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Date : 24/08/2025

Joseph Vs State of Kerala

Court: High Court Of Kerala

Date of Decision: Feb. 28, 1995

Acts Referred: Drugs and Cosmetics Act, 1940 â€" Section 21, 23, 23(4), 3
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) â€" Section 20, 42(1), 55, 80
Narcotic Drugs and Psychotropic Substances Rules, 1985 â€" Rule 17, 2, 22

Hon'ble Judges: K.P. Balanarayana Marar, J

Bench: Single Bench

Advocate: T.V. Prabhakaran, for the Appellant; M. Ratna Singh, Director General of Prosecution, for the Respondent

Final Decision: Dismissed

Judgement

K.P. Balanarayana Marar, J.
The first accused in Sessions Case 165 of 1991 before Sessions Court, Thodupuzha is the Appellant. Along

with the second accused he was charged for the offence u/s 20(a)(i) of the Narcotic Drugs and Psychotropic Substances Act (for short the Act).

The prosecution case is that the accused persons along with one Kuttappan were found cultivating 1089 cannabis plants which were aged about 5

months in an area of about 2 acres of revenue land at Pappanpara Thavalam in Chathurangappara Village. The Circle Inspector of Police,

Nedumkandam along with a police party proceeded to that place on getting credible information that illicit cannabis cultivation was seen at

Pappanpara Bhagom at about 4 p.m. on 2nd January 1990. The police party reached the place, found the cultivation and the two accused persons

and one Kuttappan. watering, manuring and doing spade work there. On seeing the police party all the three persons attempted to escape. The

second accused and Kuttappan succeeded in their attempt. But Appellant, the first accused was nabbed by the Police. Three cannabis plants were

plucked by P.W. 2 and taken into custody and the remaining plants were destroyed. The sample ganja plants were forwarded to Judicial First

Class Magistrate, Nedumkandam which on analysis was found to be genuine ganja plants known as cannabis sativa. The first accused who had

been arrested by the Police was also produced before Court. The second accused surrendered before the Magistrate. Charge sheet was laid after

completion of investigation. The Court below framed charge against both the accused u/s 20(a)(i) of the Act. After trial the Court found the first

accused guilty of the offence, convicted him and sentenced him to undergo rigorous imprisonment for a period of 5 years and to pay a fine of Rs.

25,000 and on default to pay the fine to undergo R.I. for Anr. period of one year. The second accused was found not guilty and acquitted. The

first accused has come up in appeal.

2. Heard counsel for Appellant and Public Prosecutor.

3. The conviction and sentence are assailed on various grounds. The grounds raised are:

(i) The provisions of the Drugs and Cosmetics Act, 1940 and the Rules framed thereunder had not been followed.

(ii) The property from where the ganja plants were taken has not been proved to be either owned or possessed by Appellant.

(iii) There is violation of the mandatory provision contained in Section 42(1) of the Act.

(iv) The trial is vitiated on account of the committal of the case by the Magistrate.

4. The main contention advanced by Sri. Prabhakaran, learned Counsel for the Appellant is based on Section 80 of the Act which reads:

The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Drugs and Cosmetics Act, 1940 (23 of

1940) or the rules made thereunder.

According to counsel the provisions of the Drugs and Cosmetics Act (Drugs Act for short) are incorporated into the N.D.P.S. Act by reference

into the later Act and the provisions of the Drugs Act had thus become part and parcel of the N.D.P.S. Act as if they had been bodily transposed

into it. Attention is drawn to the following statement made by Lord Esher, M.R. quoted by G.P. Singh in ""Principles of Statutory Interpretation"".

The statement reads:

If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write

those sections into the new Act as if they had been actually written in it with the pen, or printed in it.

5. In the light of the principle referred to in the foregoing paragraph three aspects arise for consideration.

(i) What is meant by the phrases ""in addition to"" and ""not in derogation of"" contained in Section 80 of the Act?

(ii) Is there an incorporation of the provisions of the Drugs Act into the N.D.P.S. Act?

(iii) Are the officers authorised or empowered under the N.D.P.S. Act bound to comply with the provisions of the Drugs Act?

6. The Act does not contain any provision regarding taking of sample, sealing and sending the same for analysis. Section 55, no doubt, refers to

sampling and sealing, but that has to be done from the Police Station to which articles seized under this Act within the local area of that police

station are taken for delivery thereto in which case the procedure contemplated in that section has to be followed. In other words, an officer in

charge of a police station to whom article seized under this Act within the local area of that police station are taken for delivery shall allow any

officer who accompanies such articles to affix his seal to such articles or to take samples of and from them, in which case all samples so taken shall

also be sealed with the seal of the officer in charge of the police station. The section only directs an officer in charge of the police station to render

all assistance to an officer who has taken articles to the police station for delivery thereto and shall also take delivery of the articles and keep them

in safe custody. That section is therefore inapplicable to a case where the articles are seized by the officer in charge of the police station or if the

articles are not taken to a police station for delivery for safe custody. In short, there is no provision in the Act regarding the procedure to be

followed by an authorised officer or an empowered officer in the matter of taking of samples, sealing and sending the same for analysis.

7. The Act does not contain any definition of an analyst or a chemical examiner. But as per Rule 2(c) of the Narcotic Drugs and Psychotropic

Substances Rules, 1985 chemical examiner means the chemical examiner, Government Opium and Alkaloid Works, Neemuch or as the case may

be, Ghazipur. The only function of the chemical examiner is to certify whether opium received under Rule 17 is adulterated or not. If found

adulterated on examination by the chemical examiner in the Government Opium Factory all such opium received under Rule 17 of the rules are

liable to be confiscated by the General Manager. This provision in Rule 22 is contained in Chapter III dealing with opium poppy cultivation and

production of opium and poppy straw. That chapter deals with cultivation of opium with licence and delivery of opium to District Opium Officer.

Except the provision contained in Rule 22 none of the rules refers to the function of a chemical examiner. The rules do not therefore provide for

taking a sample or for sending the same for analysis or the procedure to be followed in that matter when a narcotic drug or psychotropic substance

is seized by an authorised or an empowered officer. In the absence of any provision either in the Act or the rules regarding the procedure to be

followed the article can be got analysed by a competent person. Such analysis is required only to prove that the article seized is a narcotic or a

psychotropic substance in respect of which an offence has been committed under Chapter IV of the Act. The taking of sample, sealing of the same

and keeping it in safe custody are necessitated only for the purpose of assuring that the article analysed by the analyst was in the same condition in

which it was seized from the accused and not by virtue of any direction contained in the enactment or the rules. The non-sealing of the sample is

therefore of not much consequence.

8. The next aspect to be considered is whether the provisions of the Drugs Act had been incorporated into the N.D.P.S. Act. The two phrases

used in Section 80 are ""in addition to"" and ""not in derogation of"". The word derogation means lessening of authority or impairment of law. Addition

is the process of adding. What is intended by Section 80 is only that the provisions of the Act will not in any way lessen the authority of the Drugs

Act whereas the provisions of the N.D.P.S. Act are only in addition to the provisions contained in the Drugs Act. This provision was incorporated

only to make it clear that the two legislations are separate and distinct and do not conflict with each other. The provision was necessitated in view

of the definition of drug contained in Section 3(c) of the Drugs Act which may include a narcotic drug or a psychotropic substance. Some of the

items included in the list of psychotropic substances in Schedule-II of the N.D.P.S. Act may come within the definition of drug. A question may

arise whether possession of such a drug is an offence under the N.D.P.S. Act or whether proceedings can be initiated under the Drugs Act. The

intention of the legislature as could be gathered from the phraseology used in Section 80 is to make it clear that the N.D.P.S. Act is only an

addition to the Drugs Act which implies that an offence committed in respect of a drug coming within the definition of Section 3(c) of the Drugs Act

is punishable under that Act and if that drug comes within the definition of a narcotic drug or psychotropic substance under the N.D.P.S. Act

prosecution can be launched under the latter Act also. Section 80 is more or less a saving provision as far as the provisions of the Drugs Act are

concerned. Those provisions are kept in tact unaffected by any of the provisions of the N.D.P.S. Act. Such a provision was necessary in view of

the repealing of the Opium Act and the Dangerous Drugs Act by the N.D.P.S. Act and no action can be initiated under those enactments. On the

contrary action can be initiated both under the Drugs Act and the N.D.P.S. Act for the offences committed under these Acts. The plea of the

learned Counsel that there has been an incorporation of the provisions of the Drugs Act into the N.D.P.S. Act by virtue of Section 80 of the Act is

therefore unsustainable.

8A. The view that I have taken gets support from the decision of the Supreme Court in P.C. Joshi and Another Vs. The State of Uttar Pradesh, .

The Supreme Court was interpreting Sub-section (13) of Section 198 B of the Code of 1898. That Sub-section reads:

The provisions of the this section shall be in addition to and not in derogation of those of secton 198.

The Supreme Court observed that this clause is enacted with a view to state ex abundanti cautela that the right of a party aggrieved by publication

of a defamatory statement to proceed u/s 198 is not derogated by the enactment of Section 198B. It was held:

The expressions, "in addition to" and "not in derogation of" mean the same thing... that Section 198B is an additional provision and is not intended

to take away the right of a person aggrieved even if he belongs to the specified classes and the offence is in respect of his conduct in the discharge

of his public functions to file a complaint in the manner provided by Section 198.

After observing that the word ""derogation"" means taking away, lessening or impairing the authority, position or dignity, it was held that Sub-section

(13) of Section 198B shows that the provisions of Section 198B do not impair the remedy provided by Section 198. It was held that the

provisions of Section 198 B are to be read as supplementary to those of Section 198. The result is that the provisions of the Drugs Act are to be

read as supplementary to the provisions in the N.D.P.S. Act and will not impair the remedy provided in N.D.P.S. Act.

9. Even otherwise the question of complying with the provisions of the Drugs Act in the matter of taking of samples and sending for analysis does

not arise and is not contemplated by the legislature. Section 23 of the Drugs Act prescribes the procedure to be followed by an inspector who

takes a sample of a drug. He shall tender a price and issue a receipt in the prescribed form. The sample taken shall be divided into four portions

and effectively sealed and the same marked by him and permit such person to add his own seal and mark. One portion of the sample shall be

restored to the person from whom the sample was taken and the remaining shall be retained by the inspector to be disposed of in the manner

stated in Sub-section (4) of Section 23. The drug of which the sample is taken u/s 23 has to come within the definition of drug which includes all

medicines. The inspector appointed u/s 21 has to purchase the sample and tender the fair price thereof and acquire a written acknowledgment

therefor. A medicine can be sold or purchased and a sample of that medicine can be taken after it is purchased by the inspector. But narcotic

drugs defined in the Act are not meant to be sold or purchased except opium cultivated as per a licence. Opium shall not be manufactured save by

the Central Government Opium Factories at Ghazipur and Neemuch. But opium mixtures can be manufactured from opium lawfully possessed by

a person authorised under the rule made by the State Government for the purpose. Sale or purchase of opium except by a person who possesses

a licence in that behalf is an offence under the N.D.P.S. Act and mere possession of a drug itself is an offence. There is thus no question of the

inspector purchasing any sample from the person in possession of a prohibited drug. Samples as stated in Section 23 of the Drugs Act cannot

therefore be purchased by an authorised officer or an empowered officer nor can one of the samples so taken be restored to the person from

whom it was taken. If it be so, this will make possession of a narcotic drug by a person legal when mere possession is illegal and made an offence

under the Act. The procedure of sampling in Section 23 of the Drugs Act cannot therefore be followed while taking samples under the N.D.P.S.

Act.

10. It is then contended that the property where the ganja plants were seen was not proved to be one either owned or possessed by the Appellant.

The mahazar Ext. P-1 shows that ganja plants were seen on revenue land taken on lease by the first accused. No document was produced either

to prove the lease or the possession of the first accused on the strength of such lease. Even the Village Officer was not examined. Though cited as

a witness he was given up. The testimony of the witnesses who has spoken about the presence of the first accused in the property at the time of the

visit of the police officers was also attacked as unreliable. The Sessions Judge has placed considerable reliance on the testimony of the witnesses

and is of the view that non-production of documents by the prosecution is of no consequence. The offence charged is one u/s 20(a)(i) of the Act

which makes cultivation of any cannabis plant an offence punishable thereunder. Cultivation includes preparation for crops by ploughing, watering,

etc. The case of the prosecution is that the first accused was seen watering the ganja plants and that was witnessed by P.Ws. 1 and 2. The

testimony of the witnesses could have been relied on provided the best piece of evidence available had been produced. It is the specific case of the

Appellant that the property did not belong to him and that the same had been exchanged for an adjacent property. True no registered document

was produced to prove the exchange but only an agreement written on plain paper. As rightly observed by the Court below the document is

inadmissible in evidence and cannot be relied on for any purpose. Applicant can be said to have not succeeded in establishing that plea. The

challenge of the testimony of the witnesses was also not successful according to the Court below. Even if it be so, it cannot be safely said that the

possession of the property has been proved by the prosecution when documentary evidence is available and the fact of possession could have

been proved by examining the Village Officer. The land being revenue land the relevant records will be available in the Village Office to prove

which no attempt was made by the prosecution. In the absence of such documentary evidence the Court below was not right in relying on the

testimony of the witnesses to find that Appellant was found in possession of the property and that he was seen watering ganja plants. On a careful

consideration of the evidence on record the finding of the Court below does not appear to be correct. The prosecution having failed to prove

satisfactorily the ownership of the property or the possession thereof by Appellant and the fact of cultivation of ganja plants the conviction for the

offence u/s 20(a)(i) of the Act is unsustainable.

11. The plea of non-compliance of the mandatory provision contained in Section 42(1) of the Act is unsustainable since the information received

by the authorised officer is a vague information which is not expected to be reduced into writing. Section 42(1) directs the authorised officer to

take down in writing any information given by a person regarding commission of an offence punishable under Chapter IV of the Act and it is

obligatory on the pare of the officer to forthwith send a copy thereof to his immediate superior. Compliance of this provision is necessitated only if

the information is an authentic information. This Court in the decision in Mohanan v. State of Kerala 1995 (1) KLT 57 has held that a vague

information need not be reduced into writing and the authorised officer is not obliged to inform his immediate superior regarding that information.

There is thus no violation of the provision contained in Section 42(1) of the Act.

12. A contention is raised that the trial is vitiated on account of the committal of the case by the Magistrate. The offence is one cognizable by the

Special Court constituted under the Act. The Sessions Judge was therefore competent to take cognizance of the offence whereas cognizance was

taken on the basis of a committal made by the Judicial First Glass Magistrate, Nedumkandam. Attention is drawn to a Full Bench decision of this

Court in Hareendran v. Sarctda 1995 (1) KLT 231. That decision is of no assistance to Appellant since the Full Bench has only held that in a case

where Special Court receives final report disclosing offence under the Act it can certainly take cognizance of the same without committal. It was

also held that the Magistrate has no jurisdiction to take cognizance of the case and the complaint ought to have been returned for presentation

before proper Court. It was for this reason that the committal proceedings before the Judicial Magistrate were quashed by the Full Bench and the

Magistrate was directed to return the complaint for presentation to the proper Court. While holding so, the Full Bench expressed agreement with

the view expressed by the Division Bench in Re: 1992 (2) KLT 748. The committal proceedings were quashed only because the Magistrate has

no jurisdiction to take cognizance of the case and to initiate committal proceedings. That stage is over in the present case. After committal of the

case the Sessions Judge had taken cognizance of the offence and framed charge against the accused. Trial was also conducted thereafter. Since

the Sessions Judge was competent to take cognizance of the offence that it was done on the basis of the committal made by the Court is of no

consequence. The Full Bench decision is therefore of no assistance to Appellant to support the contention advanced by him.

12. In view of my finding on the second ground formulated in this judgment the conviction and sentence are set aside and Appellant is acquitted of

the offence u/s 20(a)(i) of the N.D.P.S. Act and set at liberty. Appellant shall be released forthwith if not required in any other case.