(1991) 02 KL CK 0044

High Court Of Kerala

Case No: Criminal Appeal No''s. 298, 301 and 371 of 1990

Ismail and etc.	APPELLANT
Vs	
State of Kerala	RESPONDENT

Date of Decision: Feb. 1, 1991

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 162(2), 293, 5
- Evidence Act, 1872 - Section 10, 125, 3
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20, 29, 42, 50, 50(1)
- Penal Code, 1860 (IPC) - Section 116, 4, 4(2), 5

Citation: (1991) CriLJ 2945 : (1991) 2 ILR (Ker) 820

Hon'ble Judges: S. Padmanabhan, J

Bench: Single Bench

Advocate: M.N. Sukumaran Nayar and C.V. John, for Cri A No. 298/90 and T.V. Prabhakaran, for Cri A Nos. 301 and 371/90, for the Appellant; Chincy Gopakumar, Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

S. Padmanabhan, J.

As directed by the Assistant Commissioner of Police, after getting source information that in Room No. 306 of Lucia Hotel near K.S.R.T.C. Bus Stand at Ernakulam narcotic drugs and psychotropic substances are being illegally dealt with, P.W. 16, Circle Inspector of Police, along with P.W. 15, Sub Inspector, and party visited the room at about 3.00 p.m. on 21-4-1989. Door was found bolted from inside. On knocking the door, the third accused opened it from inside. First accused was sitting on a cot with MO 1 plastic container having 1.25 kgs. of Hashish inside near him. Second accused was standing near him. It was seized and the three accused arrested and samples taken in two plastic containers. Ext. P 10 report of

analysis revealed that the samples were charas. Investigation revealed that the three accused were dealers in narcotic drugs and psychotropic substances and accused 2 and 3 conspired with the first accused and abetted him for its sale to them. First accused was, therefore, prosecuted for violation of Section 8(c) and accused 2 and 3 for violation of Section 8(c) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act (the Act) punishable u/s 20 thereof. Sessions Judge convicted and sentenced all the three accused. Criminal Appeals Nos. 371, 298 and 301 were filed respectively by accused 1, 2 and 3.

2. Though the prosecution examined sixteen witnesses, all except PWs. 2, 7, 10 to 13, 15 and 16 turned hostile. But, even from the evidence of the hostile witnesses, there are materials in support of the prosecution case. The defence of the appellants is total denial of their involvement. They would say that they were arrested on a previous day and not from the hotel room. In support of that contention, they examined DW 1, whose evidence appears to be not worth even the paper on which it is written.

3. Prosecution succeeded in establishing beyond doubt that all the three accused (they alone) were inside the bolted room with MO 1 containing 1.25 kgs. of charas inside on a cot and the first accused was seated nearby. Second accused was standing near him. Ext. P1 is the seizure mahazar prepared by PW. 16 and attested by PW 15 and others. PW 12 is a police constable who was along with them. As directed by PW. 16, he brought PW 2 and a weighing balance and plastic covers. All these witnesses gave evidence to these facts and said that PW 16 took samples in two plastic covers (MO 2 series) and sealed them then and there. The evidence of PWs. 15 and 16 further shows that MO 1 and MO 2 series were kept in safe custody in the police station and then produced before court in sealed container itself. PW 7 is the Thondi Clerk in the Magistrate''s Court. His evidence shows that when produced before court, MO 2 series were sealed and MO 1 was only tightly closed. He said that he kept them in safe custody and MO 2 series were sent for analysis in sealed condition. The evidence of PW 11, Assistant Director of Forensic-Science Laboratory, and Ext. P10 report submitted by him show that the samples were received with seal intact though there was slight tearing in one outer cover.

4. I mentioned these facts only because MO 2 series are now in an open unsealed condition and an argument came that the samples cannot be accepted as taken from MO 1. In support of that contention, the defence relied on Ext. C1 remand report and the omission of P.W. 16 to mention about the sampling in Ext. P1 seizure mahazar. I do agree that PW 16 was a little irresponsible in preparing Exts. P1 and C1. He ought to have mentioned about the sampling in Ext. P1. So also, the wording of Ext. C1 ought to have been more careful. It is capable of an interpretation that sampling was not done when the remand report was prepared. But, in view of the clear disinterested evidence that came from PWs. 2, 12, 15 and 16, supported by the depositions of PWs. 7 and 11 and Ext. P-10, I accept the evidence that samples were

taken and sealed then and there and these samples themselves in untampered condition were examined by PW 11. Though MO 1 was not sealed, the evidence is that it was also in an untampered safe condition and kept safely. The evidence of PW 7 explains the present open condition of MO 2 series. She said that the plastic covers containing the samples were opened for verification after getting them back after analysis. There was delay of a few days in producing MO 1 and MO 2 series before court. That was also a serious ground taken by the defence. Even though they ought to have been produced promptly, I do not think that the delay is of any serious consequence. The evidence of PWs 15 and 16 and PW 7 is that they were kept safely and produced in court. The delay was also explained.

5. In this connection, learned counsel took me to the decision in State of Rajasthan Vs. Daulat Ram, That was a case in which the samples changed several hands before reaching the public analyst and yet none of the custodians was examined to prove that seals were intact. Here the samples never changed hands and we are having the evidence of PWs. 15 and 16 supported by PWs. 7 and 11 that seals were intact. PWs. 15 and 16 are impartial official witnesses, who were not in any way interested in any malpractice.

6. Another argument was that Ext. P 10 report cannot be accepted for the reason that even though the tests conducted were mentioned, the positive result of each test was not mentioned. I do not think that it was obligatory on the part of the analyst to give the details of the results of each test. PW 11 is a scientific expert, coming u/s 293 of the Criminal P.C. Ext. P 10 could be used as evidence even without his examination,; though the court can summon and examine him, if it thinks fit. In this case, the expert was examined and he said that all the tests were positive. Therefore, at any rate, there is no scope for challenging the correctness of Ext. P 10 now. The samples were found to be charas.

7. Then it was argued, basing on the decision in State of Himachal Pradesh v. Sudarshan Kumar 1989 Cri LJ 1412 (Him Pra) that the provisions of Sections 42, 50(1), 52(1) and 57 of the Act were violated and hence the prosecution must fail for those reasons alone, without looking into the merits. u/s 4 of the Code, all offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with, according to the provisions of the Code of Criminal Procedure. Sub-section (2) provides that offences under any other law also shall be investigated, inquired into, tried and otherwise dealt with according to the Code of Criminal Procedure, but subject to any law being in force for the time being regulating the matters. So also, there is the saving clause contained in Section 5 of the Code that nothing therein to the contrary shall affect any special or local law or any special form of procedure prescribed therein. But there is Section 51 of the Act, which says that the provisions of the Code shall apply in so far as they are not inconsistent with the provisions of the Act. The contention is that the above provisions are inconsistent with those in the Code and unless they are complied with strictly, the

prosecution must fail for that reason. I do not agree. The provisions are not intended as technical defences on which the prosecution must fail for that reason alone. In view of the stringency of the punishments, the provisions are intended only as safeguards to protect the interest of the accused from unmerited prosecutions. The question to be considered is only prejudice or failure of justice. Non-compliance or delayed compliance or insufficient compliance could vitiate the prosecution only if it resulted in prejudice and failure of justice. Normally an irregularity or illegality in the collection of materials cannot affect the trial and conviction unless prejudice or failure of justice is the result. But there may be cases in which the violations themselves will prove fatal and prejudice or failure of justice will be presumed.

8. In this case, there is no contravention at all. PW 16 is an officer competent u/s 42 and he was acting on the basis of personal knowledge from source information, which need not be revealed u/s 125 of the Evidence Act. Section 50(1), relied on by the counsel, could apply only in a case where a person is being searched. Here, what is involved is search of the premises and compliance of Section 50 will defeat the very purpose. Informing the ground of arrest u/s 52(1) cannot arise because from the very facts, it is clear that the appellants and the police officers were aware of the ground. The evidence shows that the ground itself was put to the appellants. PW 16 said that the matter was reported to the superior officer within 48 hours. The alleged violations are only imaginary.

9. Therefore, on facts, there cannot be any dispute. First accused was possessing charas inside the room openly to the knowledge of accused 2 and 3, who were present in the closed room. I do not think that any presumption could follow in favour of the third accused as an innocent onlooker simply because he opened the door on hearing the knock. In all probability, the opening was without knowing that the knocking was by somebody in authority. Even if that was known, there was no other go also because there was no other way of escaping. In the way in which the contraband article was placed on the cot openly in the presence and to the knowledge of the three, the purpose of their presence is clear. If accused 2 and 3 were unaware of the article and they went there for some innocent purpose, they could have very well explained. But their contention is that they were absent. That contention itself indicates that their presence was not innocent. Charas is a prohibited article and any dealing with it is to result in severe penal consequences. Unless the persons present in the room were conspirators, the open exhibition of the prohibited article on the cot is not likely.

10. The three appellants are not innocent strangers, as they claim to be. If so, they will have to explain how they three alone happened to be inside a closed room in a hotel. PWs. 1, 3 to 6 and 13 are employees in the Lucia Hotel, from where seizure was made. All of them, except PW 13, who had no reason to turn hostile, are hostile. Evidently, that was only to help the accused. The prosecution case is that the second

accused is a permanent occupant of Room No. 414 in the hotel and having his business in the nearby K.S.R.T.C. bus station and that third accused is his employee. It is true that the investigating and prosecuting agencies are guilty of the neglect to prove that matter by causing production and proof of the concerned records. Probably, they might have thought that the matter could be proved by these witnesses. With the available evidence, let us see how far the complicity of these persons could be inferred.

11. PWs. 1, 2 to 6 and 13 were not able to conceal their acquaintance with the second accused though they said that the other accused are not known to them. The action taken by the police in the hotel, including preparation of Ext. P1 seizure mahazar and Ext. P5 scene mahazar, is clear from their evidence, though they attempted to hide facts. PW 1 said that he has seen the second accused engaged in sale in the canteen in the K.S.R.T.C. bus station nearby. PW 3 knows him because he used to come to the hotel regularly for food. PW 4 said he often saw the second accused in the bar in Lucia Hotel. According to him, the brother of the second accused had a room in the hotel where the second accused used to frequent. PW 5 also used to see him frequently in the bus station and canteen and got acquainted with him. The evidence of PW 6 receptionist, who rented out Room No. 306 to the first accused on the disputed day and proved Ext. P7 occupancy register as well as Ext. P7(a) entry therein, shows that in spite of the nonavailability of room, which prevented the first accused being accommodated, he rented out a room and that too without receiving advance as usual only because of the acquaintance of the first accused with second accused and his care of address given. Though he said that the second accused is not a permanent resident in the hotel, his evidence shows that the second accused is a frequenter to the hotel and he is running a canteen in the K.S.R.T.C. bus station. Ext. P7(aa) is the relevant entry where the care of address of the second accused was given for first accused while letting out the room. These items of evidence clearly indicate the connection of the second accused with the hotel and its employees, his connection with the canteen in the bus station and the association between accused 1 and 2.

12. PW 8 is a nephew of the second accused. He is an employee in the Plyma Snack Bar run by the brother of the second accused (another uncle of PW 8) in the K.S.R.T.C. bus station. He said that the second accused is also having some shops in the bus station. According to him, the phone number of Plyma Snack Bar is 368944. He said he used to frequent the stall of the second accused and the second accused used to frequent his stall. He himself was the contractor of the canteen, who deposited amounts. In cross, he said amounts were deposited in his name by his uncle. His evidence also probabilises the prosecution case of second accused''s connection with the bus station, Lucia hotel and telephone number 368944, to which there was an S.T.D. call from Moolamattom on the 19th. The evidence of PW 9 also shows that the second accused is a person running a stall in the bus station. PW 16 gave evidence that telephone number 368944 was in the stall run by the brother of

the second accused and its extension is in the shop of the second accused. The evidence of PW 14, operator of Moolamattom telephone booth, and Ext. P 16 register as well as Ext. P 16(a) entry therein show that from Moolamattom, to which place the first accused belongs, there was an S.T.D. call to Kochi 368944 on 19-4-1989. Because this witness turned hostile, the prosecution was not able to prove its case that this call was by the first accused to the second accused concerning the disputed transaction. PW 10 is an attestor to Ext. P 13 mahazar by which Ext. P 16 register was seized by PW 16.

13. It is in the background of these items of evidence and circumstances that the testimony of PW 9 will have to be appreciated. Even though the appellants wanted his evidence to be discarded on the ground of conflicting versions, I do not find any merit in that contention. It is true that he was declared hostile since he gave wrong identity of the accused by name. But a reading of his entire deposition shows that he is a truthful witness, against whom there is not even an allegation of bias to the appellants or interest in the prosecution. The only serious contradiction, on which he was sought to be discredited, was that he did not tell PW 16 that all of them sent together, whereas he gave evidence in the box that all the three went in his canoe. Even if it is a contradiction by omission, it will not come within the ambit of the explanation to Section 162(2) of the Code. Further, a reading of his evidence shows that it is not a contradiction at all by omission. What he said is that even though the three together came, the third accused used to wait in his canoe and accused 1 and 2 alone used to go together to the foreign yachts anchored in the Bolgatty island.

14. There may be some contradictions in the evidence of this rustic witness, who has no axe to grind against the accused or interest in the prosecution. He is having a canoe used as a ferry to lake people to the Bolgatty island and back. Even though he does not know the names of these accused correctly, he has some idea of it also because he had occasion to hear them calling by names. He made a mistake in assigning the name of the third accused to first accused. But he appeared to me a truthful witness. His evidence shows that all the three accused used to go occasionally in his canoe when foreign yachts are anchored in the island. He had also occasion to see the same hand bag being handled by all these persons. His inference after the detection of the crime that these persons might have been going to purchase narcotic drugs and psychotropic substances seems to be legitimate also. It is true that the prosecution was not able to establish its case that the third accused is a dependent and employee of the second accused. That is because the relevant witnesses turned hostile.

15. When the presence of all the three accused in the room closed from inside with MO 1 on the table is considered in the background of the above facts and circumstances and in the absence of a plausible explanation, it is clear that they were there for dealing in charas. The false plea that they were not there shows their guilty mind, which cannot afford any explanation at all.

16. Possession, sale, purchase, etc. are prohibited by Section 8(c) and made punishable u/s 20. Possession, sale, purchase, etc. of cannabis other than ganja is made punishable u/s 20(b)(ii). What is seized is charas, which is cannabis other than ganja. Abetment or being a party to a criminal conspiracy to commit an offence is made punishable u/s 29, irrespective of the question whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy and notwithstanding Section 116 of the Penal Code. From the evidence and circumstances, the irresistible conclusion is that the first accused was possessing charas. The prosecution case is that accused 2 and 3 were there in pursuance of a pre-arranged plan to purchase charas from him. That is the only inference possible. Then the question is only whether it will amount to abetment or engagement in a criminal conspiracy to commit an offence under the Act.

17. u/s 3 of the Evidence Act, a fact is said to be proved when after considering the materials before it the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Preponderance of probability may be sufficient for that purpose in a civil case, but the standard required in a criminal case is proof beyond reasonable doubt.

18. Abetting includes instigation to do a thing, engaging with one or more persons in any conspiracy for doing the thing, or intentionally aiding by any act or illegal omission the doing of the thing. Criminal conspiracy is agreement to do or cause to be done an illegal act or an act which is not illegal by illegal means. Here, what is involved is an illegal act and, therefore, nothing more than an agreement is necessary and that is clear from Section 29 also.

19. Conspiracies will always be had only in secret. Direct evidence may not be normally possible. Conclusions could, therefore, be only by way of inferences from proved facts and circumstances. That is why Section 10 of the Evidence Act is there, providing that where there is reasonable ground to believe that two or more persons conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them is a relevant fact as against each of the persons believed to be conspiring.

20. It is clear that the accused were not strangers. They were meeting frequently in order to deal with narcotic drugs. They were often going together to foreign yachts presumably to purchase narcotic drugs. They are only back door illicit transactions, for which documentary evidence may not be possible. Their unexplained presence together in a closed room with the charas on the cot in the circumstances could only be in the process of bargaining for the purchase or effecting the sale on the basis of a pre-arranged plan. It is clear that all the accused committed the offence punishable u/s 20(b)(ii) for violation of Section 8(c), accused 2 and 3 being liable with the aid of Section 29. Conviction must stand.

21. On the question of sentence, I do not think that the first accused deserves any sympathy. He was sentenced to undergo rigorous imprisonment for fifteen years and to pay a fine of Rs. one lakh with a default sentence of rigorous imprisonment for a further term of four years. Sentence awarded to the second accused is the same. Third accused was sentenced to undergo rigorous imprisonment for twelve years and to pay a fine of Rs. one lakh with a default sentence of rigorous imprisonment for three more years. I think that accused 2 and 3, who did not actually transact the purchase, need only be given the minimum sentence. Criminal Appeal No. 371 of 1990 filed by the first accused is dismissed, confirming the conviction and sentence. In Criminal Appeal Nos. 298 and 301 of 1990 also, the convictions of accused 2 and 3 are confirmed and those appeals are partly allowed only by reducing the substantive terms of imprisonment to ten years each and the default sentence of the second accused to three years. In all other respects, those two appeals are also dismissed.