

(2004) 08 KL CK 0034

High Court Of Kerala

Case No: Criminal A. No. 76 of 2000

State of Kerala

APPELLANT

Vs

K.M. Joseph and Another

RESPONDENT

Date of Decision: Aug. 16, 2004

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 24, 378
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20(b)(ii), 28, 29, 41, 41(2)

Citation: (2004) 2 KLJ 939 : (2004) 3 KLT 907 : (2005) 1 RCR(Criminal) 421

Hon'ble Judges: K.A. Abdul Gafoor, J

Bench: Single Bench

Advocate: P.S. Sreedharan Pillai SCGSC and John Varghese SCGSC, for the Appellant;
Harun-Al-Rashid, for the Respondent

Final Decision: Dismissed

Judgement

K.A. Abdul Gafoor, J.

This appeal is preferred by the Superintendent of Central Excise and Customs, Headquarters Preventive Unit, Kochi against the order of acquittal of the respondents in a case charged for offences punishable under Sections 20(b)(ii), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act"). This appeal is seen preferred by the Senior Central Government Standing Counsel. It is not pointed out to me that Senior Central Government Standing Counsel is appointed as a Public Prosecutor by the Central Government in terms of Section 24 of the Code of Criminal Procedure. The memorandum of appeal discloses that it is filed in terms of sub-section (3) of Section 378 of the Code of Criminal Procedure. Even then, the Central agency investigating a case for an offence under the Central Act has to empower the Public Prosecutor to present an appeal. Therefore, this appeal against the order of acquittal itself is without authority.

2. The Sessions Judge, Thodupuzha, acquitted the accused including on the ground of violation of Section 50 of the Act insofar as the accused were not made known their right for body search in the presence of a gazetted officer or a magistrate. Apart from the testimony of PWs. 9 and 10, the officers of the customs department, who were present at the time of body search and Ext. P1 mahazar, there is no other corroborative piece of evidence to show that the accused had been made known their entitlement for the search being conducted on their body in the presence of a gazetted officer or a magistrate.

3. Even though PWs. 9 and 10 had spoken to before the court below in that regard, there is no other contemporaneous documentary evidence available on record that they had conveyed that fact to the accused. Ext. P1 mahazar, of course, discloses that they had told the accused about such right and they answered in the negative and conceded to be searched by PW. 10 himself. This mahazar Ext. P7 had been duly attested by PWs. 1 and 5. PW.1 had very categorically stated that he had never been present at the scene of occurrence, when the body of the first accused was being searched. Therefore, he cannot vouchsafe as to whether PWs. 9 and 10 had told the accused about their right of being searched in the presence of a gazetted officer or a magistrate. Moreover, PW.1 was declared hostile when he gave evidence as stated above. His evidence does not, in any way, corroborate the testimony of PWs. 9 and 10 that they had rendered that protection to the accused.

4. PW. 5 is other witness. According to him, he had been present throughout. When the officers came to the hotel room, the accused persons attempted, to confront the officers, one among them took a tube light and attempted to attack the officers. Thereupon he fired a round and the other officers overpowered the first accused. The said witness disclosed as follows:

(On hearing the firing, the other officers came there. Altogether there were 5 or 8 persons. Thereafter, the first accused did not do anything. The officer who fired and the other officer jointly caught hold of the first accused and his hands taken to back side. One among them unfolded the belt. It was made up of Khaki colour cloth and it had a width of about 1/2 a foot.).

5. This is the description of the incident given by PW. 5, who had attested Ext. P1. When this description is believed, it is clear that the officers had not told the accused about their right to be searched in the presence of a magistrate or a gazetted officer. Thus, it is clear that PWs. 9 and 10 had not divulged to the accused about this statutory privilege available to them. It was without, thus, conforming to the protective provisions contained in Section 50 of the Act that the search of the body of the accused had been conducted. The contention that the detecting officers did not have the obligation to conduct the body search in the presence of a gazetted officer or a magistrate, as they are the officers authorised u/s 41(2) of the Act, also cannot be accepted. Under Sub-section (2) of Section 41, the officers like PWs. 9 and 10, if they had reasons to believe from their personal knowledge or information

given by any person that somebody has committed an offence under the Act or any narcotic drug or psychotropic substance or controlled substance in respect of which offence has been committed is kept or concealed in any building or conveyance or place, any such officer may authorise any on subordinate to them "to arrest such a person or search a building, conveyance or place.....". The power given to the officer concerned under this provisions is to arrest a person or search a building or a place. Of course, the officers had gone there in order to search a room. But admittedly by them, they obtained the contraband articles only on search of the body of the first accused. Sub-section (2) of Section 41 does not by itself authorise any officer to conduct search on the body of any person, but only allows him to arrest the person concerned or to search a building, conveyance or a place. But, at the same time, it is very specifically mentioned in Section 42(1)(d) that any such officer authorised under Sub-section (2) of Section 41, if he has reason to believe from the personal knowledge or information given by any person that any narcotic drug or psychotropic substance or controlled substance in respect of which an offence has been committed is kept or concealed in any building conveyance or enclosed place can enter into and search that building, in case of any resistance, remove any obstacle to such entry, seize such drug or substance and all materials used for the manufacture thereof or insured and insurer. Necessarily, the compensation payable in respect of the accident on 28-06-1990 shall have to be recouped from the owner of the vehicle. Accordingly, appeals are allowed and award is modified making it clear that the appellant will be entitled to realise the award amount from the insured.