K. Mohanan

v.

State of Kerala

(Supreme Court Of India)

HON'BLE MR. JUSTICE K.T. THOMAS HON'BLE MR. JUSTICE D.P. MOHAPATRA

Crl.A.No.967 of 1998 | 27-10-1999

1. In this case the appellant stands convicted under S.21 of the Narcotic Drugs and Psychotropic Substances Act (for short "the Act"). He was also convicted under S.31 of the Act on the premise that he had a previous conviction of an offence under the Act. Therefore, the trial court awarded enhanced sentence of rigorous imprisonment for 16 years and a fine of Rs 2 lakhs. Though the High Court confirmed the conviction under both counts the Division Bench of the High Court reduced the sentence of rigorous imprisonment to 10 years and six months and a fine of Rs 1 lakh.

2. As we examined S.31 of the Act we felt that the Court has no jurisdiction to reduce the sentence below a period of 15 years so far as the jail term is concerned. Accordingly, we issued a notice to the appellant as to why the sentence shall not be raised to the aforesaid minimum in case we choose to confirm the conviction under S.31 of the Act.

3. Now, we heard the arguments on merits. The case against him, in short, is that PW 1 Sub Inspector of Police, District Crime Investigation Bureau (Calicut City) intercepted the appellant at 4.15 p.m. on 24-9-1990 and conducted a search on his person and recovered a packet from the folder of his loincloth. That packet contained four small packets of brown sugar, total of which weighed 4150 mg.

4. The main legal point canvassed before us is that the mandatory requirement in S.50 of the Act has not been complied with. It is recited in the judgment that PW 1, 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 PW 1 that the aforesaid recital is substantially correct.

5. The Constitution Bench of this Court in State of Punjab v. Baldev Singh (1999 (6) SCC 172 : 1999 SCC (Cri) 1080 : JT 1999 (4) SC 595) has considered various aspects of the compliance with S.50 of the Act. The Bench has laid down the propositions of law of which the first and second are extracted below:

"57. (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-s.(1) of S.50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused."

6. If the accused, who was subjected to search was merely asked whether he required to be searched in the presence of 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. What PW 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 S.50 of the Act was not complied with.

7. We, therefore, hold that there was non compliance with S.50 of the Act and consequently the evidence of search spoken to by PW 1 cannot be acted upon in

the absence of any other independent evidence to show that the appellant was in possession of the contraband article.

8. In the aforesaid view it is unnecessary for us to consider whether conviction under S.31 of the Act need be sustained. Nevertheless, we may point out that S.31 was invoked by the trial court on the strength of the conviction imposed on the appellant in Sessions Case No. 21 of 1989 of the same trial court though the said conviction has been confirmed by the High Court. We may point out that this Court has interfered with the said conviction and sentence and set them aside in Criminal Appeal No. 710 of 1994 as per order dated 4-9-1995. So, even apart from our finding on the merits of the case in the present incident we are of the view that S.31 is inapplicable as against the appellant in this case.

9. In the result we allow this appeal and set aside the conviction and sentence and acquit him. We direct him to be set at liberty forthwith unless he is required in any other case.