

**Pious Vs. State of Kerala**

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**Court :** Kerala

**Decided On :** Jul-09-2002

**Reported in :** 2002(2)ALT(Cri)457

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

**Acts :** [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 41, 42, 42(2), 43 and 50; Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001

**Appeal No. :** Crl. A. No. 455 of 2000

**Appellant :** Pious

**Respondent :** State of Kerala

**Advocate for Def. :** L. Aloysius Thomas, Public Prosecutor

**Advocate for Pet/Ap. :** T.D. Robin, Adv.

**Judgement :**

**M.R. Hariharan Nair, J.**

1. The challenge in the appeal is with regard to the conviction entered against the appellant as accused in C.C. No. 18/97 of the II Additional Sessions Court, Ernakulam, (Special Court for trial of the NDPS Act Cases), for the offence under

Section 22 of the NDPS Act and the sentence of rigorous imprisonment for 15 years and a fine of Rs. 1 lakh (in default, rigorous imprisonment for two years and six months) imposed therefor.

2. The prosecution case was that during the second show in the 'Saritha Theatre', Ernakulam, it was reported by one of the persons, who had come to the theatre to view the film, that in the toilet, a person was seen giving injection of drug to another and that PW2, who was the Assistant Manager of the theatre, passed on the information to the Police pursuant to which, the Flying Squad reached the spot and kept the accused, who was in possession of a bag, under surveillance until PW. 7 - Sub. Inspector of Police arrived at the scene along with PW9, who was an Excise Official of the Gazetted rank. In the subsequent search conducted, after due compliance with Section 50 of the NDPS Act, 102 ampoules of Tidigesic (Buprenorphine), 11 ampoules of Phenergan for injection, 4 disposable syringes and 15 needles were seized from the possession of the accused, besides an amount of Rs. 850/- found on the shirt pocket.

3. Even though the accused pleaded not guilty of the charge, he was found guilty based on the evidence of PWs. 1 to 10 and Exts. P1 to P24 and considering M.Os. I to XVI series. Even though DWs. 1 and 2 were also examined, their evidence was found insufficient to tilt the balance.

4. Sri. T.D. Robin, who appeared for the appellant, submitted that there is violation of Sections 42 and 50 of the NDPS Act and also that there is no reliable evidence to find the accused guilty. It was pointed out that there are substantial contradictions appearing in the versions of PW6 on the one part and PWs. 7 and 9 on the other and that the effect of these contradictions is to render the prosecution case totally unbelievable. If the version of PW6 is believed, the seizure, it is pointed out, was by PW.9, who was incompetent. Lastly, it is contended that the benefit of Section 41 of the NDPS (Amendment) Act 9 of 2001 might be given to the accused considering the fact that the quantum seized is only a small quantity which under the amended provisions attracts only a much lesser sentence.

5. On the arguments advanced in the case, the points that arise for decisions are:

(1) Whether there is reliable evidence to find that the accused was in possession of the contraband including 102 ampoules of tidigesic?

(2) Whether there is violation of Section 42 of the NDPS Act?

(3) Whether there is violation of Section 50 of the NDPS Act?

(4) Whether the accused is entitled to get the benefit of lesser punishment under the NDPS (Amendment) Act 9 of 2001

6. Point No. 1:- PW2, who is the Assistant Manager of the Saritha Theatre, has deposed that at about 11.30pm on 10.10.1996, while he was in his cabin, one of the persons, who had come for viewing the cinema being exhibited there, informed him that a person wearing Kakki shirt and white dhoti was seen giving injection to another inside the toilet of the theatre and that he believed that the injection was of some contraband drug. PW2 also deposed that the information received from the aforesaid person including that he was still available in one of the first class seats of the theatre was passed on to the police by contacting the Control Room. According to him, by the time he came down and reached the ground floor, the Flying Squad of the police reached there and he directed the Squad to the first class seats. After sometime, PW2 was informed by the police that the offender had been apprehended. The cross-examination of the witness has not brought out anything to show that he is speaking falsehood in this regard.

7. PW6 of the aforesaid Flying Squad deposed that while the jeep carrying the Squad was stationed near the KSRTC Bus Stand, direction was received from the Control Room that the Squad should reach the Saritha Theatre immediately as a person with some narcotic drug was available in one of the first class seats of the theatre. Accordingly, the party reached the theatre at 11.50 p.m. and when they climbed up towards the first class seats, a person holding a white plastic bag was found coming down-stairs. He identified the accused as the person so found. On seeing the police, the accused turned to retreat upwards; but he was apprehended and questioned by Antony, who was the Leader of the Squad. The accused then admitted that the bag contained tidigesic. As it was felt that the Contents were contraband material, the said Antony went over to the jeep and reported the matter

to the Control Room and in due course, PWs. 7 and 9 who are Sub Inspector of Police of the Central Police Station and Excise Circle Inspector respectively reached there. After questioning the accused further with regard to his identity, PW. 7 conveyed to the accused his rights in the matter of search under Section 50 of the NDPS Act and on getting no reply, introduced PW9 as a person competent to witness and seize such contraband. Thereupon, PW9 received the plastic cover and its contents were found to be tidigestic. The accused was thereafter arrested and the contraband seized. After preparing Ext. P7 mahazar, the arrested accused and the contraband were removed and the matter proceeded with.

8. The above evidence of PW6 is corroborated by PWs. 7 and 9, though with some variations. PW. 7 stated that he was contacted over wireless by the Flying Squad Unit No. 1 to inform that a person with a cover suspected to contain narcotic drug had been detained and that after recording the information in the G.D. and reporting the matter to the official superior, he went over to the Saritha Theatre along with PW9 and an Assistant Sub Inspector of Police by name Neelakantan and that the accused was found sitting holding a white plastic cover in the second step from the top near the first class seats of the theatre having been kept under surveillance by the officers of the Flying Squad. After complying with Section 50 of the NDPS Act, the cover was opened and it was found to contain 102 ampoules of tidigestic, besides the other items already mentioned.

9. PW9 deposed that pursuant to a request received from PW7 and the Assistant Sub Inspector of Police, he went to the scene of occurrence in this case and found the accused sitting there with the bag which when opened and searched was found to contain contraband material.

10. There is some inconsistency between the versions of PW6 on the one part and PWs. 7 and 9 on the other. While PW6 stated that the bag was received by PW9 and its contents spread in front of the canteen counter, the version of PWs. 7 and 9 was that the bag was seized and searched by PW7. The details mentioned in the contemporaneous records produced in the case as Exts. P7 and P9 (seizure mahazar and FIR) supports the version of PW6 that it was PW.9, who actually received the packet and opened it. The said variation in the evidence of PWs. 6

and 9, according to me, is insufficient to shake the credibility of the witnesses in the matter of actual seizure. It would appear from the contemporaneous records and the evidence of PW. 6 that it was PW9, who received it. Even then, it cannot be said that the seizure is irregular in so far as PW9 was himself an empowered official to make such seizure. What is apparent is that at the relevant time PW. 7 was under the impression that it was better to have the seizure effected by a competent officer of another Department, probably to give more credibility. Whatever that be, a joint reading of the evidence of PWs. 6, 7 and 9 makes it abundantly clear that the seizure was from the hands of none other than the accused at a time when PWs. 6, 7 and 9 were available at the spot. What is important in case of the present nature is whether the accused was actually in possession of the contraband. Viewed from that perspective, there is no doubt at all lingering with regard to the fact that the contraband in question was found in the packet held by the accused himself.

11. Point No. 2:- The search and seizure in this case were effected after PW6 had received the information that the bag in the possession of the accused contained contraband material. According to PW7, he had recorded the information and conveyed the same to his official superior vide Ext. P18 letter complying with Section 42(2) of the NDPS Act. Thus, the evidence of PW7 and Ext. P18 show that there was an effort on the part of PW7 to comply with the requirements of Section 42(2) of the NDPS Act.

12. According to the learned Government Pleader, even if it is found that there was non-compliance with Section 42(2) of the NDPS Act, that cannot affect the conviction of the accused in so far as the information related to the availability of the person with contraband in a 'public place'. In this regard, the Explanation to Section 43 of the NDPS Act was highlighted, according to which, the expression 'public place' includes any public conveyance, hotel, shop or other place intended for use by, or accessible to, the public.

13. A cinema theatre at the time when exhibition of film is going on there, is a place of accessible to the public and hence comes within the definition of 'public place'. That, in turn, makes the information and seizure in the case one under

Section 43 of the NDPS Act.

14. Abdul Azeez v. State of Kerala (2001 (1) KLT 805) is authority for the proposition that Section 42(2) of the NDPS Act will not have any application in the matter of information relating to the availability of the contraband in a public place. In the circumstances, I do not find any merit in the defence contention that the accused herein is entitled to get an acquittal based on violation of Section 42(2) of the NDPS Act.

15. Point No. 3:- There is wide variation between the versions of PWs. 6 and 7 with regard to the compliance with Section 50 of the NDPS Act. What PW6 deposed was that PW7 conveyed to the accused the information that he had a right to be searched in the presence of a Gazetted Officer or a Magistrate and that there was no response thereto from the accused and thereupon PW7 introduced PW9 to the accused stating that he was a person competent to effect the search and seizure and thereupon PW9 received the plastic cover held by the accused and opened the same. Then it was found that it contained 102 ampoules of tidigestic, besides other items. According to PW6, there was no specific question posed to the accused with regard to his option in the matter of search before a Gazetted Officer or a Magistrate. According to PW7, before proceeding to seizure the packet held by the accused, he had conveyed to the accused his rights to be searched in the presence of a Gazetted Officer or a Magistrate and the accused had answered that he had no objection in the cover being examined. Thereupon, PW7 introduced PW9 as a Gazetted Officer - Excise Circle Inspector and asked the accused whether he had any objection in the search being conducted by PW9 and the accused answered that he had no such objection.

16. The evidence of PW9 is in conformity with the version of PW.7 and at variance with the version of PW6. Even going by the evidence of PWs. 7 and 9, there was no specific question put to the accused with regard to his option to be searched in the presence of a Gazetted Officer or a Magistrate and what was actually conveyed was the right; but not the option. Instead of giving the option, the accused was merely told that PW 9 was a competent official to make the search and seizure. A perusal of Exts. P7 and P9 also show that there was no specific

question put to the accused with regard to his option and that what actually transpired was the communication of his rights under Section 50 of the NDPS Act followed by introduction of PW.9 to the accused as the competent official.

17. According to the learned Government Pleader, the said lapse also is insufficient to acquit the accused in so far as the seizure was not from the body of the accused as such; but only from a packet held by him. In this regard, he relied on some case law as well. *Gurbax Singh v. State of Haryana* ((2001) 3 SCC 28) was a case where the accused had arrived by a train and he was noticed by PW. 2, who was present on Platform No. 1 of the Railway Station for checking smuggling and other antisocial elements, that the accused, 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, a bag was nabbed and it was found that it contained poppy straw. Before opening the bag, there was no communication of his rights under Section 50 of the NDPS Act or extension of any option. The Apex Court held, following *Kalema Tumba v. State of Maharashtra* ((1999) 8 SCC 257) as also *State of Punjab v. Baldev Singh* ((1999) 6 SCC 172), that on its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. It was held therefore that the Section would apply only where search of a person is attempted.

18. *Kalema Thumba's* case related to seizure of a baggage in the hands of a foreign national who arrived at Bombay by an airline and on information received by the Intelligence Officer of the NCB, the bag was opened and its contents was found to be 2 kgs of brown sugar. It was contended that there was violation of Section 50 of the NDPS Act in so far as no opinion was given to the accused before the search of the baggage. It was held that only when the person of an accused is to be searched, there is the need for compliance with Section 50 of the NDPS Act and where search is of a baggage held by a person, the section would not strictly apply. If a person is carrying a bag or some other article with him and a narcotic drug or a psychotropic substance is found in it, it cannot be said that it was found from his person. In view of the aforesaid decisions, what can be found is that the seizure in the instant case was not from the person of the accused; but from a bag held by him for opening which the requirement of compliance with

Section 50 of the NDPS Act was not necessary. Further, it is not established that any prejudice was caused to the accused in the matter of the opening of the bag by PW.9, who was not only a Gazetted Officer of another Department but also himself an officer competent to effect the search.

19. In *Marakkar v. State of Kerala* (2001 (3) KLT 539), the question arose whether mention of only one option to the accused was sufficient compliance and it was held that even if only one option is given, no prejudice will be caused and there will be substantial compliance and that in the absence of likelihood of prejudice to the accused, substantial compliance of the section would be sufficient. On the fact situations in the present case, I do not think that the accused was prejudiced by opening of the bag by an independent Gazetted and empowered officer of another Department. The failure to strictly comply with Section 50 of the NDPS Act, in the circumstances, is not of any consequence.

20. The evidence of DW. I and the contents of Ext. P5 - Analyst's report show that 25 ampoules of tidigesic were received in the laboratory duly sealed; and when examined, it was found to contain buprenorphine hydrochloride. The learned counsel for the appellant pointed out that in the nature of the case, chemical analysis of all the 102 ampoules of buprenorphine was essential to bring home guilt of the accused, I find no substance in this contention. Here is a case where the ampoules seized had identical labels. That apart, the contents were 2 ml. each. The total quantity of the buprenorphine solution seized was only 204 mls. and the weight thereof at the rate of .3 mg was only 61.2 mg. The law that prevailed at the relevant time defined 'small quantity' as quantity below 1 gram and as such, the seizure made in the case pertains only to a small quantity of buprenorphine. Even the contents of 25 ampoules, actually analysed in the laboratory, would be sufficient to show that the accused was having in his possession buprenorphine and it was not essential to sustain a conviction for the offence to show that the contents of all the ampoules seized was buprenorphine itself. The contention would have had some weight if the position were that to sustain a conviction for the offence under Section 22 of the NDPS Act. It was necessary to establish that the contents of all the ampoules taken together alone would bring the offence under Section 22. That is not the position here. In answer

to the questions under Section 313 of the Cr.P.C, the accused had no case that he was having possession of buprenorphine for his own consumption. The number of ampoules, the fact that 4 disposable syringes were available with the accused and the circumstances in which he was apprehended all show that this was not a case where Section 27 of the NDPS Act could have any application. In any case, no evidence or even a proper plea is forthcoming from the accused to show that the offence comes within the operation of Section 27 of the NDPS Act. In these circumstances, the accused has, undoubtedly, committed the offence under Section 22 of the NDPS Act.

Point No. 4

21. It is true that the Act has undergone some change through Act 9 of 2001 and where the contravention involves small quantity, the sentence under the present law can extend only upto the rigorous imprisonment for six months or fine which may extend to ten thousand rupees. However, I do not think that the accused can be given the said benefit by this Court in view of the fact that Section 41 of the Act 9 of 2001 specifically states that the said benefit would not be available to cases pending before the appellate Court. The benefit would be available only to the cases pending before the trial courts or under investigation at the commencement of the Amendment Act. The proviso to Section 41 makes the position very clear that the amendment would not apply to cases pending in appeal. The date of occurrence in the present case is 10.10.1996 and under the law, as it stood then, the punishment prescribed for the offence under Section 22 of the NDPS Act is rigorous imprisonment for a term which shall not be less than 10 years; but which may extend to 20 years and fine which shall not be less than rupees one lakh; but which may extend to two lakhs rupees. In the instant case, the accused has been sentenced to undergo rigorous imprisonment for 15 years, besides liability to pay a fine of Rs. 1 lakh. I do not think that the accused deserves anything more than the minimum sentence on the facts and circumstances of this case, especially when the quantum seized is small.

I therefore reduce the sentence imposed on the accused from rigorous imprisonment for 15 years to rigorous imprisonment for 10 years. The liability for

fine will also stand; but the default sentence is also reduced from rigorous imprisonment for two years and six months to rigorous imprisonment for six months.

The appeal is disposed of with this reduction in sentence. The trial court will issue appropriate fresh warrant.

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