

Naushad Vs. State of Kerala

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Court : Kerala

Decided On : Feb-23-2000

Reported in : 2000CriLJ2870

Judge : S. Marimuthu, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 20 and 21 to 27; Evidence Act - Sections 145 and 157; Code of Criminal Procedure (CrPC) , 1974 - Sections 154, 155, 161 and 162

Appeal No. : Crl. Appeal No. 211 of 1997

Appellant : Naushad

Respondent : State of Kerala

Advocate for Def. : A.G. Aneetha, P.P.

Advocate for Pet/Ap. : P. Vijaya Bhanu, Adv.

Disposition : Appeal allowed

Judgement :

S. Marimuthu, J.

1. This appeal is directed challenging the conviction and sentence delivered by the IInd Addl. Sessions Judge, Ernakulam in C.C. No. 43 of 1995. The learned

Sessions Judge found the appellant-accused guilty under Section 22 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (hereinafter referred to as 'the Act') and thereby sentenced him to undergo Rigorous Imprisonment for 10 years and also to pay a fine of Rs. 1 lakh, in default in the payment of fine to undergo simple Imprisonment for a period of one year on the following facts and evidence let in by the prosecution.

2. P.W. 11, the Sub Inspector of Police attached to the Mattancherry Police Station, would testify that he received a phone call at about 12-15 p.m. on 29-6-1995 from an unidentified person that psychotropic substances had been kept and sold in the house of the appellant located at a lane near the Community Hall at Karippalam. P.W. 11 recorded the above said information and informed the same to the Assistant Commissioner and the copy of the report recorded is marked as Ext. P16. Then P.W. 11 proceeded with his police men to the said house of the appellant and searched there at about 12-30 p.m. On disclosing his identity to P.W. 3, mother of the appellant and other inmates present there, he searched the house since they did not desire to search the house in the presence of the magistrate or any Gazetted Officer. However, before search, he sent one of his men to bring a Magistrate or a Gazetted Officer. But he could not procure either a Magistrate or a Gazetted Officer. During the course of the search P.W. 11 found 15 ampules of tidigesic injunction, 4 ampules of Promethazine Hydroehloride injection, 2 disposable syringes with needles and 3 disposable needles on the western end of the beam located on the said room occupied by the appellant. The search list is marked as Ext. P1. the sample signature and white covering paper are marked as Exts. P2 and P3. The appellant was, after arrest, taken to the police station, where Ext. P18 first information statement was recorded. Material objects recovered by P.W. 11 were received in the Court as per Ext. P1 1 property list. As per Ext. P11 property list, items 1 to 4 were in the sealed covers and seals were tallying with the sample seal as per the evidence of P.W. 8, the Head Clerk of the Sessions Court, Ernakulam, According to the further evidence of P.W. 8, on the requisition of the Investigating Officer, the materials were sent for Chemical examination and report. After the examination, Ext. P9 report of the Chemical Examiner was received. P.W. 6 is the Joint Chemical Examiner attached to the Regional Chemical Examination Laboratory, Kakkanad, Ernakulam and she

examined the articles and after the examination, she issued Ext. P9 certificate. P.W. 11, the Investigating Officer, on collecting the above statements, materials and evidence, filed the final report before the Sessions Judge. Since the appellant denied the charge framed against him under Section 22 of the Act, the prosecution let in both oral and documentary evidence and also marked material objects. Learned Sessions Judge, as pointed out above, found the appellant guilty and convicted thereon.

3. Mr. P. Vijaya Bhanu, learned counsel appearing for the appellant would raise the following points, namely (1) that in the instant case the complainant and the Investigating Officer are one and the same and when that be so, it is not in accordance with the settled proposition of law. Such an act of the Investigating Officer would certainly invalidate the proceeding and ultimately the conviction is liable to be set aside; (2) the conviction under Section 22 of the Act could not be upheld even if it is admitted for the sake of argument that the contraband was found in the possession of the appellant, having regard to the quantity of the narcotic sub-stance recovered. In such situation, the conviction must be one under Section 27 of the Act; (3) even under Section 27 of the Act, the conviction cannot be sustained in view of the proposition of law laid down by the Apex Court in a recent decision and (4) when there is no reliable evidence that the room from which the article was seized was in the exclusive possession of the appellant, it could not be said that the appellant was in possession of the narcotic drugs.

4. Point No. 4. The argument advanced by the learned counsel appearing for the appellant would be that there is no legal and reliable evidence that the room from which the contrabands were said to have been recovered was in the exclusive possession of the appellant or that he had kept the contrabands for sale, etc. In support of this argument, he would place reliance on the ratio of judgment of the Rajasthan High Court reported in *Urmed v. State of Rajasthan* 1996 (1) Crimes 358. In that case the principle laid down is that when the recovery is from a place which was in the possession of an accused and his brother against whom also a search warrant was issued and when no action was taken against the brother, the investigation suffers from basic infirmity and the conviction cannot be sustained. In the instant case, the prosecution has examined P.W. 1, a neighbour of the

appellant to establish the recovery. This witness was declared hostile and nothing was elicited from him that the room, from where the material object was recovered was in the exclusive possession of the appellant. P.W. 2 is residing with her husband in the same building on a rental arrangement. She had also not stated that the room in question was in the exclusive possession of the appellant. This witness was also declared hostile. P.Ws. 3 and 4 mother and father of the appellant, are also not supporting the prosecution theory. P.W. 5 is another brother of the appellant and in fact he also is not supporting the case of the prosecution. Thus, as rightly pointed out by the learned counsel for the appellant, there is no reliable and acceptable evidence that the room in question was in the exclusive possession of the appellant and the other family members had no access to this room. Hence it is very difficult to accept the case of the prosecution that the room in question was in the exclusive possession of the appellant.

5. Point No. 1. Even if it is taken for the sake of argument that the recovery was in accordance with the provisions of law and that the room from which the contrabands were recovered was in the exclusive possession of the appellant, the point is whether the prosecution has legally established their case to render a conviction under Section 22 of the Act. The learned counsel appearing for the appellant would mainly attack the prosecution case on the ground that the complainant and the Investigating Officer are one and the same, namely P.W. 11. When that is the position, the conviction rendered by the trial Court cannot be supported by this Court in view of the well settled propositions of law. In support of this contention, learned counsel would draw my attention to the following judgments. In *Megha Singh v. State Haryana* AIR 1995 SC 2339 : (1995 Cri LJ 3988) the Supreme Court has ruled as follows (at page 3989 of Cri LJ) :

We have also noted another disturbing feature in this case. PW-3, Siri Chand, head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it appears to us that he was not only the complainant in the case but he carried on with the investigation and examined witnesses under Section 161, Cr.P.C. Such

practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation.

The Rajasthan High Court in *Gyan Chand v. State of Rajasthan* 1993 Cri LJ 3716 has held thus (at page 3718 of Cri LJ) :

On the basis of the material and the evidence available on record, there is no room for any doubt that the case was registered by PW-6, Pratap Singh on the basis of source information and it is fully established by the statement of other witnesses as well as Pratap Singh himself that he, himself had gone for the search, had effected the recovery had seized opium and had investigated the whole case throughout. This course of action militates against the basic tenets of jurisprudence and fair investigation. In the facts of the case, I find the status of Investigating Officer, Pratap Singh could not be placed on any pedestal higher than of a complainant and the complainant himself cannot be the sole agency of investigation. In my humble opinion the prosecution in his case suffers from the basic infirmity as aforesaid and it is a question which goes to the very root of the matter and in the facts of the case it must be held to be sufficient to vitiate the whole investigation. Once I find that the whole bedrock of the investigation on the basis of which the appellant has been prosecuted is found to be unfair and-against the basic tenets of criminal jurisprudence, the conviction and sentence based on such a highly infirm investigation as aforesaid cannot be sustained in the eye of law and accordingly the whole proceedings based on such investigation as aforesaid deserve to be quashed and set aside, which I hereby do.

This Court in *Xavier v. State of Kerala* (1998 (1) KLT 686 : (1998 Cri LJ 3182) it is held as follows (at page 3182-3183 of Cri LJ):

A case of this nature, when the complainant himself is a police Official, the investigation should have been conducted by his top ranking officer and the final report also ought to have been filed by the higher official. A complainant being a police officer cannot be an investigating Officer. For, in such case, the accused and the prosecution will be deprived of their valuable rights of contradicting and corroborating, the previous informations recorded under Sections 154 or 155, Cri P.C. and previous statement of the witnesses, being a police officer, complaint

recorded, under Section 161, Cr. P.C, enjoined in Section 145 and 157 of the Indian Evidence Act and proviso of Section 162, Cr. P.C.

6. On the above propositions of law, I will look into the evidence let in by the prosecution.' It is the evidence of P.W. 11 that on receipt of the information he reduced it into report and then he proceeded to the spot. Thereafter he searched the house, recovered the contrabands and then returned to the police station with the appellant and the contrabands. It was he, who registered and investigated the case. In short, P.W. 11 alone can be rightly categorised as the complainant and Investigating Officer in this case. That could not be approved by the Court of law as held in the above said decisions. When that be the situation, the conviction cannot be said to be fair and it is not in accordance with the settled propositions of law and it has to be invalidated.

7. Points 2 & 3. Learned counsel appearing for the appellant would contend that in the instant case, from the house the following articles were recovered.

15. ampules of tidigesic injection, 4 ampules of Promethazine Hydrochloride injection, two disposable syringes with needles and three disposable needles

Out of the contrabands recovered, the following items were sent to P.W. 6, Joint Chemical Examiner, for her examination and report.

One 3ml disposable syringe with needle kept inside a cover having the following printed label.

SEPNIL DISPOSABLESYRINGE WITH2-3ml Mfg by MAY '95Peekay Enter IMPORTEDprises Thiru- NEEDLEmalaisamudram APR '98(Post)Thanjavur-613402ML.NO.579/282. One disposable Syringe with needle (label same as 1 above)

3. A stripe containing four 2ml ampoules of Promethazine Hydrochloride Injection I.P. having the following printed label and labelled 1 to 4 in the laboratory.

2ml.

Promethazine Hydrochloride Injection I.P. Each ml. contains

Promethazine Hydrochloride I.P. 25 mg. Mfg. Lic.No.KD/168A Lot 3V 969 Mfg. date 12/94 Expiry Date 11/97

(all the four ampoules have the same lot number)

4. Three strips containing fifteen 2ml.

ampoules of Tidigesic Injection labelled 1 to 15 in the laboratory and having the following printed label.

2ml

Buprenorphine Injection

TIDIGESIC

Buprenorphine 0.3mg/ml

(as Buprenorphine Hydrochloride)

Mfg.Lic.No.907/A/AP

Tamil Nadu Dadha Pharmaceuticals Ltd.,

Ameer Pet, Hyderabad-500016.

Batch No. E 9510

Mfg. : Apr 95

Exp : Mar '97

(all the fifteen ampoules have the same batch number)

5. Three needles with cover labelled 1,2 and 3 in the laboratory kept inside a cover having the following printed label

(B-D) Precision Glide 26 G/2

Needle

Lot No. 05 A 2005 Mfg. 01/95 Ext. 12/99

(all the three packets have the same lot No. and label)

After investigation the Joint Chemical Examiner has issued Ext. P9 report as pointed out above.

8. According to the learned counsel the above said quantity attracts the minimum quantity and therefore, the conviction, if any, that could be only under Section 27 of the Act and not under Section 22 of the Act. According to the learned counsel the minimum quantity prescribed comes to 1 gram as mentioned in column 3 of Notification No. 204 scheduled to the Act published in the Gazette of India, dated 23rd July, 1996. He placed reliance on the ratio of judgment reported in *Raju v. State of Kerala* AIR 1999 SC 2139 : (1999 Cri LJ 3486) to base a conviction under Section 27 of the Act. There the Supreme Court has held thus (at page 3487 of Cri LJ) :

The prosecution had led no evidence to show that he was an addict or that he was regularly taking brown sugar. Therefore, it was not proper to reject the defence of the appellant on the ground that during the trial the appellant was in custody and could not have consumed brown sugar and yet he did not exhibit withdrawal symptoms. It is also not in dispute that the quantity which he was carrying was 'small quantity'. The value of it was only Rs. 25/-. It is, therefore doubtful if such a small quantity was purchased by him for sale and make any profit out of it. In any case, there is no evidence on the basis of which such an inference can be drawn. These aspects have not been considered by the trial Court and the High Court. We are of the opinion that this appeal deserves to be allowed and the conviction of the appellant deserves to be altered from Section 21 - 27 of the NDPS Act.

We accordingly allow this appeal and alter the conviction of the appellant from under Section 21 to one under Section 27 of the NDPS Act and also alter the sentence of 10 years rigorous imprisonment and a fine of Rs. 1 lakh to rigorous imprisonment for one year and a fine of Rs. 5,000/-. In default of payment of fine, the appellant shall suffer further imprisonment for a period of three months.

Learned counsel on the basis of the above principle would argue that some of the circumstances and the materials available on record would show (even if the possession is found to be proved by the prosecution) that the appellant was using the drugs for his health purposes and hence this small quantity (when it comes below the minimum quantity) no criminal liability can be fastened on the accused even under Section 27 of the Act in view of the observation by the Apex Court in *Crl. Appeal No. 780 of 1998 dated 27-10-1999*. In *Gaunter Edwin Kircher v. State of Goa 1993 Cri LJ 1485 : (AIR 1993 SC 1456)* the Supreme Court has ruled that when the contraband is proved to be less than 5 grams and that was used by the accused in pouch along with the smoking pipe and smoking materials, it could not be said that it attracts Section 20, on the other hand the conviction can be recorded only under Section 27 of the Act. In a latest judgment of the Supreme Court, which the learned counsel placed reliance, delivered in *Crl. Appeal No. 780 of 1998 dated 27-10-1999* (stated supra) it is held as follows :

The proviso to Sub-rule (2) is very evident, that a person is permitted to keep in his possession for his personal medical use the psychotropic substance up to one hundred dosage at a time.

We are not disposed to think that 6 ampoules would cross the above limit and there is no attempt made either through DW-1 (Doctor) or through Court witness No. 1 (D.M.O.) that 100 dosage would be below the 6 ampoules recovered from him.

It is unfortunate that the aforesaid points have not been put forward before the trial Court or the High Court. We feel that the conviction and sentence imposed on this appellant were without the sanction of law.

Appellant is unlawfully deprived of his personal liberty for such a long period of 5 years on account of over looking the aforesaid facts and the legal position.

We, therefore, allow this appeal and quash the judgment of the High Court as well as the Sessions Court. We acquit the appellant and direct him to be set at liberty forthwith. In this case we are not considering the question of awarding compensation to the appellant but he is free to resort to his remedies under law for

that purpose

9. In spite of the above incurable infirmities in the case of the prosecution on hand, such as same officer being the complainant and the Investigating Officer, even if there are evidence for an offence punishable under Section 27 of the Act (for minimum quantity), in this case a conviction cannot be supported in view of the fact that the appellant has been in custody from 1995, more than 4 years, on account of the verdict rendered by the Supreme Court in Crl. Appeal No. 780 of 1998 (stated supra).

10. On account of the above reasons, circumstances and the evidence on record I am of the view that the conviction and sentence recorded by the Sessions Judge could not be sustained by this Court.

In the result, the appeal stands allowed by acquitting the appellant. Jail authorities are directed to release the appellant provided his judicial custody is not needed in any other case.

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