

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 15TH DAY OF SEPTEMBER 2015/24TH BHADRA, 1937

CRL.A.No. 603 of 2003 ()

AGAINST THE JUDGMENT IN SC 180/2002 of SPL. COURT
(NDPS ACT CASES), VADAKARA, DATED 07-04-2003.

APPELLANT(S) / 2nd ACCUSED:

N.V.MUHAMMED IQBAL
S/O. ALI, N.C.HOUSE,
VELLAYIL, NEAR CHETTIKULAM BAZAR,
KOZHIKODE.

BY ADVS.SRI.T.G.RAJENDRAN
SMT.C.M.CHARISMA

RESPONDENT(S) / COMPLAINANT :

1. S.I.OF POLICE,
KASABA POLICE STATION KOZHIKODE.
2. STATE REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. JIBU P. THOMAS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

Crl. Appeal No.603 of 2003

Dated this the 15th day of September, 2015

JUDGMENT

Second accused in S.C.No.180/2002 on the file of Special Judge, NDPS Act cases, Vadakara, is the appellant herein. The appellant was charge sheeted by the Assistant Commissioner of police, Kozhikode, in Crime No.352/2001 of Kasaba police station under Section 21(b) read with Section 29 of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (herein after called 'NDPS Act').

2. The case of the prosecution in nut shell was that, on 19.10.2001 at about 5.40 p.m., the first accused was found to be in possession of 20 grams of heroine under his waist a narcotic substance and the 2nd accused was found in that room (Room No.313 of Keerthi Mahal Lodge) and they were conspiring together for trafficking the narcotic substance and thereby both of them have

committed the offence punishable under Section 21(b) and Section 29 of NDPS Act.

3. After investigation final report was filed before the Special Judge for NDPS Act cases, Vadakara, where it was taken on file as S.C.No.180/2002.

4. When the accused appeared before the court below, after hearing both sides, charge under Section 21(b) read with Section 29 of NDPS Act was framed against both the accused and the same was read over and explained to them and they pleaded not guilty. In order to prove the case of the prosecution, PWs 1 to 5 were examined and Exts. P1 to P4, P3(a), P4(b) and P5 to P16 were marked on the side of the prosecution. After closure of the prosecution evidence, the accused were questioned under Section 313 of the Code of Criminal Procedure (hereinafter called the Code) and they denied all the incriminating circumstances brought against them in the prosecution evidence. They have further stated that they have not committed any

offence. First accused had filed a statement stating that he had not committed any offence and he went there to meet a person in connection with obtaining visa and at that time they were arrested by the police. The 2nd accused had stated that he had gone to meet one Abdul Rahiman, accused in Crime No.351/2001 of Kasaba police station in connection with obtaining visa for his son on the basis of an information received that he was in the hotel. Accordingly he went there and when he was enquiring about him in the counter, it was revealed that he was not there and immediately he saw Sri.Viswanatha Kurup/ PW5 there, who told to arrest him as he was the person who had assaulted the police officials in respect of which a crime had already registered against him and thereafter he was produced before the court. So he had not committed any offence. In order to prove the case of the 2nd accused/ the appellant herein, DWs 1 and 2 were examined and D1 and D2 were marked on his side. After considering the evidence on

record, the court below found both the accused guilty under Section 21(b) read with Section 29 of the NDPS Act and convicted them thereunder and sentenced them to undergo rigorous imprisonment for three years each and also to pay a fine of ₹30,000/- each, in default to undergo simple imprisonment for one year each. Set off was allowed for the period of detention already undergone by them under Section 428 of the Code of Criminal Procedure. Aggrieved by the same, the present appeal has been preferred by the appellant/ 2nd accused in the court below. Though an enquiry was made from the office as to whether first accused had filed any appeal, it was revealed from the note that, no appeal has been preferred by the first accused.

5. Heard Sri.T.G.Rajendran, counsel for the appellant and Sri.Jibu P.Thomas, Public Prosecutor appearing for the State.

6. The counsel for the appellant submitted that, even as per the evidence adduced from the side of the

prosecution, there is no incriminating article seized from his possession. Further the evidence of PW3 will go to show that they did not see the accused having any conversation with the first accused or indulged in any transaction with the first accused. Further even at the first instance itself he had stated before the magistrate evidenced by Ext.D1 that, he went there to see one Abdul Rahiman in connection with visa transaction and he was taken from the hotel when he was standing near the counter and he had not committed any offence. Further he himself had gone to the witness box to prove his case as well. Ext.D2 will go to show that he was an accused in a case where he had alleged to have assaulted some police officials. So the possibility of 2nd accused being harassed by the police officials, when he was seen there, on account of the enmity cannot be ruled out in the circumstance of the case. Further no ingredient of Section 29 of the NDPS Act has been made out as well in this case. He has also submitted that, his signature was not

obtained in any of the material objects and no arrest memo was prepared. All those things threw suspicion regarding the case of the prosecution. He had relied on the decision reported in **A.K. Mehaboob v. Intelligence Officer Narcotics Control Bureau (2002(SCC) (Cri.) 1035)** in support of his case.

7. On the other hand, learned Public Prosecutor submitted that it will be seen from the documents produced that, when the detecting officer questioned an accused by name Abdul Rahiman where the appellant to see in the hotel when he was in custody in connection with another narcotic case. It was revealed that two other persons involving in the narcotic substance trafficking were in the hotel and it was on that basis, the search was conducted and seizure was effected. Further the appellant was seen in the same room with first accused. So under the circumstances, prosecution has proved the case against the 2nd accused/ appellant herein beyond reasonable doubt that he can be

convicted for the offence with the aid of Section 29 of the NDPS Act and the court below was perfectly justified in convicting the appellant for the offence alleged.

8. The case of the prosecution as emerged from the prosecution witness was as follows:

On 19.10.2001 while PW3 the Circle Inspector of police, Kasaba police station questioned the accused Abdul Rahiman, who was arrested in connection with a narcotic case, it was revealed that two persons were staying in Room No.313 of Keerthy Mahal lodge and they came from Bombay for selling narcotic substances. On the basis of the reliable information received from an accused in a narcotic case, he prepared Ext.P6 report regarding the information received and action to be taken on that basis sent the same to PW5, his superior officer and then prepared Ext.P7 search memo and sent the same to court. Thereafter he went to Keerthy Mahal lodge along with PW4 and party and knocked the door of Room No.313 of that lodge and when it was opened,

he saw accused Nos. 1 and 2 inside the room. He got introduced to them and thereafter he told accused Nos.1 and 2 that they are going to conduct search on their body, as they got information that they were in possession of narcotic substance and apprised their right to ask for the presence of a gazetted officer or a magistrate for conducting their body search asked whether they wanted the same and they told that it was not necessary and that was given in writing evidenced by Exts.P8 and P9 in which they have stated that PW3 himself could conduct the search. Thereafter PW3 conducted body search of PW1 and found a packet covered with brown paper from his waist and also found ₹240/- in his pocket. On examination of the brown paper wrapped packet, he was convinced that it was heroine and he weighed the same and found that it was having a weight of 20 grams. Thereafter he had seen MO5 suit case containing an empty polythene cover and MO4 packet beneath the cot in that room. Thereafter he had

taken three samples of five grams each from the 20 gram heroine seized and packed the same and sealed the same with the label containing the signatures of the first accused, himself and the witnesses PWs 1 and 2. He had packed the remaining heroine also in the same fashion. Thereafter he seized the articles as per Ext.P2 search list and prepared Ext.P1 seizure mahazar in the presence of PWs 1 and 2. When the body search of 2nd accused was made, there was only ₹40 found in his pocket and no incriminating articles found in his possession. He seized MOs 1 to 6 as per Ext.P1 mahazar and he came to police station and registered Ext.P9 first information report as Crime No.35/2001 of Kasaba police station against the appellant and first accused under Section 21(b) and 29 of the NDPS Act. He prepared Ext.P12 property list and Ext.P15 forwarding note and produced the accused along with the contraband article before court. The investigation in this case was conducted by PW5. He went to the place of occurrence and prepared

Ext.P13 scene mahazar. He had seized MO7 Guest Register as produced by PW2 as per the mahazar. He had produced the same before court along with Ext.P14 property list. He obtained Ext.P16 chemical analysis report which was obtained from the laboratory after examination as sent from the court on the basis of Ext.P15 forwarding note sent. He completed the investigation and submitted final report.

9. PWs 1 and 2 are the alleged independent witnesses to the seizure. PW2 is the receptionist of that hotel. Both of them have admitted their signature in Exts.P1 and P2 and also labels seen on MOs 1 and 2. He also deposed that they have seen first accused in the room, but they have stated that the 2nd accused was not there in the room at that time. But in the cross examination it was admitted by them that all these articles were seized from the room. Even PW2 had gone to the extent of saying that the 2nd accused had come there enquiring about one Abdul Rahiman, who is staying in Room No.313. It was at that

time he was taken by the police, in connection with this case. Then the evidence available is that of PW3 the detecting officer and PW4 the police officer who accompanied the detecting officer. They have categorically stated about the procedure adopted for conducting the search and effecting seizure and arrest of the accused persons. Since no appeal has been preferred against conviction against the first accused, I am not going into the details regarding the evidence collected against the first accused in this appeal. PW3 had categorically stated in his cross examination that, no incriminating articles were seized from the possession of the accused. He had also stated that he did not know why the 2nd accused had come to the hotel and when a suggestion was given that he came there for the purpose of seeing one Abdul Rahim in connection with visa transaction, he pretended ignorance of the same and he did not deny the same. But he had also admitted that he was accused in the case where he had

alleged to have beaten some police officials. He had also admitted that he had not seen any belongings of the 2nd accused in the room as well. He had also stated that he did not see any transaction going on between the first accused and the 2nd accused as well. Neither PW3 nor PW5 the investigating officer had collected any material to connect the 2nd accused with the contraband articles seized and also any connection with the first accused for the 2nd accused as well. So in the absence of any evidence of seizure of the contraband article from the possession of the 2nd accused or evidencing any transaction going on between accused Nos. 1 and 2 at the time when the detection was made, it cannot be said that he was found to be in possession of any contraband article so as to convict him for the offence punishable under Section 21(b) of the NDPS Act.

10. If at all he had to be convicted for the offence, then the prosecution has to prove that there was conspiracy between accused Nos.1 and 2 for the purpose of

engaging in trafficking of narcotic substances or the 2nd accused abetting the first accused for such offence, as mentioned in Section 29 of the NDPS Act. But there is no such evidence adduced on the side of the prosecution as well to connect the 2nd accused with the contraband article or with first accused. No statement under Section 67 of the NDPS Act was recorded of the accused persons so as to implicate them in the commission of the offence or role played by him in the commission of the offence as well. So merely because 2nd accused was found there in the room alone, even if the entire prosecution case is admitted, is not sufficient, in the absence of other evidence to prove the conspiracy for committing the crime or trafficking any narcotic substance, to come to the conclusion that he had committed any offence of abetting or conspiracy for doing such offence, invoking Section 29 of the NDPS Act, as has been done by the court below in this case. In the decision reported in the **A.K Mehaboob v. Intelligence Officer,**

Narcotics Control Bureau (2002 (SCC) (Crl.) 1035) it has been held that, in the absence of any seizure of any contraband article or money as consideration thereof was recovered from the 2nd accused, then he cannot be convicted for the offence under Section 21 and 29 of the NDPS ACT, merely on the basis of the statement given by the co-accused or he was found in that room with the accused.

11. In this case also there is no evidence to show that he was found to be in possession of any narcotic substance, no huge amount was seized from his possession, only ₹40/- was seized from his possession, which cannot be said that, this was used for purchasing heroine or it is a cash obtained by him in the transaction of handing over heroine to the first accused. Neither PW3 nor PW5 had such a case as well. So under the circumstances, merely because the 2nd accused was found alleged to be in the room alone is not sufficient to convict him for the offence under

Section 21(b) read with Section 29 of the NDPS Act.

12. Further it will be seen from the admission of PW2 and entry in MO7 Guest Register that the room was taken in the name of first accused. There is nothing on record to show that second accused was residing along with first accused in that room. Even in the first occasion when he was produced before the magistrate along with remand report, he had stated that he had gone there to enquire about one Abdul Rahiman, in connection with visa transaction and at that time he was taken by the police officer as seen in Ext.D1 endorsement made by the magistrate on the remand report while remanding him. He had also produced Ext.D2 to prove that he was an accused in Crime No.312/1992 of Kozhikode City police station, alleging commission of the offence under Section 332 of the Indian Penal Code alleged to have attacked a police officer and preventing him from discharging his duties. So under the circumstances, when he was found in the company of

first accused, taking him on the assumption that he is also having some connection with first accused and implicate him in the case cannot be ruled out. So under the circumstances, the finding of the court below that the prosecution has proved the case beyond reasonable doubt that the 2nd accused had committed the offence along with the first accused invoking Section 29 of the NDPS Act and convicting him for the offence under Section 21(b) read with Section 29 of the NDPS Act are unsustainable in law and the same is liable to be set aside. The appellant is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt. In view of the finding that the appellant is entitled to get acquittal, the sentence imposed is also not proper and the same is also set aside.

In the result, the appellant succeeds and the appeal is allowed and the order of conviction and sentence passed by the court below against the appellant under Section 21(b) read with Section 29 of the NDPS Act are

hereby set aside and the appellant is acquitted of the charge levelled against him giving him the benefit of doubt. He is set at liberty. The bail bond executed by him will stand cancelled. Since there is no evidence to show that amount of ₹40/- recovered from him is involved in the commission of crime and since he was acquitted by this court, court below is directed to refund that amount to the appellant. If the appellant had remitted any amount towards the fine, then court below is directed to refund that amount also to him on making necessary application for that purpose.

Office is directed to communicate this judgment to the court below at the earliest.

Sd/-
K. Ramakrishnan, Judge

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P.A. to Judge