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Court : Chennai

Decided On : Jan-23-2002

Reported in : 2002(1)ALT(Cri)544; 2002(83)ECC821

Judge : M. Karpagavinayagam, J.

Acts : Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 8, 21 and 50

Appeal No. : Crl. A. No. 593 of 1998

Appellant : Nayagam

Respondent : State by Inspector of Police N. 2, Kasimedu Police Station Chennai

Advocate for Def. : E. Raja, Additional Public Prosecutor

Advocate for Pet/Ap. : C.M. Gunasekaran, Adv. for M.K. Subramanian, Adv.

Disposition : Appeal allowed

Judgement :

ORDER

1. Nayagam, wife of Chinnasundar, the appellant herein was convicted for an offence under Section 8(c) read with Section 21 of the N.D.P.S. Act. Challenging

the same, the present appeal has been filed.

2. The prosecution case is that on 21.9.1995 at about 2.45 p.m. in front of Kuthallamman Koil, within the Kasimedu Police limit, the appellant was found in possession of 2.200 grams of heroin. To prove the prosecution case, P.Ws. 1 to 5 were examined, Exs. P.1 to P. 5 were filed and M.O.I was marked.

3. The case of the appellant is one of total denial. The learned counsel for the appellant, would raise several grounds to establish that the conviction and sentence imposed upon the appellant is not valid in law. However reference about those grounds would be unnecessary as the appeal has got to be allowed on the simple point namely, Section 50 of the N.D.P.S. Act, which is a mandatory provision, has not been complied with.

4. According to P.W.2, Sub-Inspector of Police, the appellant, moving in a suspicious manner, tried to escape from the place but however, she was caught by the police personnel and when she was interrogated, she confessed that she was having five packets of heroin in her jacket. When she was asked whether she was to be searched in the presence of a Gazetted Officer or a Magistrate, she said that she could be searched by the Police Officers themselves. Therefore, P.W. 4, a Women Police Constable searched her body and recovered five paper packets from her weighing about 2.200 grams. On analysis it was found that it was heroin.

5. It is contended by the learned counsel for the appellant, on the strength of the judgment in K. Mohanan v. State of Kerala, 2000 S.C.C. (CM). 1228, that mere asking the accused whether she was required to be searched in the presence of a Gazetted Officer or a Magistrate, cannot be treated as communication to the accused and that she has a right under law to be searched before Magistrate or Gazetted Officer as contemplated under Section 50 of the Act.

6. In this case, admittedly, such a right had not been informed by the witnesses. It is contended by the learned Additional Public Prosecutor, on the strength of the judgment reported in Sanjan Abraham v. State of Kerala, 2001 AIR SCW 2970, that oral communication is enough. In paragraph 10 of the said decision, it is clearly observed by the Supreme Court that communication may be oral only with

regard to the right as provided under Section 50 of the Act. Therefore, this decision also would support the plea of the learned counsel for the accused.

7. In this context, it would be relevant to refer about the observations made by the Supreme Court in *K. Mohanan v. State of Kerala*, 2000 S.C.C. (Cri) 1228, which is as follows:

'The main legal point canvassed before us is that the mandatory requirement in Section 50 of the Act has not been complied with. It is recited in the judgment that P.W.I before the search was conducted, asked the appellant whether he required to be produced before a Gazetted Officer or a Magistrate for the purpose of search and that the appellant answered in the negative. In order to ascertain whether the said recital is authentic, we called for the original records, though the evidence is recorded in vernacular we found from the testimony of P.W.I that the aforesaid recital is substantially correct

If the accused, who was subjected to search was- merely asked whether he required to be searched before a Gazetted Officer or a Magistrate it cannot be treated as communicating to him that he had a right under law to be searched so. When P.W.1 has done in this case was to seek the opinion of the accused whether he wanted it or not. If he was told that he had a right under law to have it (sic himself) searched what would, have been the answer given by the accused cannot be gauged by us at this distance of time. This is particularly so when the main defence adopted by the appellant at all stages was that Section 50 of the Act was not complied with.'

8. In view of the fact situation, where there is no material to show that right was informed, the decision rendered by the Supreme Court in *K. Mohanan v. State of Kerala*, 2000 S.C.C. (Cri.) 1228 would squarely apply to this case.

9. In the result, the appeal is allowed. The conviction and sentence imposed upon the appellant is liable to be set aside and accordingly, the same is set aside. The appellant is directed to be released forthwith.