

State Vs. Moidu

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Court : Kerala

Decided On : Jul-24-1990

Reported in : 1991(51)ELT34(Ker)

Judge : B.M. Thulasidas, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 17, 36, 36A, 36A(1), 36B, 36C, 36D, 41(1), 42(2), 42 to 44, 49, 51, 52, 52A, 53, 53A, 54, 57 and 67; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 49, 173, 173(2), 190, 190(1), 192, 193, 200, 201(1), 202, 202(1), 202(2), 203, 204, 207, 227, 208, 209 and 395(2)

Appeal No. : Criminal Reference No. 2 of 1990

Appellant : State

Respondent : Moidu

Advocate for Def. : K. Prabhakaran, Sr. Central Govt. Standing Counsel

Advocate for Pet/Ap. : T.V. Prabhakaran, Adv. (Amicus Curiae)

Judgement :

B.M. Thulasidas, J.

1. This reference under Section 395(2) of the Code of Criminal Procedure has been made by the Additional Sessions Judge, Tellicherry in respect of an order of committal passed by the Judicial Magistrate of the Second Class, Cannanore.

2. The above case arose on a complaint filed by the Superintendent of Special Customs Preventive Unit, Cannanore against one A. Moidu of Azhiyoor under Section 17 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) on the allegation that he was found in unauthorised possession of 7.600 kgs., of opium for sale on 26-1-1989 at 12.30 hrs. The accused was apprehended while travelling in bus KRZ 3804 from Bombay to Tirur.

3. I heard Shri T.V. Prabhakaran as amicus curiae and Shri K. Prabhakaran, Senior Central Government Standing Counsel as also the Additional Public Prosecutor.

4. The Sessions Judge has stated, that the officers empowered under the Narcotic Drugs and Psychotropic Substances Act to investigate into offences and prosecute the offenders are not police officers, entitled to file a report or a charge-sheet under Section 173(2) of the Code of Criminal Procedure, but should file complaint under Section 190 of the Code of Criminal Procedure and since such a complaint under the above Act will be in respect of an offence triable exclusively by the Court of Session, the Court which takes cognizance of the complaint has to conduct an enquiry in terms of Sub-section (2) of Section 202, in view of the decision of a Full Bench of this Court reported in Moideenkutty Haji v. Kunhikoya, 1987 (1) KLT 635. He has pointed out that since the committal court did not conduct the enquiry, the order of committal is illegal. He can neither set it aside in view of the decision in John Samuel v. State of Kerala-1985 KLT 902, nor send back the records to the committal Magistrate for passing a fresh order after complying with the mandatory legal provisions. He has, therefore, made a reference to this Court under Section 395(2) of the Code of Criminal Procedure for decision on the following question :

'When a court of session finds that the order of the learned Magistrate committing the case instituted upon a complaint in respect of an offence exclusively triable by the Court of Session is vitiated by illegality for the reasons aforesaid, what should be done by the Court of Session and how the Court of Session should proceed

further in the case?'

5. The [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (hereinafter called the Act) is an enactment to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances (to provide for the forfeiture of property derived from, or used in illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the international conventions on narcotic drugs and psychotropic substances) and for matters connected therewith. The Act received the assent of the President on September 16, 1985.

6. A bird's eye view of the relevant provisions of the Act would, indeed, be helpful. Section 36 of Chapter IV of the Act provides for constitution of Special Courts. Section 36A of the Act states that all offences under the Act shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more special courts than one for such area, by such one of them as may be specified in this behalf, and provides for detention of the accused suspected of the commission of offences under the Act by the Magistrate. Under sub-clause (d) of Section 36A(1) of the Act--

'a Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an officer of the Central Government or a State Government authorised in this behalf, take cognizance of that offence without the accused being committed to it for trial'.

Section 36B of the Act provides for appeal and revision. Section 36C states, that--

'...the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor'.

Section 36D of the Act provides for transitional provisions for trial by the Court of Session, pending constitution of the Special Court under Section 36. Offences

under the Act are cognizable and non-bailable.

7. Chapter V of the Act contains provisions relating to procedure to be followed by officers appointed to implement the Act. Under Sub-section (1) of Section 41,

'A Metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed.

Power to arrest, search, seizure without warrant or authorisation etc., is conferred on officers under section 41(2), and Sections 42 - 44. Power to stop and search conveyance or goods is conferred by Section 49. Under Section 51, provisions of the Code of Criminal Procedure are made applicable in so far as they are not inconsistent with the provisions of the Act, to warrants, arrests, searches and seizures, Section 52 provides for disposal of persons arrested and articles seized. Section 52A provides for disposal of seized narcotic drugs and psychotropic substances. Section 53 provides, --

'(1) The Central Government, after consultation with the State Government may, by notification published in the Official Gazette, invest any officer of the department of central excise, narcotics, customs, revenue intelligence or Border Security Force or any class of such officers, with the powers of an officer-in-charge of a police station for the investigation of the offences under this Act. '

(2) The State Government may, by notification published in the Official Gazette, invest any officer of the department of drugs control, revenue or excise or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of offences under this Act.

Under Section 53A of the Act,--

A statement made and signed by a person before any officer empowered under Section 53 for the investigation of offences, during the course of any inquiry or proceedings by such officer, shall be relevant for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.'

Section 54 of the Act provides for presumption from possession of illicit articles. Under Section 57, whenever any person makes any arrest or seizure, he shall, within forty eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior. Section 67 provides, that--

'Any officer referred to in Section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provision of this Act-

(a) call for information from any person for the purpose of satisfying himself whether there has been any Contravention of the provisions of this Act or any rule or order made thereunder;

(b) require any person to produce or deliver any document or thing useful or relevant to the enquiry;

and

(c) examine any person acquainted with the facts and circumstances of the case.'

8. Section 36 and 36A to 36D of the Act came into force with effect from 29-5-1989. Special Courts have now been constituted in Kerala. By virtue of Section 36D of the Act, offences under the Act will have to be tried by the Court of Session, which is not obliged to transfer the case to the Special Court, if, during the pendency of the trial, such a Court has been established. The Court of Session itself can give judgment in the case.

9. The Supreme Court held in *Rajkumar Karwal v. Union of India*, (1990) 2 SCC 409, that the powers of investigation and enquiry conferred upon officers duly empowered under the Act are unlike the powers of police officers to investigate cognizable offences. It was also pointed out that the Act does not contain provisions to show that the Legislature decided to vest in the officers appointed under Section 53 of the Act all the powers under Chapter XII, including the power to submit a report under Section 173 of the Code. According to the Supreme Court, -

'...the issue is placed beyond the pale of doubt by Sub-section (1) of Section 36A of the Act which begins with a non-obstante clause-notwithstanding anything contained in the Code-and proceeds to say in clause (d) as under :

36A(d) a Special Court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an officer of the Central Government or a State Government authorised in this behalf, take cognizance of that offence without the accused being committed to it for trial.

This clause makes it clear that if the investigation is conducted by the police, it would conclude in a police report but if the investigation is made by an officer of any other department including the DRI, the Special Court would take cognizance of the offence upon a formal complaint made by such authorised officer of the concerned government. Needless to say that such a complaint would have to be under Section 190 of the Code. This clause, in our view, clinches the matter. We must, therefore, negative the contention that an officer appointed under Section 53 of the Act, other than a police officer, is entitled to exercise 'all' the powers under Chapter XII of the Code, including the power to submit a report or charge-sheet under Section 173 of the Code'.

The Sessions Judge is, therefore, right to say that officers empowered under the Act could file complaint under Section 190 of the Code of Criminal Procedure and not a report or charge-sheet under Section 173 of the Code of Criminal Procedure.

10. The question that has to be considered is whether the order of committal is bad for the reason pointed out by the Sessions Judge that the Magistrate did not follow the procedure in Section 202(2) of the Code of Criminal Procedure, as explained in *Moideenkutty Haji v. Kunhikoya*, [1987 (1) KLT 635 F.B.]

11. The point that arose for decision before the Full Bench was, 'whether a Magistrate, who receives a private complaint which discloses an offence exclusively triable by a Court of Session and who records the statement of the complainant as contemplated by Section 200 of the Code of Criminal Procedure, should also resort to the enquiry envisaged in Section 202(1) and by virtue of the proviso to Sub-section (2), is he bound to call upon the complainant to produce all his witnesses and examine them on oath'? The Full Bench held, that-

'It is evident that the legislature intended two different types of enquiries, a discretionary enquiry in ordinary complaint cases and a mandatory enquiry in complaint cases under Section 202. In the discretionary enquiry the Magistrate can either enquire into the case himself or direct an investigation to be made by a police officer or such other person as he thinks fit. But in a mandatory enquiry in a complaint case that discretion is taken away by proviso (a) to Section 202(1). The Magistrate will have to conduct the enquiry himself and he cannot order investigation. It is true that the said discretion is absent in another category of cases coming under proviso (b) to Section 202(1) also. But we are not concerned with such cases here. In a discretionary enquiry in ordinary complaint cases Section 202(2) gives the option to the Magistrate to take evidence of witnesses on oath or not as he thinks fit. That means he can even record a summary of the statements of witnesses. But in a mandatory enquiry in a complaint case that discretion is not there and the proviso to Sub-section (2) says that he shall call upon the complainant to produce all his witnesses and examine them on oath. The scope of the discretionary enquiry under Section 202(1) is left undefined. That means even if the Magistrate decides to have an enquiry he is the master to

decide what all materials are to be collected and at what point the enquiry has to be stopped subject to his satisfaction whether or not there is sufficient ground for proceeding. But in the mandatory enquiry in a complaint case he has no such discretion. The proviso to Section 202(2) makes it compulsory for him to call upon the complainant to produce all his witnesses and examine them on oath. There are points considered with approval in the decisions referred to by us in paragraph 15 above and we are in full agreement with those views. If in a complaint case also the legislature intended the discretion to be with the Magistrate to dispense with the enquiry under Section 202 and proceed to dismiss the complaint under Section 203 or issue process under Section 204 in his satisfaction after compliance of Section 200, alone it is beyond comprehension why formation of his opinion in complaint cases alone was made dependent upon examination of all witnesses simply because he wanted some more assurance and proceeded to have an enquiry under Section 202 for that purpose. The reason is patent. Unlike in an ordinary complaint case the dismissal of a complaint under Section 203 or issue of process under Section 204 in a complaint case could only be after the mandatory enquiry under Section 202'.

In stating that the enquiry into complaint cases is mandatory under Section 202, the Full Bench referred to the recommendations of the Law Commission in its 41st Report set out in paragraphs 16.11 and 18.29, and said, that it would obviate the problems of the accused in his defence and would eliminate the risk of an easy discharge under Section 227 of the Code of Criminal Procedure, even in genuine cases, for want of sufficient materials for the prosecution. It was also stated, if an enquiry under Section 202, in 'complaint cases' was not conducted, documents mentioned in Section 207 would not be available to the accused, who would thereby be in a disadvantageous position. According to the Full Bench the object of the provisions of Section 202, when taken along with Sections 208 and 209, is to place the accused in a 'complaint case' in the same advantageous position as the accused in a police charge case.

12. It is of interest to note that the decision was rendered in relation to committal orders passed in private complaint cases triable by the Court of Session. The Full Bench did not deal with complaints of public servants filed under Sections 190(1)

and 200 of the Code of Criminal Procedure, which disclosed an offence triable by a Court of Session. There are obvious differences between ordinary private complaints and complaints laid by public servants acting or purporting to act in their official capacity. A Magistrate taking cognizance of a complaint under Section 200 of the Code of Criminal Procedure shall examine on oath the complainant and the witnesses, if any, present and the substance of such examination shall be reduced to writing and shall be signed by the complainant, witnesses and the Magistrate. But, where the complaint is made in writing the Magistrate need not examine the complainant and the witnesses, where the complaint had been made by a public servant, acting or purporting to act in the discharge of his official duties or where the court has made the complaint, or where the Magistrate makes over the case for enquiry or trial to another Magistrate under Section 192. The object of examination is to prevent issue of process in apparently false, frivolous and vexatious cases and confine it to complaints which disclose a prima facie case. In respect of a complaint filed by a public servant, acting or purporting to act in the discharge of his official duties, or where a court has filed a complaint, examination is statutorily dispensed with presumably on the ground that the court could assume that the public servant has acted reasonably and not vexatiously. Risk of a motivated prosecution is less in such a complaint which could be expected to contain all that the Magistrate would require to find in it for taking cognizance.

13. In ordinary private complaints triable by the Magistrate, the accused would get only copies of the complaint, the sworn statement of the complainant and statement of witnesses, if any, examined. But, since in respect of a complaint for an offence triable by a Court of Session, examination of the complainant and his witnesses is mandatory under Section 202(2) of the Code of Criminal Procedure, as held by the Full Bench in *Moideenkutly Haji v. Kunhikoya*, 1987 (1) KLT 635, the accused will have copies of the complaint and statement of witnesses. This will, no doubt, help him to prepare his defence as effectively as the accused in a case charged by the police would be able to. In my view, the procedure prescribed under Section 202(2) of the Code of Criminal Procedure must be confined to private complaint disclosing Sessions Offence and not to complaint coming under clause (a) of Section 200 of the Code of Criminal Procedure.

14. In the case before the Court of Session, the complaint was laid by the Superintendent of Central Excise, Special Preventive Unit. There had been an investigation and enquiry into the alleged offence. Contraband had been seized under a mahazar, duly attested by persons, who are witnesses in the case. The accused had been questioned and his statement was recorded. The sample had been examined by the Chemical Examiner and report also had been produced. All these had been done by the investigating/enquiry officer, who had been empowered under the Act. There is no doubt, that there was investigation/enquiry into the offence conducted under the authority of law. All the materials on which the prosecution wanted to rely had been produced and copies of the same had been given to the accused as seen from the order of committal. The materials produced were adequate to make out a prima facie case against the accused. There is no risk of easy discharge under Section 227 of the Code of Criminal Procedure. The accused cannot complain that he is prejudiced due to dearth of materials for a fair and adequate defence. Virtually, he had been placed in the same advantageous position as the accused in a police charge-case.

15. In my view, the Full Bench decision does not apply to a complaint laid by an authorised officer under the Act on the basis of materials which were collected during investigation/enquiry into the offence. The Full Bench decision must be understood in the context in which it was rendered and held applicable only to private complaint cases and not to complaint cases filed by a public servant acting under Section 190(1), where there had been an enquiry prior to the complaint and materials had been collected for prosecution.

16. The order of committal is legal and proper and the Sessions Judge is bound to take cognizance of the offence under Section 193 of the Code of Criminal Procedure. The reference cannot be accepted.

17. The specific question raised by the Sessions Judge is covered by the rulings of this Court reported in *State v. Baby*, 1981 K.L.T. 27 and *John Samuel v. State of Kerala*, 1985 K.L.T. 902, where the decision in *Siddegowda v. Siddegowda*, 1976 CrL. L.J. 1967, had been approved. The Sessions Judge was right to state that he has no power to exercise revisional jurisdiction to quash an illegal order of

committal.

I should, in this context, impress upon the Government the need for constituting Special Courts for speedy trial of offences under the Act. The volume of cases is reportedly increasing. The procedure for trial of offences under the Act, as now before the Sessions Court, is cumbersome and time consuming and 'speedy trial' would be wishful thinking. The matter requires the urgent attention of the Government. Registrar will forward a copy of this order to the Chief Secretary to the Government of Kerala for necessary action.

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