Koluttumottil Razak vs State Of Kerala on 24 February, 2000

Equivalent citations: 2000(II)OLR(SC)643, (2000)4SCC465, AIRONLINE 2000 SC 249, (2001) 1 UC 111, (2001) 2 BLJ 8, (2000) 2 ORISSA LR 64, 2000 (4) SCC 465, 2000 SCC (CRI) 829, (2001) 1 EFR 262, (2001) 43 ALLCRIC 170

Author: K.T. Thomas

Bench: K.T. Thomas

ORDER

1. A request was made on behalf of the appellant to adjourn this matter as the advocates have called for a strike today. But when we considered the stark reality that this appellant has been languishing in jail for a very long time we felt it our duty to look into the matter by ourselves and if there is no scope for interference with the conviction and sentence there would be necessity to hear an advocate appointed as amicus curiae to argue for the appellant. Having gone into the matter we found that the conviction and sentence imposed can be interfered with and, therefore, we feel further delay in disposing of the matter would be a violation of Article 21 of the Constitution. Hence, we proceed to dispose of this matter.

2. The appellant was convicted under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act") for possession of five small plastic packets of brown sugar. While passing the sentence on him the trial Court took into consideration tan added factor that the appellant was already convicted under the same section in a different case and, therefore, he was asked to show cause why the enhanced sentence as contemplated under Section 31 of the Act should not be awarded to him. After hearing him the trial Court imposed a sentence of rigorous imprisonment for 15 years and a fine of Rs. 1,50,000 (in default of payment of fine he was directed to undergo simple imprisonment for a further period of 3 years). Thus, in all if he fails to pay the fine amount of Rs. 1,50,000, he has to undergo imprisonment for a total period of 18 years. When he filed an appeal a learned Single Judge of the High Court of Kerala has confirmed the conviction and sentence and dismissed his appeal.

3. We appointed Mr. K.K. Mehrotra, Advocate as amicus curiae but when the matter came up for hearing on 14.9.1999 the said amicus curiae did not turn up and hence we removed him and in his place appointed Mrs. Sheil Sethi, Advocate as amicus curiae. When the matter came up for arguments today, the amicus curiae appointed on the second occasion is also absent. Nobody appears for the State of Kerala. Considering the fact that this appellant has been languishing in jail for a long time, we considered it necessary to dispose of this appeal.

4. There are two glaring infirmities. One is non-compliance with Section 50 of the Act and the other is non-compliance with Section 42 of the Act.

5. P.W. 1 was the Sub-Inspector of Police, who said that he got reliable information on the evening of 31.3.1991 that one man was selling brown sugar near the Sarada Mandiram Bus-stop. But P.W. 1 admitted in his cross-examination that he did not reduce the information into writing nor did he inform his superior officers about it and instead he opted to proceed to the place without doing the aforesaid duty.

6. It is a mandate of Section 42 of the Act that when an officer referred to in Sub-section (1) thereof "has reason to believe from personal knowledge or information given by any person and taken down in writing" that any narcotic drug or psychotropic substance is kept or concealed he may detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence under the Act. The other requirement of law is that the officer who takes down the information in writing or records grounds for his belief shall forthwith send a copy thereof to his immediate official superior. A three-Judge Bench of this Court held in Abdul Rashid Ibrahim Mansuri v. State of Gujarat : that non-compliance with the requirements of Section 42(1) and (2) would render the resultant search and seizure suspect, though that by itself may not vitiate the proceedings.

7. In the present case, unfortunately, apart from the evidence of the police officers there is absolutely no independent evidence to ensure confidence in our mind that the search was in fact conducted by PW 2 as ne has claimed. As his evidence is required to be approached with suspicion due to violation of Section 42 of the Act we may require corroboration from independent sources that is lacking in this case.

8. The second infirmity is that P.W. 1 admitted that before the search was conducted no officer or Magistrate as envisaged in Section 50 of the Act was called. The excuse put forward by P.W. 1 for not resorting to such action was that the appellant himself told that he did not require the presence of any such officer. For that matter also we have only the ipse dixit of the police officer. None of the independent witnesses stated the said version P.W. 1 in his cross-examination said that he arrested the appellant at 5.20 p.m. and the body of the appellant was searched only after that. When law requires that the appellant must be afforded with an opportunity to have the presence of a gazetted officer or a Magistrate the appellant has a right to be taken to the nearest gazetted officer or Magistrate for the purpose of conducting search in his presence. The said right cannot be sidelined as a mere formality. A Constitution Bench of this Court has highlighted the importance of such a right, the implication of non-compliance with the same and other allied matters connected with Section 50 of the Act vide State of Punjab v. Baldev Singh : .

9. In the fact-situation of the case, particularly in the absence of any corresponding entry in any of the police records it is difficult for us to believe, the mere oral vibration made by P.W. 1 that he asked the appellant whether he should require the search to be conducted in the presence of any one of the above officers and that the appellant politely declined the offer.

10. We are of the considered view that in the light of his non-compliance with the provisions of Section 42(1) and (2) of the Act besides non-compliance with the requirement in Section 50 of the Act it is difficult to sustain the conviction and sentence of the appellant. The graver the

consequences the greater must be the circumspection, to be adopted. We take into account that the appellant otherwise will have to be subjected to a longer period of sentence as Section 31 of the Act was also invoked in the present situation for adopting such greater circumspection for scrutinising the evidence.

11. In the result, we allow this appeal and set aside the conviction and sentence passed on the appellant as per the impugned judgment. We direct the appellant to be set at liberty forthwith unless he is required in any other case.