

Ramu Vs. the State

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Court : Chennai

Decided On : Mar-21-2000

Reported in : 2000CriLJ3412

Judge : V. Bakthavatsalu, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 20B(1), 25, 35, 42, 42(1), 42(2), 43, 50 and 57; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Criminal Appeal No. 610 of 1996

Appellant : Ramu

Respondent : The State

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : K.V. Sridharan, Adv.

Disposition : Appeal allowed

Judgement :

V. Bakthavatsalu, J.

1. This appeal is preferred by the accused against the conviction and sentence imposed by the learned Sessions Judge, Madurai in C.C. No. 13 of 1996. The

charge against the accused is that on 9-11-1995 at about 6.15 a.m., he was driving the vehicle AB 36-B 6099 along with Veeranna and Sathaiah, who were carrying two boxes and that the vehicle was intercepted by the police on National Highways Madurai-Tiruchy and that when the boxes were searched it was found to contain fifty-nine and thirty-nine kilograms of ganja and that therefore, the accused is liable to be punished under Section 8(c) read with Section 25 of the N.D.P.S. Act (hereinafter referred to as 'The Act'). The accused pleaded not guilty.

2. To prove the above charges, the prosecution has examined P.Ws. 1 to 4 and marked Exs. P. 1 to P. 12 and M.Os. 1 to 14.

3. The case of the prosecution as disclosed from the evidence is as follows :

P.W. 4 was an Inspector attached to Dindigul N.I.B. On 8-11-1995 at about 11.00 p.m., he received an information that three persons were transporting ganja in a Maruti van and the same was recorded by him under Ex. P. 4. Thereafter, he proceeded to the spot along with witnesses P.Ws. 1 and 2. At about 3.30 a.m., they intercepted vehicles passing through the said road. At about 6.15 a.m. the van bearing Registration No. AB, 36-B 6099 was proceeding towards west. P.W.4 intercepted the above van. The accused was driving the said van and two other persons were seated inside the van. As the accused and other two persons did not know Tamil language, P.W. 4 enquired them with the assistance of P.W. 2, who knows Telugu. The accused were also informed of their right to be searched in the presence of a Gazetted Officer or Magistrate for which they told that the Inspector himself could search them. Ex. P. 1 is the consent letter given by the accused.

4. In the presence of the witnesses, P.W. 4 searched the van. On search, he found a white colour blanket on the seat of Sathaiah. On the said Blanket a cotton stitched cover was found. When P.W.4 removed the said cotton cover, he has found a plank studded with iron rods. The above planks appeared to be seats. When P.W.4 removed the iron rods, he has found a polythene paper which contained ganja. When he weighed the said polythene papers containing ganja it weighed sixty-eight kilos and it was taken from the first seat. The contraband taken from second box weighed forty-five kilos. The ganja after deducting the weight of the boxes, weighed fifty-nine kilos and thirty-nine kilos. P.W.4 took samples from

each box weighing fifty grams. He took the samples in a paper and after wrapping he put N.I.B. seal. P.W.4 also recovered the Registration Certificate and other documents from the accused. He prepared a Mahazar under Ex. P.2. P.W.1, the Village Administrative Officer and P.W. 2, who explained the incident to the accused in Telugu, have also signed in the Mahazar. M.O.1 is the sample packet taken from big box. M.Os. 2 to 6 are ganja packets, M.O. 8 is the Maruthi van.

5. P.W. 3, the photographer took photos in different angles. M.O.9 are the photos and M.O. 10 are its negatives. M.O. 11 is the license issued to the accused. M.O. 12 is the Registration Certificate and M.O. 13 is the Insurance Certificate.

6. P.W. 4 arrested the accused and the other two persons and registered the case in C.C. Nos. 58, 59 and 60 of 1995. Ex. P. 5 is the F.I.R. P.W.4 also sent a detailed report under Section 57 of the Act to the Deputy Superintendent of Police under Ex. P.6. Exs. P. 9 and P. 12 are the reports of the Chemical Examiner, wherein it is stated that the sample is ganja. After examining the witnesses, P.W.4 completed the investigation and filed a charge-sheet on 4-1-1996.

7. The case against Sathaiah was tried in C.C. No. 15 of 1996. He has admitted the offence and, therefore, he was sentenced to undergo Rigorous Imprisonment for two months and to pay a fine of Rs. 39,000/-under Section 20(B)(1) of the Act. The case against Veeranna was split up and tried as C.C. No. 14 of 1996. The said accused admitted the offence, and accordingly he was convicted under Section 20(B)(1) of the Act and sentenced to undergo Rigorous Imprisonment for two months and pay a fine of Rs. 50,000/-. This accused was convicted under 8(c) r/w. 25 of the Act and sentenced to undergo R.I. for 10 years and pay fine of Rs. one lakh.

8. The point for determination in this appeal is whether the accused is guilty of the offence under Section 8(c) read with Section 25 of the Act.

9. The learned counsel for the appellant contended that though the information received by P.W. 4 was recorded, the same was not submitted to Superior Authority and that, therefore, it has to be held that the provision of Section 42(2) has been violated. The learned counsel for the appellant also contended that the

accused was not properly explained of his right enshrined in Section 50 of the Act, since he did not know Tamil. The learned counsel has also contended that Section 8(c) read with Section 25 of the Act will not apply to the facts of this case, and that therefore, the findings of the Trial Court are not sustainable in law.

10. It is seen from the evidence of P.Ws. 2 and 4 that the accused were informed of their right to be searched in the presence of a Gazetted Officer or a Magistrate. P.W. 4 has stated that the accused gave a consent letter Ex. P. 1 and that they were given option to be searched in the presence of a Magistrate or a Gazetted Officer. Ex. P. 1 will show that P.W. 4 has given option to the accused to be searched in the presence of Magistrate or a Gazetted Officer and they were also explained in Telugu and that they told that they could be checked by Inspector himself. The evidence of P.Ws. 2 and 4 on this aspect of the case cannot be brushed aside. The evidence of P.W. 1 also corroborated P.W.4. Therefore, it is to be held that the mandatory requirements contemplated under Section 50 of the Act are complied with.

11. It is also established from the evidence of P.W.4 that he has also submitted a detailed report to the Deputy Superintendent of Police under Section 57 of the Act. Ex. P. 6 is the said report. Hence, I have no hesitation in holding that Section 57 of the Act has been complied with.

12. The evidence of P.W.4 will show that he received information at about 11.00 p.m. on 8-11 -1995. Ex. P.4 will show that the said information was reduced into writing by P.W.4. P.W.4 has stated that he has sent a copy of the said information to the Deputy Superintendent of Police. But there is no endorsement in Ex. P. 4 to indicate that the copy of Ex. P.4 was sent to the Deputy Superintendent of Police. Relying upon the above facts, it is contended by the learned counsel for the appellant that Section 42(2) of the Act has not been complied with. It is well settled that compliance of Section 42(2) of the Act is mandatory and that the non-compliance of the said provision would vitiate the conviction. But the learned Government Advocate contended that the search was conducted in a public place and as such only Section 43 of the Act will apply. In this connection, it would be relevant to extract Section 42 and Section 43 of the Act at this stage. Section 42(1)

of the Act reads thus :-

Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government, or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug or psycho-tropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset.

13. Section 42(2) states that the information taken down under sub-clause (1) shall be sent to superior officer. Section 43 of the Act relates to seizure and arrest in Public Places, Section 43 of the Act reads thus :

Any officer of any of the departments mentioned in Section 42 may :-

(a) seize, in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter IV has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under Chapter IV relating to such drug or substance.

As per explanation of the above section, the expression 'public place' includes any public conveyance, hotel, shop and other place intended for use by or accessible to the public.

14. It is admitted in this case that while the van was proceeding in the public road, the same was intercepted by P.W.4. Therefore, it has to be held that the search was conducted 'in transit' in a public place. As the contraband was searched and seized in a public road in the van, which was proceeding on the road, it has to be held that Section 42 of the Act will not apply to this case. On the other hand, the search and seizure conducted by P.W.4 would fall under Section 43 of the Act. For the above reasons, I hold that the contention raised on behalf of the appellant cannot be sustained.

15. Section 8(c) of the Act states that no person shall possess/transport narcotic drugs except for medical and scientific purposes. In this case, the accused is also charged under Section 25 of the Act. Section 25 of the Act reads thus :

Whoever, being the owner or occupier or having the control or use of any house, room enclosure, space, place, animal or conveyance, knowingly permits it to be used for the commission by any other person of an offence punishable under any provision of this Act, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees.

16. Learned counsel for the appellant contended that the explanation given by the accused during 313 Cr.P.C. examination was not properly considered and appreciated by the trial Court. The accused is the driver of the van. The owner of the van has not been arrested. It is not shown that P.W.4 has examined the owner of the van. It is, however, seen from Section 25 of the Act that to attract Section 25 of the Act, it must be established that the accused knowingly permitted the vehicle to be used for commission by any other person of an offence punishable under this Act.

17. The presumption of culpable mental state as stated in Section 35 of the Act will arise only if it is established that the accused knowingly permitted his vehicle to be used for the commission of offence. On this aspect of the case, learned counsel for the appellant raises upon a decision reported in 1990 Cri LJ 1119, Madhya Pradesh. The facts of the above case would show that the accused was one

among the persons with whom the opium was found. The Court has held that the above fact is not sufficient to convict the accused. In the above decision, the Court has held thus :

In the instant case except for the circumstance that the accused was driving the car in question, there is no other circumstance whatsoever. The investigation has not been pursued in the direction to connect the accused with the knowledge of the concealed article. It is all the more necessary that two of the inmates sitting in the rear seat of the car have very comfortably and conveniently escaped under the very nose of the authority.

18. Regarding the true import of the word 'knowingly'; the Court has held thus :

The charge against accused who was owner of the car in which opium was found, was that he was a registered owner of the car, but that by itself is not sufficient to sustain the charge under Section 25 of the Act. The crux of the offence under Section 25 of the Act lies in knowingly permitting use of any place or conveyance for commission of any offence under the Act. These terms 'knowingly permitting' raise the perennial problem of 'mens rea', in the form of guilty knowledge is an essential requirement of this particular offence. The difficulty sometimes in interpreting the phrase 'knowingly permit' is no doubt there but a distinction though subtle does exist, term 'knowingly permitting' goes further and requires proof that the person permitting use of his house, room enclosure, animal or conveyance, was aware of the fact that such place or conveyance was intended to be used for commission of an offence under the Act. The insertion of the extra word 'knowingly', it must be presumed, has been intentionally used by the Legislature.

19. Learned counsel for the appellant also relies upon another decision of Orissa High Court, reported in 1995 Cri LJ 1762. The Orissa High Court, on the question of applicability of the Section 25 of the Act, has held thus (Para 4) :

Section 25 of the Act provides, inter alia, that whoever being the owner of conveyance knowingly permits it to be used for commission by any other person of an offence under any provision of the Act, shall be punishable with the sentence mentioned therein. The linchpin of the offence under Section 25 thus, lies in

knowingly permitting use of the vehicle for commission of any offence under the Act. No doubt, under Section 35 of the Act, the Court shall presume culpable mental state of the accused in any prosecution for an offence under the Act.

In the above Judgment, the decision of the Supreme Court reported in 1967 MLJ 575, is relied upon. The Apex Court has held that the word 'knowing' or 'knowingly' are used to indicate that knowledge as such must be proved either by positive evidence or by circumstantial evidence before mens rea can be established. It is also held that the word 'knowingly' is more forcible than the words, 'has reason to believe'. In view of the principle laid down by the Apex Court, the mere fact that the accused was the driver of the van, from where the contraband was seized is not sufficient to convict the accused under Section 25 of the Act.

20. As already stated, the prosecution has not examined the owner of the van. It is not clear under that circumstance the owner permitted the driver to take the passengers from Andhra Pradesh. All that is stated by the accused during 313, Cr.P.C. examination is that as per instructions of the owner he took his family members in the van and that he did not know that ganja was kept in the van. From the mere fact, that the accused permitted two other persons to travel in the van along with two boxes, it cannot be readily inferred that the accused knowing fully well permitted the other two persons to travel in the van with boxes containing ganja. There must be some other evidence to prove that the accused had knowledge that two other accused kept ganja in the boxes.

21. It is no doubt true that the boxes were placed in the van in a clandestine manner and that the boxes were covered by blanket and other materials. The trial Court seems to have been influenced by the above fact for holding that the accused had knowledge that two other persons were travelling with contraband. As already stated, when two other persons are allowed to travel in the van with boxes the accused would not have had any knowledge that the other persons placed ganja inside the boxes. From the mere fact that P. W. 4 recovered the blankets and planks inserted with iron rods, it cannot be concluded that the accused had knowledge that the boxes contained ganja. For the above reasons, I hold that the prosecution failed to prove that the driver knowingly permitted the

other two persons to carry the contraband in the van. Therefore, the accused cannot be convicted for the alleged offence under Section 8(c) read with Section 25 of the Act. The Trial Court fail to advert to the above aspects of the case, that is, the applicability of Section 25 of the Act.

22. In the result, the criminal appeal is allowed. The conviction and sentence imposed on the accused are set aside. The fine amount if any paid by the accused is ordered to be refunded to the appellant/accused. The accused is ordered to be released forth with, unless his presence is required in any other case.

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