

Ali Mustafa Abdul Rahman Moosa vs State Of Kerala on 28 September, 1994

Equivalent citations: 1995 AIR 244, 1994 SCC (6) 569, AIR 1995 SUPREME COURT 244, 1994 AIR SCW 4393, 1994 AIR SCW 4390, 1995 ALL. L. J. 219, 1994 (2) UJ (SC) 677, (1994) 5 SERVLR 197, 1994 CRIAPPR(SC) 329, 1995 SCC (CRI) 32, (1994) 3 SCJ 624, 1994 (6) JT 326, (1995) 1 SCT 254, (1994) 5 JT 632 (SC), (1994) 24 ALL LR 344, 1994 (6) SCC 1, (1995) SCCRIR 392, 1995 (1) BLJR 27, 1994 UJ(SC) 2 677

PETITIONER:

ALI MUSTAFA ABDUL RAHMAN MOOSA

Vs.

RESPONDENT:

STATE OF KERALA

DATE OF JUDGMENT 28/09/1994

BENCH:

ANAND, A.S. (J)

BENCH:

ANAND, A.S. (J)

FAIZAN UDDIN (J)

CITATION:

1995 AIR 244

1994 SCC (6) 569

JT 1994 (6) 326

1994 SCALE (4) 328

ACT:

HEADNOTE :

JUDGMENT :

The Judgment of the Court was delivered by DR A.S. ANAND, J.- The appellant, a Kuwaiti national, was convicted for an offence under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter 'the NDPS Act') and sentenced to suffer imprisonment for 11 years and a fine of Rs 1 lakh by the learned Sessions Judge, Quilon. His appeal against the conviction failed before the High Court of Kerala though the sentence of imprisonment was reduced to 10 years' RI. The imposition of fine of Rs 1 lakh as also the imprisonment in default of the payment of fine as

imposed by the trial court was, however, maintained.

+ From the Judgment and Order dated 10-4-1990 of the Kerala High Court in Crl. A. No. 414 of 1989

2. According to the prosecution case, on 12-10-1988 at about II. 15 p.m., the appellant was found in possession of 780 gms of charas in the first class waiting room of the railway station at Quilon. PW 6, Ashok Kumar, SubInspector of Police attached to the Quilon Railway Station, on receipt of reliable information that a foreigner having charas in his possession was sitting at the Quilon Railway Station, went to the platform where PW I Constable Nataraja Pillai was on patrol duty. Both PW I and PW 6 went to the first class waiting room. The appellant was found sitting there with a bag. On suspicion, he was questioned by PW I and PW

6. The appellant took out a small packet of charas from his bag and handed it over to PW 6. On further questioning and search, PW 6 recovered three big packets of charas from the bag which was in possession of the appellant. The seizure of charas was effected in presence of the witnesses on the spot itself and the contraband was taken into possession after making the mahazar. The other valuable articles which were with the appellant were also taken into custody, after preparing the recovery memo. The contraband was weighed and in the presence of witnesses, a small portion from each of the four packets of contraband, was taken as sample for examination. The search and seizure lasted till about 5 a.m. on 13-10-1988. The appellant was arrested on the spot and produced at the police station adjacent to the railway station. The seized articles were kept in safe custody of the police station and the appellant was produced before the Magistrate, after the registration of the case. After further investigation, the charge-sheet was filed before the Chief Judicial Magistrate, Quilon who committed the case to the sessions court for trial.

3. Six witnesses were examined by the prosecution and various articles as recovered from the possession of the appellant were exhibited as material objects. The contraband was found by the expert to be 'charas'. The appellant in his statement under Section 313 CrPC denied the seizure and disowned the bag from which the contraband had been recovered and seized and asserted that it was an abandoned bag and that the appellant had been unnecessarily linked up with the seizure of the contraband on misguided suspicion.

4. Though a number of submissions were made by learned counsel for the appellant, we need not detain ourselves to deal with all those submissions as in our opinion there is force in the main argument of the learned counsel for the appellant viz. that on account of the non-compliance with the provisions of Section 50 of the NDPS Act, which provisions have been held to be mandatory by this Court in *State of Punjab v. Balbir Singh* the conviction and sentence of the appellant cannot be sustained.

5. From the testimony of PW 6, it is apparent that before reaching the first class waiting room at the railway station, he had received information that a foreigner was sitting with charas at the railway station. The appellant was thereafter spotted and subjected to search and from his possession allegedly 780 gms of charas was seized. Undoubtedly, before the search of 1 (1994) 3 SCC 299: 1994

SCC (Cri) 634 the appellant was made, he was not given any option as to whether he desired to be searched in the presence of a Gazetted Officer or a Magistrate as envisaged by Section 50. In *State of Punjab v. Balbir Singh*¹ it has been held that before the authorised or empowered officer conducts a search, he should give the accused an option to be searched either in the presence of a Gazetted Officer or a Magistrate. It was also held that Section 50 confers a valuable right on the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires and the failure to provide that option to the accused vitiates his conviction. The court expressly held the provisions of Section 50 to be mandatory, the non-compliance whereof would vitiate the conviction.

6. Learned counsel for the respondents on the other hand submitted that the question of giving option to the accused in compliance with Section 50 of the Act is subject to the condition that the accused 'requires' that he be searched in the presence of a Gazetted Officer or a Magistrate but where the accused does not so 'require' for whatever reason his conviction would not stand vitiated, in case the option was not given to him. A similar argument had been advanced in *Balbir Singh case*¹ and the Bench repelled the same after a detailed discussion and observed : (SCC p. 316, para 16) "The words 'if the person to be searched so desires' are important. One of the submissions is whether the person who is about to be searched should by himself make a request or whether it is obligatory on the part of the empowered or the authorised officer to inform such person that if he so requires, he would be produced before a Gazetted Officer or a Magistrate and thereafter the search would be conducted. In the context in which this right has been conferred, it must naturally be presumed that it is imperative on the part of the officer to inform the person to be searched of his right that if he so requires to be searched before a Gazetted Officer or a Magistrate. To us, it appears that this is a valuable right given to the person to be searched in the presence of a Gazetted Officer or a Magistrate if he so requires, since such a search would impart much more authenticity and creditworthiness to the proceedings while equally providing an important safeguard to the accused. To afford such an opportunity to the person to be searched, he must be aware of his right and that can be done only by the authorised makes it obligatory on the authorised officer to inform the person to be searched of his right."

(emphasis supplied) We respectfully agree with the above observations and reject the submission made on behalf of the respondents.

7. Learned counsel for the respondents then submitted that the judgment in *Balbir Singh case*¹ requires reconsideration. We cannot agree. There are no compelling reasons advanced by the learned counsel for the respondents for the reconsideration of the judgment in *Balbir Singh case*¹.

8. The last submission of the learned counsel for the respondents is that even if the search and seizure of the contraband are held to be illegal and contrary to the provisions of Section 50 of the NDPS Act, it would still not affect the conviction because the seized articles could be used as 'evidence' of unlawful possession of a contraband. Reliance for this submission is placed on the judgment of this Court in *Pooran Mal v. Director Of Inspection*². We are afraid the submission is misconceived and the reliance placed on the said judgment is misplaced. The judgment in *Pooran Mal case*² only lays down that the evidence collected as a result of illegal search or seizure, could be used as evidence in proceedings against the party under the Income Tax Act. The judgment cannot

be interpreted to lay down that a contraband seized as a result of illegal search or seizure, can be used to fasten that liability of unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in an illegal manner.

"Unlawful possession" of the contraband is the sine qua non for conviction under the NDPS Act and that factor has to be established by the prosecution beyond a reasonable doubt. Indeed the seized contraband is evidence but in the absence of proof of possession of the same, an accused cannot be held guilty under the NDPS Act.

9. In view of the law laid down in Balbir Singh case I, we hold that there has been violation of the provisions of Section 50 of NDPS Act and consequently the conviction of the appellant cannot be sustained. We, therefore, allow this appeal and set aside the conviction and sentence of the appellant. He is directed to be released forthwith unless required in any other case.