

P.U. Regi Vs. Superintendent of C. Ex.

P.U. Regi Vs. Superintendent of C. Ex.

SooperKanoon Citation : sooperkanoon.com/823468

Court : Chennai

Decided On : Nov-22-2000

Reported in : 2001(129)ELT593(Mad)

Judge : Malai Subramanian, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 8, 20, 35, 53 and 67; Evidence Act - Sections 25; [Constitution of India](#) - Article 20; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Criminal Appeal Nos. 27, 33 and 347 of 1992

Appellant : P.U. Regi

Respondent : Superintendent of C. Ex.

Advocate for Def. : P. Rajamanickam, Spl. Public Prosecutor

Advocate for Pet/Ap. : Ramasamy, ;T. Sudanthiram and ;S. Shanmugavelayutham, Advs. for ;S. Samuel Rajapandian, Adv.

Judgement :

Malai Sburamanian, J.

1. The first two appeals were filed against the conviction of the accused 3 and 2 respectively and the third appeal was filed by the State against the acquittal of the

first accused in C.C. No. 43/91 on the file of the I Additional Sessions Judge, Madurai.

2. The learned Sessions Judge while acquitting the first accused, convicted the second and third accused on a charge that in between 17-10-1989 and 20-10-1989 the NDPS officers saw cultivation of cannabis for about 31 acres in Mathikettan Parai, Thalai vetti Parai, Utthamapalayam and in Semangakuzhulipallam and destroyed them. Further charge is that the second and third accused cultivated cannabis plants in the land belonging to the first accused and on the directions of the first accused. The second and third accused were convicted by the Trial Judge for an offence under Section 8(b) read with 21 (a) Clause 1 of the NDPS Act and each of them was sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 10,000/- each in default to undergo rigorous imprisonment for one year. Hence the appeals.

3. The facts that are necessary to decide the appeals are as follows :

P.W. 1 the Superintendent of Police under NDPS Act, Madurai went on raid on 17-10-1989 with hundred coolie for destroying the cannabis plants in the above said villages at the altitude of 5000 feet and on 19-10-1989 when they reached Semangakuzhulipallam they found ganja plantations for about 5 acres and they also found certain persons sitting in a hut and when they approached, except the second and third accused, others escaped. Then he destroyed the cannabis plants, prepared seizure mahazar Exs. P1 and P2 and observation mahazars Ex. P6 and then obtained statements from the second and third accused. The original statements being in Malayalam, Ex. P3 and P7 are respective translations of Ex. P9 and P8. After arresting the second and third accused, P.W. 1 ascertained from them that the first accused was the owner of the land in which the cannabis plants were cultivated. On 21-10-1989 he arrested the first accused also and sent all the accused for remand. After completing investigation, he laid the complaint against the accused.

4. After the evidence of prosecution was over, the accused were examined under Section 313 Cr.P.C. to explain the incriminatory circumstances appearing in the evidence against them. They denied the commission of the offence and pleaded

innocence.

5. It is in the evidence of P.W. 1 that he along with P.W. 2, the Superintendent of Police, Customs and Excise Intelligence and P.W. 3, an independent witness along with 100 others went to the scene of crime, destroyed the cannabis and arrested the second and third accused who were found in the hut where Explosive substances were also available and they obtained statements implicating them in the commission of the offence. On facts, there is no hesitation to believe the evidence of P.Ws 1 to 3 that they went and destroyed the cannabis plants and also arrested the second and third accused and obtained statements from them. The English translation of those statements being marked as Exs P8 and P9.

6. The main point that required for consideration is as to whether the prosecution has fulfilled its obligation in establishing the commission of offence against the accused beyond reasonable doubt. Both the appellants who are second and third accused before the Trial Court stand charged for an offence under Section 8(b) read with 20(a) Clause (1) of NDPS act, the latter provision is only a penal provision and the main provision contravention of which is punishable, is Section 8(b) of the NDPS Act. The said section says that 'no person shall cultivate the opium poppy or any cannabis plant'. In so far as the fact that cannabis plants were found at the site is concerned, there is no dispute. The only dispute is with regard to the essential ingredient of cultivation. When the provisions of law demand proof of cultivation by the accused concerned, it is the duty of the prosecution to prove that it was the accused and none else who cultivated the cannabis plants. In this case, there is no such proof by any independent evidence and the only evidence relied on by the prosecution is the statement of the second and third accused.

7. According to the learned Counsel for the appellants, those statements were hit under Article 20 Clause 3 of the [Constitution of India](#) and they are totally inadmissible in evidence. To fortify his contention, he relied on a ruling of Rajasthan High Court reported in Banshi Lal v. State of Rajasthan wherein it has been held that the statements of the appellants under the provisions of Section 67 of the Act following their arrest are not admissible in evidence being hit by the provisions of Article 20 Clause 3 of the [Constitution of India](#) and cannot be relied

upon to sustain the conviction of the appellants being inculpatory statements.

8. Learned Departmental Counsel submits that it is not hit by Article 20 Clause 3 of the [Constitution of India](#) as they were not recorded by police officers. So far as the provision under Article 20 Clause 3 of the [Constitution of India](#) is concerned, it does not speak about the person who recorded the statement. It is a general safeguard given to the accused person from being compelled to be a witness against himself. Therefore, this ruling is on a different footing. Regarding the admissibility of the evidence. The Supreme Court in the case of *Rajkumar Karwal v. Union of India* - : 1991 CriLJ97 had been pleased to hold :

'Officers of the Department of Revenue Intelligence who have been invested with the powers of an Officer-in-charge of a police station under Section 53 of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#), are not 'police officers' within the meaning of Section 25 of the Evidence Act and therefore a confessional statement recorded by such officer in the course of investigation of a person accused of an offence under the Act is admissible in evidence as against him'.

This ruling of the Supreme Court, according to both sides has not yet been overruled. Therefore, in so far as the admissibility under Section 25 of the Evidence Act is concerned, there cannot be any dispute that Exs. P8 and P9 are admissible in evidence. But the question before the Rajasthan High Court was that it was hit by Section 20 Clause 3 of the [Constitution of India](#). Article 20 Clause 3 of the [Constitution of India](#) being the basic provision regarding the admissibility of any piece of evidence against the accused on the statements given by the accused, it has been discussed in various judgments of the Supreme Court that Section 25 of the Act is an offspring of Article 20 Clause 3 of the [Constitution of India](#) and therefore once it is held that a particular statement is admissible in evidence and not hit by Section 25 of the Evidence Act, then it cannot be said that it is hit by Article 20 Clause 3 of the [Constitution of India](#). Therefore, legally it is permissible for this Court as per the ruling of the Supreme Court to rely on the statements given by the accused to convict them provided the statement are sufficient to the convict them and they are corroborated by any material particulars.

9. Coming to the facts, what has been stated in both the statements is that both the accused/appellants (accused 2 and 3) were only doing coolie work and working as watchmen of the place where cannabis were planted. This piece of evidence, I do not think, would suffice to prove the ingredient of the provisions of law as embodied in Section 8(b) of the NDPS Act. 'Whoever Cultivates' is the main and important ingredient. This is required to be proved by the prosecution. Merely because the coolie was there for watering the plants or watching the plants to prevent further damage by any source, he cannot be said to be a person who has cultivated it. Unfortunately, in this case, the first accused who is said to be the owner of the field was acquitted on the ground that there was no material against him to prove that he has cultivated. As a matter of fact, the confession of the co-accused was alone relied on by the prosecution to prove the case of the first accused. The Department Officials though in the rank of Superintendent of Police have not taken care to collect documentary evidence to prove the ownership of the land to show that the ownership vests on the first accused, nor did they collect any evidence about the cultivation. The confession statement of the co-accused can be taken into consideration only to lend assurance to any material evidence already available on record against a particular accused. In the absence of any material evidence against the first accused to prove that he cultivated cannabis plants, the trial Judge was right in acquitting the accused without relying on the confessional statements of the co-accused alone. Therefore, the appeal against acquittal of the first accused by the State necessarily fails.

10. The trial Court acquitted A1 on account of lack of evidence except his retracted statement given to P.W. 1 and the trial Court refused to rely on the statement of A1. In so far as A2 and A3 are concerned, the trial Court took into account the retracted statement said to have been made by A2 and A3 along with the circumstances that they were found at the place where cannabis plants were cultivated to convict them. Therefore, the main ground on which A2 and A3 were convicted by the trial Court appears to be their presence in the field. Mere presence of any person in the place where cannabis plants were cultivated especially when A2 and A3 had stated that they were employed as coolies for the purpose of guarding the area where cannabis plants were cultivated, does not prove that they have cultivated cannabis plants.

11. The act of cultivate cannot be equated into the act of guarding the plants. The term 'Cultivation' requires an element of expenses besides physical exertion to raise the plants. The plants are raised motivated by profit and that is why expense are incurred. By no stretch of imagination it can be said that a coolie employed for the purpose of guarding a field has cultivated the crops. Therefore, merely because A2 and A3 were present in the cultivated area, they cannot be said to have cultivated the plants. Therefore, the element of 'cultivation' by A2 and A3 has not been proved in this case.

12. As stated supra, the prosecution miserably failed to prove that it was the second and third accused who actually cultivated the particular lands. Learned Counsel appearing for the appellants relied on a ruling of the Rajasthan High Court reported in *Raya v. State of Rajasthan* 1997 Cri L.J. 3783. There it is held that -

'There was no reliable evidence showing accused was in exclusive possession of the field in question and that he had cultivated seized opium poppy plants.'

It is exactly the facts on hand where the prosecution failed to prove that it was the second and third accused who cultivated the cannabis plants. In the absence of any proof of cultivation by these accused, they cannot be pinned with any criminal liability.

13. Another ruling relied on by the learned Counsel for the appellants is the a case of *Udugula Yadagiri v. State of Andhra Pradesh* : 1999(1)ALD674 wherein it is held that -

'there is absolutely no evidence on record to prove that the ganja plants were in fact found in Survey No. 518 and that the said survey number or any part of that survey number was in possession of the accused or under cultivation of the accused.'

In the case on hand, though we accept the evidence of the prosecution witnesses that cannabis plants were found in the fields in question, still there is no proof forthcoming from the prosecution to establish that the accused were in exclusive

possession of the fields or they were the owners of the field or they had actually cultivated the plants. Coolies who sow the plants, water them and guard the field cannot become cultivators. In the absence of such proof, the second and third accused also cannot be convicted for the contravention Section 8(b) of NDPS Act.

14. Learned Departmental Counsel relying on Section 35 of the NDPS Act submits that presumption is against the accused and hence they are liable to be convicted. Section 35 reads that in any prosecution for an offence under any of the provisions of this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be the duty of the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. The explanation to Section 35 says that 'culpable mental state' includes intention, motive, knowledge of a fact and belief in, or reasons to believe a fact. In so far as the appellants A2 and A3 are concerned, in the absence of proof that they have cultivated the plants, the question of presumption of culpable mental state does not arise at all. Only where an Act is proved to have been done, further burden of rebuttal of culpable mental state shifts on the accused. Since it has not been proved that it were A2 and A3 who had actually cultivated cannabis plants, Section 35 of N.D.P.S. Act could not be invoked.

15. On the above discussion, I hold the second and third accused also not guilty of the offence for which they were convicted. In the result, the conviction and sentence imposed by the trial Judge on the second and third accused are set aside and they are acquitted and the fine amount, if paid, shall be refunded to them. The CrI. A. Nos. 27 and 33 of 1992 are allowed.

16. In so far as the first accused is concerned the appeal against the acquittal fails and the CrI. A.347 of 1992 is hereby dismissed.