

(1993) 06 KL CK 0057

In the High Court Of Kerala

Case No : Criminal Appeal No. 229 of 1991

Aziz alias Kallu Azi and Another

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 24-06-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 293
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 10, 10(1),
14, 2, 20

Citation : (1994) CriLJ 2407 : (1994) 3 RCR(Criminal) 442

Hon'ble Judges : K.T. Thomas, J

Bench : Single Bench

Advocate : V.K. Hamza and V.B. Narayanan, for the Appellant; M. Rena Singh, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

K.T. Thomas, J.—On 3-3-90 a Sub-Inspector of Police received information that four persons were dealing in narcotic drugs at Beach Hotel, Fort Kochi. He proceeded to the place and arrested four persons including the two appellants and seized "charas" from them (11.60 grams from the first appellant and 11 grams from the second appellant). The seized articles were produced before the Magistrate Court from where they were forwarded to the Chemical Examiner's Laboratory attached to the Government of Kerala. On analysis, they were identified to be "charas". The case was charge-sheeted and after trial the Sessions Court convicted the appellants of the offence u/s 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act"). Both were sentenced to rigorous imprisonment for 11 years and to pay a fine of Rs. 1 lakh each. Third and fourth accused were acquitted.

2. P.W. 1 is the Sub-Inspector of Police. He spoke of the case that he received information from a police constable who was detailed for duty in the area in which Beach Hotel was situate. P.W. 1 also said that when he reached the portico

of the hotel, he found the appellants whose pockets were seen bulging and on examination found that the pockets contained narcotic drugs. He identified them as charas. He prepared Exts. P2 and P3 mahazars for the articles seized and arrested the accused. Ext. P8 is the certificate issued by the Chemical Examiner showing that both articles were charas.

3. P. Ws. 2 and 3 were employees of Beach Hotel. Though both of them turned hostile, they said that police went to the hotel on the date in question and arrested some persons. P.W. 4, the police constable who gave information to P.W. 1 deposed that he knew that some persons were clandestinely dealing in narcotic drugs at or near Beach Hotel and so he informed the Sub-Inspector. He too was present when P.W. 1 arrested the persons and seized the articles.

4. Learned Sessions Judge found no reason to doubt the truth of the version spoken to by P.Ws. 1 and 4. The facts spoken to by them are corroborated by Exts. P2 and P3 mahazars and by production of the two packets containing charas. Appellants examined four witnesses on their side, in an attempt to make forays into the prosecution fortress. D.W. 1 was the attester in Ext. P3 mahazar. The witness admitted in cross-examination that he attested the same. He had no case that Ext. P3 was not prepared by the police. D.W. 3 said that he saw the police arresting the appellants. D.Ws. 2 and 4 had no useful points to contribute to the defence version. Thus, the attempt of the defence to make onslaughts on the prosecution story turned out to be a damp squib.

5. Learned counsel for the appellants advanced certain other arguments in the alternative. One such argument is that "charas" is not "cannabis" though it may fall within the definition of "cannabis (hemp)". The said contention is advanced in support of the plea that appellants cannot be convicted u/s 20(b)(ii) of the Act.

6. As the said contention has been very seriously pressed into service, the same has to be considered by reference to the relevant provisions. It is not in dispute that if the article found in the possession of the appellants is not "cannabis", then appellants can be convicted only under the residuary provision contained in Section 32 of the Act which says that whoever contravenes any provision of the Act or any rule or order made, "for which no punishment is separately provided in this Chapter" shall be punishable with imprisonment for a term which may extend to six months or with fine or with both. The attempt to bring the offence within the ambit of Section 32 of the Act, if succeeds, will practically save the appellants from further incarceration since they have already completed the maximum period of imprisonment prescribed under the said section.

7. Cannabis (hemp) is a "narcotic drug" as defined in Section 2(xiv) of the Act. Section 8 of the Act prohibits possession, sale, use, consumption etc., of any narcotic drug. Thus, if cannabis (hemp) is not cannabis, as contended by the learned counsel, the only penal provision which can be imposed against the appellants is Section 32 of the Act.

8. Section 2(iii) defines cannabis (hemp) thus:

(a) charas, that is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparations and resin known as hashish oil or liquid hashish;

(b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and

(c) any mixture, with or without any natural material, of any of the above forms of cannabis or any drink prepared therefrom;

8. No doubt, cannabis, as such, is not defined in the Act. Learned counsel invited my attention to Article 28 of the single Convention of Narcotic Drugs, 1961 which reads thus:

1. If a party permits the cultivation of cannabis plant for the production of cannabis or cannabis resin, it shall apply thereto the system of controls as provided in Article 23 respecting the control of the opium poppy.

2. This Convention shall not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes.

3. The Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in the leaves of the cannabis plant."

According to him, the said article is illustrative of the scientific approach treating cannabis as a substance different from cannabis plant or cannabis resin etc. But there are clear indications in the Act that the Parliament regarded "cannabis" as the genus of which cannabis (hemp), cannabis plant, cannabis resin, medicinal cannabis etc., are species.

9. Section 2(iv) defines cannabis plant as "any plant of the genus cannabis". Section 2(xii) defines "medicinal cannabis" as the extract or tincture of cannabis (hemp). Section 14 of the Act empowers the Government to permit cultivation of any cannabis plant for industrial purposes exclusively for obtaining fibre or seed or for horticultural purposes. Section 14 of the Act is titled as "Special provision relating to cannabis". Section 10 of the Act empowers the State Government to make rules to control and regulate possession, sale, consumption etc., of certain drugs as well as cultivation of cannabis plant. Sub-clause (iii) of Clause (a) of Section 10(1) of the Act is important in this context. It reads thus:

"the cultivation of any cannabis plant, production, manufacture, possession, transport, import inter-State, export inter-State, sale, purchase, consumption or use of cannabis (excluding charas)".

It is significant that for the purpose of the sub-clause, charas is excluded from "cannabis". This means cannabis would have otherwise included charas also.

10. From the aforesaid provisions of the Act, it is possible to infer that cannabis is regarded in the Act as the genus of which cannabis (hemp) is one of the

species. It follows therefrom that Section 20(b)(ii) of the Act which punishes contravention of the provisions of the Act "where such contravention relates to cannabis other than ganja" relates to any of the species of cannabis including charas.

11. Now I shall consider the other contentions advanced by the learned counsel. Ext. P8 is the certificate of chemical analysis issued by the Chemical Examiner to Government of Kerala. Learned counsel contended that the Chemical Examiner to Government of Kerala has no power to conduct any analysis on the narcotic drugs seized under the Act. The said contention is based on Section 76 of the Act which empowers the Central Government to make rules for "the drawing of samples and testing and analysing of such samples". There is no merit in the said contention since both Central Government and State Government are empowered to make rules "for carrying out the purposes of this Act". Unless the Act or rules prohibit any person, other than the chemical examiner mentioned therein, to conduct analysis, it is open to the court to send it to any analyst for analysis. A similar contention was raised in *Ruben Joseph Vs. State, Manoharan, J.* repelled the said contention and observed that in the absence of any specific provision in the Act a chemical examiner is competent to analyse and certify as to the nature of the substance and his opinion can be used as evidence u/s 293 of the Code of Criminal Procedure. I am in respectful agreement with the said view.

12. In the decision of the Division Bench of the Bombay High Court reported in *Vasant Shankar Gawade v. State of Maharashtra*, (1989) 3 Crimes 450 the position was different as the Government of Maharashtra had made rules which specified the persons who should conduct analysis. There is no such situation in Kerala and hence analysis made by the Chemical Examiner to Government of Kerala cannot be ignored as one without authority.

13. Learned counsel next referred to the evidence of P.W. 1 that he did not take down in writing the information received from P.W. 4 before proceedings to Beach Hotel. According to the counsel, P.W. 1 had no authority to act u/s 42 of the Act without reducing the information to writing. This argument is based on a misconception that the authority of a police officer to proceed in such cases is vested only in Section 41 or Section 42 of the Act. Of course, Section 41(1) of the Act empowers a Magistrate to issue a warrant for the arrest of any person or for the search of any building, conveyance or place in which narcotic drug or psychotropic substance is kept or concealed, and Sub-section (2) empowers any officer of the category enumerated in the section to authorise any subordinate officer to search any building, conveyance or place. Section 42 empowers any such officer to search or seize the contraband or arrest any offender even without a warrant or even without authorisation in certain circumstances. In either of those cases he is required to write down before he acts under the sections the information and the grounds for taking such steps. But Section 43 of the Act empowers any officer of any of the departments mentioned in Section 42

of the Act to seize any narcotic drug etc., in "any public place" or to detain and search any person and to arrest him or any other person in his company if he has reasons to believe that such person has committed an offence punishable under the Act. Explanation to Section 43 of the Act shows that the expression "public place" includes a hotel. Here P.W. 1 had acted u/s 43 of the Act and not u/s 42. There is no statutory requirement in Section 43 of the Act that the officer concerned can search any person or seize any narcotic drug etc., or arrest a person only after taking down the information in writing. Hence non-recording of the information before proceeding to the hotel could not vitiate the action taken by P.W. 1 in this case.

As I find no reason to interfere with the conviction and sentence, I dismiss this appeal.