Mohanan Vs. State of Kerala

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Court : Kerala

Decided On : Apr-03-1998

Reported in : 1998CriLJ3150

Judge : S. Marimuthu, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 8, 20, 42, 43 and 50; Evidence Act - Sections 145 and 157; Code of Criminal Procedure (CrPC) - Sections 161, 162 and 428; Criminal Law

Appeal No. : Crl. A. No. 205 of 1996

Appellant : Mohanan

Respondent : State of Kerala

Advocate for Def. : Public Prosecutor and; V.V. Nandago Pal, Adv.

Advocate for Pet/Ap. : Lalgi P. Thomas, Adv.

Disposition : Appeal dismissed

Judgement :

S. Marimuthu J.

1. This Crl. Appeal is directed against the conviction and sentence delivered by the Sessions Judge (as Special Judge) Waynad in S. C. No. 99/95 dated 30th

December, 1995. To appreciate the submissions of the learned Counsel appearing for the appellant and the submission of the learned Public Prosecutor, the facts and particulars which are culled out from the evidence and the judgment of the trial Court can be briefly stated hereunder.

2. On 10-6-1992 in the night PW-2 the Sub Inspector of Police attached to the Sultans Bathery Police Station along with his party, on receipt of an information, went to the southern gate of Sultan Bathery bus-stand where the appellant was standing in a suspicious manner. When the appellant was interrogated by PW-2, the appellant did not give any proper reply. Therefore PW-2 suspected that the appellant was in possession of some narcotic substances. For making a body search of the appellant, PW-2 questioned him as to whether the appellant wanted to make search in the presence of a Gazetted Officer or in the presence of a Magistrate as contemplated under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called the Act) for which the reply of the appellant was that he need not be searched in the presence of either a Gazetted Officer or a Magistrate. Therefore, PW-2 himself made the body search over the appellant and during the search he found 1.750 kilo grams of Ganja in the physical possession of the appellant. For seizing the Ganja from the appellant as well as for arresting him, Ext. P 2 seizure mahazar was prepared which was signed by an independent witness PW-1. The scene mahazar prepared by PW-2 is marked as Ext. P 4. After all these formalities were over in accordance with the procedure laid down in the Act, the accused and the seized ganja were produced to the Sultan Bathery Police Station wherein a case was registered in Crime No. 147/92 and the First Information Report was marked as Ext. P3. Then the investigation of this case was taken up by the Circle Inspector of Police who has been examined as PW-4. The sample of the Ganja was sent to Chemical Analyst for test and report with the requisition marked as Ext. P6. The report of the Chemical Analyst marked as Ext. P7 would disclose that the sample sent for the test is nothing but Ganja. After the completion of the investigation, PW-4 the investigating officer laid the final report before the Sessions Judge (Special Judge) punishable under Sections 8(c) and 20(b)(i) of the Act. Before the trial Court as the appellant denied the charge framed against him, to establish the guilt against the appellant, the prosecution examined four witnesses and also marked Exts. P1 to

P7, M. O. 1 and M. 0.2 series on their side. The learned Sessions Judge (Special Judge) on examining the evidence, both oral and documentary, came to the conclusion that the appellant has committed an offence under Section 43 of the N. D. P. S. Act punishable under Section 20(b)(i) of the Act and sentenced him to undergo rigorous imprisonment for three years and also to pay a fine of Rs. 1,000/- in default of payment of fine he shall undergo a further imprisonment for two months. He shall also set off the period already undergone by the appellant in the jail towards the sentence of imprisonment, under Section 428 of the Cr. P. C. Now the above conviction and sentence rendered by the Sessions Judge are being challenged in this appeal. The point, for consideration is whether the conviction and sentence recorded by the Sessions Judge can be sustained or not.

3. The learned Counsel appearing for the appellant advanced his argument that as per the prosecution case the offence said to have been committed by the appellant comes under Section 42 of the Act, in accordance with which the information received by the police officer or any other officer empowered under the Act shall reduce the information into writing and send one copy of the same without delay to his immediate superior officer. In the instant case, PW-2 before coming to. the scene of occurrence on information did not reduce the information into writing and sent a copy of the same to his superior officer and therefore there is a violation of the mandatory provision enjoined under Section 42 of the Act and that alone is sufficient to throw shadow of doubt on the case of the prosecution by which the accused is entitled to an acquittal. No doubt, I fully agree with the above submission of the learned Counsel appearing for the appellant. But as per the arguments of the learned Public Prosecutor before the Court, the office was committed only under Section 43 of the Act, wherein there is no provision that before proceeding to the suspected spot, namely, the public place, there is no necessity for the concerned officer who received the information to reduce the same into writing and send one copy to his higher officer. A comparative reading of Section 42 and 43 of the Act makes it very clear that Section 42 is relating to the procedure to be followed when the offence is committed inside a building. And Section 43 is relating to the seizure and arrest of the suspected person in a public place. In the- instant case before me the accused was arrested in the bus stand which needless to say is a public place. Therefore, Section 43, alone is attracted in

this case. As I have pointed out above, Section 43 does not contemplate that the secret information received by the police or any officer empowered under this Act shall reduce the information into writing and a copy of the same shall be sent to the higher officer. Now, coming to the arrest and seizure of the appellant in the place of occurrence, we have got the unassailed ocular testimony projected by PW-2 Sub-Inspector of Police and PW-3 Head Constable. No doubt, PW-1 who was an independent witness said to have been present at the time of the arrest of. the appellant and seizure of the Ganja from him has turned hostile before the trial Court and therefore he has been cross examined by the Public Prosecutor. A portion of his state-; ment recorded under Section 161, Cr. P. C. relating to the taking of samples and despatching the same is marked as Ext. D1. The Sessions Judge is wrong in marking the portion of that statement of the witness examined under Section 161, Cr. P. C. The statement recorded under Section 161, Cr. P. C. is an unsigned one. When the witness who has given such statement during the investigation is not supporting the same while he is in the witness box, the contradiction can be elicited through him, as provided under Section 145 of the Indian Evidence Act and the same can be recorded in his deposition sheet. Such contradiction cannot be marked as an exhibit as per the principle laid down by the Madras High Court in an earlier case as well as by me as Judge of this Court in a recent judgment. The statement recorded under Section 161, Cr. P. C. of a witness can be used by the accused for the purpose of contradiction, as 1 have stated above, under Section 145 and taken by the prosecution for corroboration provided under Section 157 of the Indian Evidence Act. The contradiction can also be elicited as per the proviso to Section 162, Cr. P. C. This principle of criminal law has not been followed by the Sessions Judge. Regarding the seizure and preparation of the scene mahazar, I do not find any reason to reject the evidence of P. Ws. 2 and 3 rendered for these aspects. Therefore, as '1 have pointed out above, the narcotic substance seized from the appellant was nothing but Ganja as borne out from Ext. P7 chemical report. As adverted to above, the possession of the same has been established beyond reasonable doubt by the ocular evidence projected by P.Ws. 2 and 3.I do not find any infirmity in the investigation conducted by the Circle Inspector of Police examined as PW-4. Hence, 1 have no second thought to interfere into the conviction rendered by the Sessions Judge (Special)

under Section 43 of the Act. Therefore, the judgment of the Sessions Judge in respect of the conviction under Section 43 of the Act is sustained. Regarding the sentence of imprisonment and fine, the learned Counsel appearing for the appellant submitted that the appellant has been in jail for period of 30 months as borne out in the tabular column annexed to the judgment of the trial Court as well as the information furnished to him. It is also his submission that even now for the sentence of this case, the appellant has been in jail. Therefore, the sentence of rigorous imprisonment awarded by the trial Court for a period of 3 years can be reduced and the period during which he has been in jail can be set off against his sentence of imprisonment. Regarding the sentence of fine, no doubt, the Section 20(b)(i) of the Act provides that fine is also necessary. However, the Court, particularly the High Court has got discretionary power even in a case where fine is necessary, the convicted person can be directed not to pay fine While imprisonment reasonably appears to be a substantial one in the mind of the Court. The records in this case on hand would go to show that the appellant could not come out on bail due to his financial position and it was also represented by the learned Counsel for the appellant that he is the only bread winner of the family consisting of his wife and three minor children and therefore he need not be directed to pay the fine in the above special circumstances.

4. I examined the above submissions of the learned Counsel appearing for the appellant and in this regard the learned Public Prosecutor was also heard. On my examination of the above special circumstances, I feel that the sentence of 3 years awarded by the lower Court can be reduced to a period of 2 years and the fine amount of Rs. 1,000/- imposed by the trial Court can be set aside.

In the result, the appellant is found guilty under Section 43 and punishable under Section 20(b)(i) of the Act and he is sentenced to undergo rigorous imprisonment for 2 years. The period he has undergone in the jail is set off against his sentence of imprisonment. The sentence of fine is set aside due to the reasons I have stated supra. Accordingly, the appeal stands dismissed.