

Musthafa Vs. State of Kerala

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Court : Kerala

Decided On : Jul-26-2002

Reported in : 2002(2)ALT(Cri)527; 2002(84)ECC278

Judge : M.R. Hariharan Nair, J.

Acts : Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 - Sections 20B; [Constitution of India](#) - Article 20; [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 42(2)

Appeal No. : Crl. A. No. 427 of 2002

Appellant : Musthafa

Respondent : State of Kerala

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

Advocate for Pet/Ap. : K.P. Mujeeb, Adv.

Judgement :

M.R. Hariharan Nair, J.

1. The appellant has raised before Court a novel question based on the provisions of the NDPS (Amendment) Act 9 of 2001. The contention is that the conviction contemplated in Section 20(b)(ii)(B) of the NDPS Act, as it stands amended now,

violates Article 20 of the [Constitution of India](#) as far as pre-amendment accusations are concerned.

2. It is pointed out that under the law as it stood on 25.10.2000 which is the date of occurrence in this case, for possession of ganja in question the appellant was liable for punishment with imprisonment which could extend only upto 5 years and fine which could extend only upto Rs. 50,000/-, where as by application of Section 20(b)(ii)(B) as contemplated in Section 41 of the Amendment Act 9 of 2001, the offence would get converted to one attracting imprisonment which could extend upto 10 years and fine which could extend upto Rs. 1 lakh. The contention is that notwithstanding the further provision in Section 41 of the Amendment Act itself that the accused need be given only the lesser of the two punishments above, the conviction itself becomes violative of Article 20 of the [Constitution of India](#) and hence the aspect of sentence is insignificant.

3. More facts. The appellant in this case, as accused before the Special Court for trial of NDPS cases, Vadakara, was charged with the offence under Section 20(b)(i) of the NDPS Act. It was alleged that on 25.10.2000 at about 4.45 p.m. he was found in possession of 1050 grams of ganja while he was at the waiting shed attached to the bus stand behind the Beach Hospital, Kozhikode.

4. In the statement filed by the accused under Section 313 of the Cr.P.C. he stated that the case was foisted based on some wrong facts revealed by one Allappu, who was apprehended on the very same date of occurrence viz., 25.10.2000 and that the accused was actually taken to custody while he was in the toilet of his house. He was not in possession of any ganja. The trial court disbelieved the said contention and found the accused guilty of the offence based on the evidence of PW1, who was the Sub Inspector of Police, Nadakkavu police station, which was corroborated by PW4, who was a constable of the very same police station, as also PW3, who is an independent witness.

5. Mr. K.P. Mujeeb, who argued the case of the appellant, submitted that the conviction entered against the accused for the offence under Section 20(b)(ii)(B) of the NDPS Act offends Article 20 of the [Constitution of India](#), in so far as the said offence attracts larger punishment vis-a-vis that in Section 20(b)(i) of the Pre-

amended Act, which was in force on the date of occurrence and with which alone he could be and was charged before the trial court. Now he has been convicted of an offence not charged, and not in force, on the date of alleged commission of offence. He also submitted that the accused was prejudiced by the denial of opportunity to him for confronting the Investigating Officer and some other witnesses with Exts. D1 and D2, which were not in his possession as on the date of their examination. As and when Exts. D1 and D2 were received by him he filed Crl.M.P. No. 508 of 2000 seeking to recall the witnesses examined earlier; but the court disallowed the request and thus he lost the valuable opportunity of confronting the prosecution witnesses with the said exhibits. It is submitted that if one more opportunity is given, the appellant would be able to establish before Court that the case is actually foisted and that the contraband produced before Court, in fact, is part of the contraband seized from Allappu elsewhere. Violation of Section 42 of the NDPS Act is also pointed out as a ground justifying the interference with the impugned judgment.

6. On the arguments advanced in the case the points that arise for decision are:

1) Whether the conviction entered in the case offends Article 20 of the [Constitution of India](#)?

2) Whether there is violation of Section 42(2) of the NDPS Act justifying acquittal of the accused? and

3) Whether there is justification for giving further opportunity to the accused to recall the prosecution witnesses for confronting them with the defence exhibits?

7. Point No. 1: It is not in dispute that as on 25.10.2000, which is the alleged date of occurrence, it was Section 20(b)(i) of the NDPS Act that was applicable for the trial against the accused. The said Section reads as follows:

S. 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, -

xxx xxx xxx xxx b) produces, manufactures, possesses, sells, purchases, transports, imports interstate, exports inter-state or uses cannabis, shall be punishable,-

i) where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees'.

Obviously, the maximum punishment for the offence that could have been given for the offence, if proved, was only imprisonment for a term, which may extend to five years and fine, which could extend upto Rs. 50,000/-. The learned Special Judge passed judgment in the case on 20.12.2001. In the mean time NDPS (Amendment) Act 9 of 2001 had come into force w.e.f. 2.10.2001. Section 41 of the said Amendment Act reads as follows:

'S. 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.'

8. The impact of the amendment is that S.C. No. 105 of 2001 of the Special Court, which is involved in the present appeal, was also liable to be disposed of in accordance with the provisions of the principal Act as amended by Act 9 of 2001.

9. The quantity of ganja allegedly seized in the present case is 1050 grams, which, according to the law that prevailed on the date of occurrence, was not a small

quantity, but in view of the notification S.O.1055(E)dt. 19.10.2001 issued pursuant to the amendment, was above the prescribed small quantity of 1000 grams and below the commercial quantity of 20 kgs. and thus fall within the mischief of Section 20(b)(ii)(B) of the amended Act, which 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:

xxx xxx xxx xxx b) produces, manufactures, possesses, sells, purchases, transports, imports interstate, exports inter-state or uses cannabis, shall be punishable,- xxx xxx xxx xxx ii) where such contravention relates to Sub- clause (b), xxx xxx xxx xxx (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 Jinewhich may extend to one lakh rupees'.

(emphasis and omissions supplied)

10. Thus the conviction that was passed by the trial court as on 20.12.2001, which was the date of judgment, was a conviction under Section 20(b)(ii)(B) in view of the operation of Section 41 of the Amendment Act, already quoted above. The question is whether such conviction for an offence involving liability for larger punishment, though subject to the condition that the punishment actually to be imposed should be only a lesser one, offends Article 20 of the Constitution, according to which, no person shall be convicted of any offence except for violation of the law in force at the time of commission of the act charged as an offence; nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.

11. The above article has two limbs. The first limb prohibits conviction for an offence which was not in existence on the date of commission of the Act while the second limb prohibits imposition of a penalty greater than that which might have been inflicted under the law at the time of the commission of the offence. Here the

alleged violation is only in respect of the first limb.

12. According to me, the defence argument is hyper technical. The offence alleged against the accused was possession of ganja (cannabi) violating the prohibition contained in Section 8 of the NDPS Act, which has not undergone any change. The provision relating to conviction also is more or less similar. What is punishable is possession etc., of ganja and that remains unchanged. Instead of categorising the entire quantity possessed inclusive of small quantity of ganja in one class, portions thereof are now culled out and made punishable with a lesser or higher sentence. That is to say, possession of ganja coming under 'small quantity' has now been made punishable with a lesser sentence viz., R.I. which could extend to 6 months and fine upto Rs. 10000/- or both whereas possession of commercial quantity is provided a higher punishment. In the broader sense the law applicable remains the same in so far as even after the amendment it is only the possession etc., of ganja that is made punishable and it is the provisions of Section 20(b) of the N.D.P.S. Act that is applicable for the violation. No new offence is really created under the amendment. It has also been ensured that the offender will not be visited with a higher punishment. Viewed from this perspective the appellant's contention that he was convicted for an offence which was not in existence on the date of commission of the offence is hyper technical and has no substance. Since the prohibition and the liability for punishment for such violation, as far as the appellant's offence is concerned were very much there as on 25.10.2000 itself, he cannot be heard to contend that there is violation of Article 20 of the Constitution in the matter of conviction entered under Section 2(b)(ii)(B) of the N.D.P.S. Act. The contention fails.

13. Point No. 2:- The contention that there is violation of Section 42(2) of the N.D.P.S. Act is built upon the decision in Johnson v. State of Kerala, (2001 (1) KLT SN 5). It was mentioned therein that the compliance with the Section would be necessary even where the search is in a public place as allegedly occurred in the present case. The said decision was considered by a Bench in Kader v. State of Kerala (2001 (2) KLT 407), though with respect to another aspect; was distinguished on facts and not accepted by the Bench. Based on the decisions in State of Punjab v. Baldev Singh (AIR 1999 SC 2378), Abdul Rashid Ibrahim

Mansuri v. State of Gujarat (AIR 2000 SC 821) and Koluttumottil Razak v. State of Kerala ((2000) 4 SCC 465) this Court has found in Abdul Azeez v. State of Kerala (2001 (1) KLT 805) that the provisions of Section 42(2) will apply only to cases of information relating to availability of contraband in a building, conveyance or enclosed place and not to a case of information regarding such availability in a public place. The SLP filed against the said decision as SLP (Crl.) No. 3120 of 2001 has already been dismissed. In the circumstances the trial court was right in concluding that the compliance with Section 42(2) of the NDPS Act was not necessary on the facts of the present case, where the information was only that the accused was standing in the waiting shed attached to a bus stand which is obviously a public place.

14. Point No. 3: As far as the aspect of prejudice raised in this case and the request for further opportunity are concerned, I find some merit. It is seen from the order sheet maintained by the trial court that the accused filed an application on 12.11.2001 ie., on the day before he was questioned under Section 313 of the Cr.P.C. The prayer therein is stated to be for recalling the prosecution witnesses examined earlier to be cross examined with reference to Exts. D1 and D2. It was after dismissing the said petition that the court proceeded to question him and also proceeded to the stage of defence evidence when two witnesses were examined. The contention of the appellant has some support from the defence exhibits produced, which will show that on the very same day (25.10.2000) another person by name Allappu was also apprehended by PW1 and a case under the NDPS Act registered against him.

15. Ext. D2 produced in the case contains a press report with photograph of two persons by name Mustafa and Abdulla. The press report would show that the name of Abdulla mentioned under the photograph relates to Allappu. It is argued that there is impossibility of two seizures being made by one and the same officer from different places at more or less the same time and that there is possibility of the relevant aspects being brought out if only an opportunity is given to the accused to confront PWs. 1 to 3, who had been examined prior to the production of the above defence exhibits before Court. Considering the gravity of the offence and the grievance of the appellant that he is prejudiced by the dismissal of

Crl.M.P.No. 508 of 2000, I feel that the accused can be given one more opportunity to recall the witnesses concerned, so that they could be confronted with Exts. D1 and D2. To enable this, a remand appears essential.

16. In the circumstances the impugned judgment is set aside and the matter is remitted to the special court for the purpose of re-opening the case for providing an opportunity to the accused to recall the witnesses examined for the prosecution to face cross examination in the light of the defence exhibits produced subsequently, ie., allowing the request contained in Crl.M.P. 508 of 2000.

17. The accused has been on bail during the period of trial ie., from 17,1.2001 onwards until the pronouncement of the impugned judgment. The trial court will be free to extend the same benefit to the accused if motion is made therefor pending pronouncement of the revised judgment.

The appeal is disposed of as above.

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