

Sivadasan Vs. State

Sivadasan Vs. State

SooperKanoon Citation : sooperkanoon.com/727324

Court : Kerala

Decided On : Feb-22-2003

Reported in : 2003(3)KLT100

Judge : R. Basant, J.

Acts : Kerala Abkari Act, 1077 - Sections 55 and 55(11); Narcotic Drugs and Psychotropic Substances Act - Sections 2 and 2(14)

Appeal No. : CrI. R.P. No. 782/94

Appellant : Sivadasan

Respondent : State

Advocate for Def. : M.A. Khader Kunju, Public Prosecutor

Advocate for Pet/Ap. : T.G. Rajendran, Adv.

Disposition : Revision petition dismissed

Judgement :

ORDER

R. Basant, J.

1. Does the Narcotic Drugs and Psychotropic Substances Act, hereinafter referred to as N.D.P.S. Act for short, which was enacted later completely bar a prosecution

under Section 55(a) of the Kerala Abkari Act for possession of ganja is the crucial question raised in this Revision Petition. The revision petitioner assails the concurrent verdict of guilty, conviction and sentence imposed on him under Section 55(a) of the Kerala Abkari Act.

2. The allegation against the petitioner is that at 9 a.m. on 2nd November 1989 when PWs. 1 and 2 were on patrol duty they intercepted the petitioner and he was found to keep in his possession 8 packets of ganja weighing about 15 grams at P.C. Road junction at Mukkom. PW.1 seized the contraband article under Ext.P1 mahazar. Ext.P2 first information report was registered. The case was transferred to P.W.3 the Excise Inspector. Ext.P3 is the occurrence report. Ext.P4 chemical analysis report was secured by P.W.3 and it was found that the article seized was genuine ganja (*cannabis sativa*).

3. The accused denied the offence and thereupon the prosecution examined P.Ws. 1 to 3 and proved Exts.P1 to P4. M.O.1 series ganja packets were also marked. The accused took up a defence of total denial. No defence evidence was adduced. The Courts below concurrently found that the evidence of P.Ws. 1 and 2 can be believed and that there is evidence to show that ganja, an intoxicating drug, was kept in the possession of the petitioner. Accordingly the Courts below proceeded to impose the minimum mandatory sentence prescribed under Section 55(a) of the Kerala Abkari Act.

4. The learned Counsel for the revision petitioner-accused assails the verdict of guilty, conviction and sentence. The learned Counsel for the revision petitioner relying on *State of Kerala v. Thomas* (1995 (2) KLT 873) contends that Section 55(a) is impliedly repealed in view of the relevant provisions of the N.D.P.S. Act which had come into force later and that in these circumstances the learned Magistrate was not competent even to take cognisance of the offence punishable under Section 55(a) of the Kerala Abkari Act in respect of ganja. It is in these circumstances contended that the entire prosecution initiated against the accused is void and deserves to be set aside. Of course a contention is raised that the findings of fact arrived at by the Courts below regarding the possession of ganja by the petitioner are not proper and correct.

5. I have gone through the allegations and the materials available in support of such allegations. I find no reason to disbelieve the evidence of P.Ws. 1 and 2 that seizure was effected of ganja from the possession of the accused. I do not also find any reason not to accept the conclusion in Ext.P4 report that the article seized was genuine ganja.

6. In the decision reported in *State of Kerala v. Thomas* (1995 (2) KLT 873) a learned Single Judge of this Court had held that Section 55(a) relating to a narcotic drug stands impliedly repealed by the N.D.P.S. Act. Relying on the language of Section 81 of the N.D.P.S. Act the learned Single Judge had held that the provisions of Section 55(a) in relation to possession of ganja stand impliedly repealed with the enactment of N.D.P.S. Act.

7. The learned Public Prosecutor contends that this conclusion in 1995 (2) KLT 873 is not legally sustainable. He prays that the matter may be referred to a Division Bench for reconsideration of the dictum in that case. It is further and alternatively contended that even going by the dictum in 1995 (2) KLT 873 the prosecution of the accused under Section 55(a) of the Kerala Abkari Act is not barred.

8. I shall consider the latter contention first. Facts have to be correctly and specifically ascertained. The article seized from the possession of the accused as per Ext.P4 was identified to be genuine ganja. But a perusal of Ext.P4 further shows that what was seized was 'partly crushed dry green leafy material having palmately compound leaves with toothed margins, small inconspicuous flowers and dry fruits having characteristics of ganja'. The first point to be ascertained is whether this article seized would answer the definition of ganja under the N.D.P.S. Act. It will also have to be ascertained whether the article seized satisfies the definition of intoxicating drug under the Kerala Abkari Act.

9. Section 55(a) of the Abkari Act inter alia makes possession of an intoxicating drug punishable. Section 3(14) of the Kerala Abkari Act as it stood on the date of commission of the offence, defines 'intoxicating drug' in the following words:

"Intoxicating drug' means -

(i) the leaves, small stalks and flowering or fruiting tops of the Indian hemp plant (*Cannabis Sativa L*), including all forms known as bhang, sidhi or ganja;

(ii) 'Charas', that is the resin obtained from the Indian hemp plant, which has not been submitted to any manipulations other than those necessary for packing and transport;

(iii) any mixture, with or without neutral materials, of any of the above forms of intoxicating drug, or any drink prepared therefrom; and

(iv) any other narcotic substance which the Government may, by notification, declare to be an intoxicating drug, such substance not being opium, coca leaf, or a manufactured drug, as defined in Section 2 of the Dangerous Drugs Act, 1930.'

10. It is significant to note that the leaves of *Cannabis Sativa L*, the Indian hemp plant is included in the definition of 'intoxicating drug' in Section 3(14).

11. 'Narcotic Drug' is defined in Section 2(iii) of the N.D.P.S. Act as follows:-

"Narcotic drug' means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured drugs;'

Cannabis (hemp) is defined in Section 2(iii) of the N.D.P.S. Act as follows':

'(a)

(b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated;.....'

12. It is significant that ganja under Section 2(iii)(b) of the N.D.P.S. Act is only the flowering and fruiting tops of the cannabis plant excluding the seeds and leaves when not accompanied by tops. It is transparently evident that the definition of the word 'ganja' under the N.D.P.S. Act is much more restricted. Such a definition accepts the reality that ganja leaves, stalks, etc. other than the flowering and fruiting tops of the ganja plant are used in some parts of India by various sections of the population. It is transparently evident that possession of ganja leaves was

not intended to be made punishable under the draconian N.D.P.S. Act which imposes harsher punishment.

13. In the instant case the article seized does not significantly contain flowering and fruiting tops of the cannabis plant. Ext.P4 does not at all lead the Court to the conclusion that flowering and fruiting tops of the cannabis plant were available in the possession of the petitioner. It follows therefore that the petitioner cannot be prosecuted successfully for possession of ganja referred to in Section 2(iii)(b) of the N.D.P.S. Act. In these circumstances even going by the dictum in 4995 (2) KLT 873 what is impliedly repealed is only the provisions of the Kerala Abkari Act in so far as it relates to 'ganja' as defined in Section 2(iii)(b) of the N.D.P.S. Act. Possession of other parts of the ganja plant as found in the instant case is not made punishable under the N.D.P.S. Act. The N.D.P.S. Act cannot therefore impliedly repeal the provisions of Section 55(a) of the Abkari Act in so far as it relates to an intoxicating drug defined under Section 2(14) if the same does not fall within the definition of narcotic drug under the N.D.P.S. Act. That precisely is the situation in the instant case. It cannot therefore be held that the prosecution of the petitioner was incompetent. The challenge on this ground must hence fail.

14. My attention has been drawn to the provisions of Section 3(14) of the Kerala Abkari Act as it now stands. The definition of 'intoxicating drug has been amended by Act 4 of 1996 and it has been clarified that intoxicating drug under Section 2(14) does not include a narcotic drug or psychotropic substance under the N.D.P.S. Act. Be that as it may, it is very evident that on the date of the offence in the instant case it was the unamended definition of intoxicating drug under Section 2(14) which was in force and that would certainly take in the article seized from the possession of the accused.

15. The learned Public Prosecutor has vehemently contended that the doctrine of implied repeal was incorrectly pressed into service by the learned Single Judge in 1995 (2) KLT 873. He relies particularly on paragraphs 29 to 31 in Harshad S. Mehta v. State of Maharashtra ((2001) 8 SCC 257) and Venugopal Co. (P) Ltd. v. Varghese (1984 KLT 190) in support of his contention. He contends that the learned Single Judge has not considered the play of Section 26 of the General

Clauses Act. I am persuaded to agree with the learned Public Prosecutor that the dictum in 1995 (2) KLT 873 may require reconsideration. But at any rate in the view which I have taken above, it is not necessary to make any reference in this case to a larger Bench for decision on that question as the said question does not specifically arise for consideration before me in this case. The said dictum even if correct does not apply to the facts and bar this prosecution.

16. Only the statutory minimum sentence has been imposed and in these circumstances the sentence imposed does not also warrant interference.

17. In the result this Revision Petition is dismissed.

18. The learned Magistrate shall take necessary steps for execution of the impugned sentence. The petitioner shall appear and his sureties shall produce him before the learned Magistrate on 31st March, 2003 for execution of the impugned sentence. Needless to say the learned Magistrate shall be at liberty to invoke his powers under Section 446 CrI. P.C. against the petitioner and his sureties if the petitioner does not appear as directed above.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com