous mahazar at the time. There is absolutely nothing brought out in the cross examination of PW2 to discredit him.

8. PW3 who was the independent witness examined in the case admitted his signature in the seizure mahazar and stated that he signed those papers at his residence. I have already referred to the fact that the relevant mahazar was prepared at the scene of occurrence as vouch safed by the reliable Gazetted Officer-PW2. Hence it is obvious that PW3 was trying to save the accused by giving modified version while in the box. Ext. P10 contradiction brought in his evidence shows that he had switched loyalty. Notwithstanding the aforesaid development that took place during trial, I am of the view that there is reliable evidence to conclude that the accused was found in possession of the ganja in question.

Point (ii). The accused has no case that the search and seizure were not effected in the presence of PW2. At the same time it is contended that Section 50 requires strict compliance and if that be so, the bringing of PW2 to the spot could not have met the requirements and it was essential that the accused should have been taken to PW2 or to a Magistrate. This may be considered. Section 50 reads as follows:

'When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 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 Section 42 or to the nearest Magistrate.'

9. It is true that the requirement under Section 50 is that if the offender so requires he should be taken, without unnecessary delay, to the nearest Gazetted Officer or

to the nearest Magistrate. It is also true that in the instant case PW2 was actually brought to the scene to witness the search. The question arises whether there is sufficient compliance of the Section in view of the said variation.

10. Though Section 50 has to be scrupulously followed, it does not mean that it should be stretched to an unreasonable extent. If the rights available to the accused can be safeguarded by a search made at the scene of occurrence after bringing the Magistrate or Gazetted Officer to that spot, there is no meaning in insisting that instead of doing so the accused should be carried to the place where the Gazetted Officer or the Magistrate would be available. All that is a matter of convenience and expediency. What is important is the conduct of search in the presence of Gazetted Officer or Magistrate after apprising the accused of his right of such search. The appellant has not succeeded in showing that any additional benefit would have been available to the accused if, instead of bringing the Magistrate to the spot, he were taken to the place where the Magistrate was available. No prejudice was caused by the procedure actually followed. In the circumstances, I am not prepared to accept the contention of the appellant that there is violation of Section 50 justifying acquittal of the Accused merely because PW2 was brought to the scene instead of the accused being taken to him.

Point (iii). In view of my findings as points (i) and (ii) and also considering the fact that the sample seized and produced before the court, when examined at the laboratory, was certified by the analyst in Ext. P9 as genuine ganja, I am of the view that the accused has committed the offence of possessing contraband ganja.

11. What remains to be considered is the precise section under which the conviction is to be entered. The date of occurrence in this case is 29.12.1997 and going by the notification that prevailed as on that date, small quantity, so far as ganja is concerned, was only quantity lesser than 500 grams. Therefore the quantum seized in this case viz. 600 grams, if viewed with reference to the notification that prevailed on the date of occurrence was not a small quantity.

12. During hearing the learned counsel for the appellant submitted that notwithstanding the above factual position the accused is entitled to get the benefit of the new notification that was issued pursuant to the implementation of the

Amendment Act 9 of 2001 in view of Section 41 of the said Act which provides as follows:

Section 41. 'Application of this Act to pending cases : (1) Notwithstanding anything contained in Sub-section (2) of Section 1, all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence;

Provided that nothing in this Section shall apply to cases pending in appeal.

(2) For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this Act has not come into force.'

13. It has to be stated here that as on 2.10.2001 on which date the Amendment Act came into force this case was pending before the trial court and it was disposed of only on 23.10.2001. Hence for the purposes of Section 41 this is a case which was very much pending before the trial court and if that is so, by virtue of the operation of Section 41 aforementioned, the case has to be disposed of in accordance with the provisions of the principal Act as amended by Act 9 of 2001 and the accused, if found guilty of any offence punishable under the Principal Act, as it stood immediately before the amendment effective from 2.10.2001 shall be liable only for the punishment which is lesser than the punishment for which he is otherwise liable at the date of commission of the offence. In other words, the impact of Section 41 is that the accused herein would be entitled to get the benefit of the Amendment Act including punishment which is lesser than the punishment prescribed in Section 20(b)(i) of the original Act.

14. What is to be seen further is the aspect of lesser punishment. The comparison of punishments necessary for arriving at lesser quantum is obviously between the punishment as prescribed under the law that prevailed as on the date of

occurrence and the punishment prescribed by the Amendment Act.

15. Section 20 as it stands after the amendment reads as follows:

Section 20. 'Punishment for contravention in relation to cannabis plant and cannabis -

Whoever in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder:-

(a) cultivates any cannabis plant; or

(b) produces, manufactures, possesses sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable,-

(i) where such contravention relates to Clause (a) with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine which may extend to one lakh rupees; and

(ii) where such contravention relates to Sub-clause (b),-

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to six months or with fine which may extend to ten thousand rupees, or with both;

(B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;'

16. In the present case there is no allegation that the accused cultivated any cannabis plant. The allegation is only that he possessed ganja. That being so, if it is established that contravention under Clause (b) involved only a small quantity, punishment could extend only up to a maximum of six months imprisonment or fine which may extend to Rs. 10,000/- or both. On the other hand if what is seized is quantity more than 'small quantity' but lesser than 'commercial quantity' the imprisonment may extend up to 10 years and fine also has to be imposed which may extend to Rs. 1 lakh. In view of this position the precise section for conviction

has to be depend upon the question whether the quantum seized was lesser than the commercial quantity.

17. Commercial quantity is not a term found defined or expressed in any of the sections under the original Act. It has come in only through amendment under Act 9 of 2001. Consequently 'commercial quantity' is also notified only under the new Act. Ganja comes as item No. 55 of the table attached to notification No. S.O. 1055 (E) dated 19.10.2001. According to this entry the commercial quantity of ganja is 20 Kg. and small quantity is 1 Kg. If, for purposes of prescribing punishment, the commercial quantity under the new Act has also to be considered, certainly the small quantity prescribed under same notification has also to be taken into account.

18. Notwithstanding the fact that there was change of small quantity in between the date of occurrence and the notified date of 2.10.2001, for giving full effect to the purpose behind Section 41 of the new Act viz., to extend the benefit of lesser punishment to the accused involved in cases which are pending before the trial court as on 2.10.2001, reference to the small quantity prescribed under notification dated 19.10.2001 is thus indispensable. Otherwise the position would be that for purposes of going into quantum of commercial quantity alone, the notification has to be seen as applicable and for purposes of small quantity the entry in the same notification will have to be ignored and the notification that prevailed earlier (S.O. No. 527(E) dated 16.7.85) will have to be looked into. That will be an anomalous situation. I am therefore of the view that for purposes of Section 41, the accused, in cases pending trial as on 2.10.2001 can certainly rely on the small quantity as defined in new notification of 19.10.2001 irrespective of the date of occurrence in the case. That is to say, even if the quantum seized was not a small quantity according to the earlier notification, the accused can get the benefit of the reduced punishment contemplated in Section 20(b)(ii)(A) if he can show that the quantum seized is only a small quantity under the new notification of 19.10.2001.

19. I have already referred to the fact that the quantum seized in the present case is only 600 grams and that is small quantity under the new notification being less than 1 kg. The appellant herein is certainly entitled to the benefit of Section

20(b)(ii)(A) of the amended Act. The trial court did not take into consideration the aforesaid aspect probably because it was not argued before that Court. That, however, is no reason to deny the benefit by this appellate court. In the circumstances, the conviction entered against the accused for the offence under Section 20(b)(i) of the Principal Act is altered as conviction for the offence under Section 20(b)(ii)(A) of the amended Act.

20. The maximum punishment for the said offence is only R.I. for a term which may extend to six months or fine which may extend to Rs. 10,000/- or both. The accused herein was arrested on 29.12.1997 and was released on bail on 12.2.1998. Thus he has suffered pretrial detention for a period of 44 days. After the passing of the impugned judgment dated 23.10.2001 he has suffered imprisonment from that date until he was released on bail based on orders passed by this Court on 14.12.2001 in CMP No. 6225/2001. The accused has thus suffered imprisonment after the impugned judgment also for a period of about 7 weeks. The total period for which he has suffered imprisonment and detention thus exceeds three months.

21. Considering the fact that the maximum punishment prescribed for the offence under Section 20(b)(2)(A) is only six months, I am of the view that the period already undergone by the accused as above is sufficient to meet the ends of justice. The sentence imposed on the accused is hence reduced from R.I. for 18 months and fine of Rs. 5,000/- to the period of imprisonment already undergone and to fine of Rs. 5,000/- which the petitioner appears to have paid for availing the benefit of bail.

In the circumstances, the bail bond executed by the accused is cancelled and he is set at liberty. No refund.