

Selvan and Others Etc. Vs. the State

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Court : Chennai

Decided On : Oct-10-1990

Reported in : 1991CriLJ1942

Judge : K Swamidurai, J.

Appeal No. : Criminal Appeal Nos. 194 to 197 of 1985 and 838 to 841 of 1986

Appellant : Selvan and Others Etc.

Respondent : The State

Advocate for Def. : Mrs. D. Kalaichelvi, Govt. Adv.

Advocate for Pet/Ap. : N. Natarajan, Ad. for ;A. R. Nagarajan, Adv.

Judgement :

1. Criminal Appeal Nos. 194 to 197/85 are filed by the respective accused in STC Nos. 52 to 55/84. Criminal Appeal Nos. 838 to 841 of 1986 are filed by private parties/owners of respective lorry and paddy which were directed to be confiscated in STC No. 52 to 55/84 respectively by the learned Special Judge under Essential Commodities Act, Thanjavur.

2. The accused in all the above said STC Nos. 52 to 55 of 1984 were charged under Clause 3(IA) of the Tamil Nadu Paddy (Restriction on Movement) Order, 1982 and also under O.4(1) of Tamil Nadu Essential Trade Articles (Regulation of

Trade) Order, 1974 punishable under S. 7(1)(ii) of the Essential Commodities Act, 1955. The accused in the above cases, as per the case of the prosecution had purchased paddy without a valid permit and also attempted to remove the paddy in the respective lorries TMS 8244, TNO 6275, TNQ 2638 and TMP 1708 from Thanjavur District limits to Pudukotai District violating the Notification, as the paddy should not be procured within that belt area. The admitted case of the prosecution is that the accused did not possess valid permit for procuring paddy.

3. The prosecution has examined P.Ws. 1 to 3 and marked as many as 22 exhibits. The accused have examined nine witnesses on their side and marked Ex.D. 1. P.W. 1 Abdul Mazeed is the Sub-Inspector of Police, Food Cell, Crime Branch, Thanjavur. P.W. 2 Jeyakumar is the Assistant in the Office of the Collector, Thanjavur and P.W. 5 Raju is the Inspector of Police, Civil Supplies, C.I.D., Thanjavur.

4. On going through the evidence, it is seen that the accused in STC Nos. 52 to 55 of 1984 had loaded 170 bags, another 170 bags 180 bags and 104 bags of paddy in the respective lorries, namely, 'TMS 8244, TNO 6275, TNQ 2638 and TNP 1708. The case of the prosecution is that the paddy had been loaded for transport from 16/0 k.m. within Thanjavur District border for being removed to Budukkottai District and therefore, the accused have committed the offences as stated supra. It is admitted that these, accused did not possess any valid permit. But the defence is that they did not attempt to transport paddy and therefore, they have not committed any offence.

5. Learned Special Judge has considered the evidence of the prosecution witnesses and the defence in detail and ultimately found the accused guilty of the abovesaid orders punishable under S. 7(1)(a)(ii) of the Essential Commodities Act and convicted and sentenced them to undergo rigorous imprisonment for six months under each count and also sentenced to pay a fine of Rs. 500/- each in default to undergo rigorous imprisonment for three months. Learned Special Judge also confiscated the respective lorries and also the paddy bags loaded in each of them. The accused have filed the abovesaid appeals and the respective lorry owners have filed the another set of appeals referred to above.

6. Order 4(1) of the Tamil Nadu Paddy and Rice (Regulation of Trade) Order, 1974 reads as follows :

'Subject to the provisions of Clause (3) no person shall start afresh or carry on business as a wholesaler except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority'.

Clause (3) of the said reads as follows :

'Government may, by notification direct that all purchasers of paddy and rice in any area shall be made by, or on behalf of the Government. On such notification coming into force, purchase shall not be made by any person except as an agent on behalf of Government'. Provided that Government may exempt any class or category of purchases from the purview of such notification subject to such conditions as may be specified'.

Clause 3(1) of the Tamil Nadu Paddy (Restriction on Movement) Order, 1982.

'No person shall transport, move or otherwise carry or prepare or attempt to transport, move or otherwise carry, or aid or abet in the transport, movement or otherwise carrying of paddy outside the State by road/rail or otherwise except under and in accordance with the conditions of a permit issued by an authorised officer.'

As required under the abovesaid Act and orders, sanction was accorded by the Collector of Thanjavur District for prosecuting the respective accused.

7. Learned counsel for the accused Mr. N. Natrajan, Senior Advocate, took me to the provisions of S. 100, Cr.P.C. and also the O.5(3) of the Tamil Nadu Paddy (Restriction on Movement) Order, 1982 which runs as follows :

'The provisions of Sections 100 and 165 of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974) relating to search and seizure shall, so far as may be applied to search and seizure under this clause'.

Section 100(4), Cr.P.C. reads as follows :

'Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situated or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do'.

Section 100(5) of the Code of Criminal Procedure Code reads as follows :

'The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses, but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it'.

Sub-sections (6) and (7) of S. 100, Cr.P.C. reads as follows :

'(6) The occupant of the place searched, or some person in his behalf, shall in every instance, be permitted to attend during the search, and a copy of the list prepared under this Section, signed by the said witnesses, shall be delivered to such occupant or person.

'(7) When any person is searched under subsec. (3), a list of all things taken possession of shall be prepared and a copy thereof shall be delivered to such person'.

Section 165 of the Code of Criminal Procedure reads as follows :

'(1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for

such thing in any place within the limits of such station.

'(2) A Police officer proceeding under subsec. (1), shall, if practicable, conduct the search in person.

'(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

'(4) The provisions of this Code as to search-warrants and the general provisions as to searches contained in S. 100 shall, so far as may be, apply to a search made under this section.

'(5) Copies of any record made under sub-sec. (1) or sub-sec. (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate'.

8. Learned counsel for the appellants contended that the provisions of 0.5(3) of the Tamil Nadu Paddy (Restriction of Movement) Order, 1982 relating to the search and seizure in conformity with the provisions of Sections 100 and 165 of the Code of Criminal Procedure have not been followed in this case, that the prosecution has failed to produce the Notification showing the belt area within which paddy should not be procured without a valid permit and that therefore, the prosecution has not proved that these accused have violated the provisions under the Tamil Nadu (Restriction on Movement) Order, 1982 and also the Tamil Nadu Paddy and Rice (Regulation of Trade) Order, 1974. Learned counsel for the appellants relied upon a decision of this Court reported in *Ganesan v. The Inspector of Police Etc.*, 1988 Mad LW (Cri) 59. This is a case decided under the Tamil Nadu (Restriction on Movement) Order, 1984. In this case, the Notification to show the area within which paddy should not be procured without a valid permit, was not filed in Court.

It appears that an argument was raised in the said case that the Court should take judicial notice of the Gazette Notification and so, the non-filing of Notification would not vitiate the trial. Maheswaran, J., has held that the Notification in question is not one which a Court can take judicial notice of, for, this notification is executive in character. Even a Gazette Notification has to be properly filed and proved. In the absence of such notification before the Court and in the absence of such notification notifying the area, the appellant cannot be found guilty of violating Cl. 3(1A) of the Tamil Nadu Paddy (Restriction on Movement) Order. Learned counsel for the appellant cited another decision of this Court reported in Sheik Mohammed v. State of Tamil Nadu, 1988 MLW 481. This case was also decided under the provisions of Tamil Nadu Paddy and Rice (Regulation of Trade) Order, 1974. The Notification declaring a place as belt area from which movement of paddy to any other place is prohibited, was not filed by the prosecution. Janardhanam, J., held that in the absence of any best evidence produced before Court pointing out that Bodinayakanur is a declared belt area from which the movement of paddy is prohibited, it is not possible to affix the seal of approval of the Court to the oral testimony of P.W. 5, Taluk Supply Officer, when he says that Bodinayakanur is a declared belt area from which paddy is prohibited to be imported and that there is no best evidence available prohibiting the transport of paddy from Bodinayakanur area. Learned Judge ultimately allowed the appeal setting aside the conviction and sentence imposed on him.

9. In the instant case, a copy of the mahazar was not supplied to the respective accused in all the cases as required under S. 100, Cr.P.C. Further, the Notification has also not been filed in this case. If the Notification is not filed then, there is no acceptable evidence to show that the place where these accused had procured paddy within Thanjavur District, cannot be held to be a prohibited area. The provisions of S. 100 and 165, Cr.P.C. are mandatory. S. 100(6) is to the effect that the occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witness, shall be delivered to such person. It is not the case of the prosecution that a copy of the search list was delivered to the respective accused in these cases. Therefore, the Provisions of S. 5(3) of the Tamil Nadu Paddy (Restriction on Movement) Order, 1982 have not been

followed. Therefore, learned counsel for the appellant contended that the prosecution has failed to prove that the area within which the paddy was procured by these accused could not be held as prohibited area and hence, the violations under O.4(1) of the Tamil Nadu Paddy (Restriction on Movement) Order, 1984 (Tamil Nadu Essential Trade Articles (Regulation of Trade) Order, 1974) and also O.3(1A) of the Tamil Nadu Paddy (Restriction on Movement) Order, 1982 could not be said to have been committed by the respective accused. Consequently, the order of confiscation of the respective lorry and the paddy cannot be upheld. The prosecution has failed to prove the case beyond reasonable doubt.

10. In the result, the conviction and sentence imposed on the accused are set aside and the appeals are allowed. The fine amount, if it had been paid, is ordered to be refunded to the respective accused in all the four appeals. The order of confiscation of the respective lorry and the paddy in the other set of appeals is also set aside.

11. Appeal allowed.