

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 6TH DAY OF NOVEMBER 2015/15TH KARTHIKA, 1937

CRL.A.No. 1698 of 2003 ()

AGAINST THE JUDGMENT IN SC 88/1999 of SPL. COURT FOR TRIAL OF CASES
UNDER N.D.P.S. ACT, TRIVANDRUM DATED 31-01-2003

APPELLANT/COMPLAINANT:

NARCOTIC CONTROL BUREAU, A CENTRAL GOVERNMENT
ORGANISATION BY ITS REGIONAL INTELLIGENCE UNIT,
THIRUVANANTHAPURAM REPRESENTED BY ITS SUPERINTENDENT

BY ADVS.SRI.V.K.MOHANAN
SRI.MVS.NAMBOOTHIRY

RESPONDENTS/ACCUSED):

1. SHAJAHAN @ SHAJI
S/O MOHAMMEDALI, AGED 36/98,
PONNAMMA MANDIRAM, THERIVILA,
P.O.BALARAMPURAM, THIRUVANANTHAPURAM
2. MADHUSOODANAN @ BABU, S/O VASAVAN
AGED 48/98, PONNAMMA MANDIRAM
THERIVILA, PO BALARAMAPURAM
THIRUVANANTHAPURAM

R1 BY ADV. SRI.B.RAMAN PILLAI (SR.), PUBLIC PROSECUTOR
R1 BY ADV. SRI.GEORGE PHILIP
R1 BY ADV. SRI.R.ANIL
R1 BY ADV. SRI.RAJU RADHAKRISHNAN
R1 BY ADV. SRI.ANIL K.MOHAMMED
R1 BY ADV. SRI.DELVIN JACOB MATHEWS

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06-11-2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

JV

K. RAMAKRISHNAN, J.

Crl. Appeal No.1698 of 2003

Dated this the 6th day of November, 2015

JUDGMENT

The complainant in S.C.No.88/99 on the file of Court of the Special Judge for Trial of Cases under N.D.P.S. Act, Thiruvananthapuram is the appellant herein. Respondents 1 and 2 were charge-sheeted by the appellant in O.R.No.1/98 of N.C.B, R.I.U., Thiruvananthapuram Unit alleging offence under Sections 29 and 21 of the Narcotic Drugs and Psychotropic Substances Act, hereinafter referred to as NDPS Act.

2. The case of the prosecution in nutshell was that on 25.12.1998 at about 2.30 pm, the complainant got information that the accused persons were engaged in trafficking of narcotic substance in Room No.108 of Chathurthi Lodge, Aristo Junction, Thampanoor and immediately he went to that place after complying with the formalities and conducted search and they were found to be in possession of 510 grams of Heroin and thereby they have committed the aforesaid offence.

3. After investigation, final complaint was filed and it

was taken on file as S.C.No.88/99 by the designated court for conducting NDPS cases, Thiruvananthapuram. When they were produced before the court below, after hearing both sides, charge under Sections 21 and 29 of NDPS Act was framed, the same was read over and explained to them and they pleaded not guilty.

4. In order to prove the case of the prosecution PWs. 1 to 4 were examined and Exts.P1 to P9 were marked on their side earlier and MOs. 1 to 13 were marked. After closure of the prosecution evidence, the accused were questioned under Section 313 of the Criminal Procedure Code and denied all the incriminating circumstances brought against them in the prosecution evidence. They had further stated that on 24.12.1998 evening there was some commotion occurred near Vallakkadavu and one of the accused taken by N.C.B., Thiruvananthapuram in that incident was released by the mob and on the basis of the complaint given, the present accused persons have been taken into custody on 24.12.1998 and under coercion some statements were obtained from them and thereafter they have been falsely implicated in the case. In order to prove their case, they had examined DW-1 to DW-5 and

Exts.D1 to D3 were marked on their side. Further, they filed Crl.M.P. No.2150/2000 (wrongly shown as as Crl.M.P. No.2150/2001 in the judgment of the court below) directing the investigating agency to produce the fax message alleged to have been sent under Section 42(2) of NDPS Act. But that was dismissed by the court below and after hearing both sides, they were found guilty for the offence alleged and they were convicted and sentenced for the offences as well.

5. They filed appeal before this Court as Crl.Appeal No.152/2002 and 1238/2001 by the 1st and 2nd accused respectively and this Court allowed the appeals and remanded the case for fresh disposal in accordance with law. While allowing the appeals, this Court also allowed Crl.M.P.No.2150/2000 directing the prosecution to produce documents and acceptability of the statement under Section 67 of NDPS Act said to have been recorded were also directed to be considered afresh on the basis of the evidence to be adduced by them.

6. After remand, PWs. 5 and 6 were examined and Exts.P20 and P21 were marked on the side of the prosecution. DWs. 6 and 7 were examined and Exts.XI, XI(a), D4(a) and D4(b)

were marked on the side of the defence. After considering the evidence on record, the learned Special Judge found that there was non-compliance of Section 42(2) of the NDPS Act and on the basis of the evidence, the case of the prosecution is doubtful and the case of the accused is probable as they were taken into custody on 24.12.1998 and not on 25.02.1998 at 7 pm as claimed by the Prosecution and acquitted them of the charge levelled against them under Section 235 (1) of Criminal Procedure Code. Aggrieved by the same, the present appeal has been preferred by the appellant/complainant before the court below with Leave Petition and the Leave was granted and the appeal was admitted to file.

7. Heard Sri MVS Namboothiry, Special Prosecutor for the appellant and Sri R.Anil, counsel representing Sri. B.Raman Pillai, learned Senior Counsel appearing for respondents 1 and 2.

8. The learned Special Public Prosecutor submitted that they have produced documents to show that the fax was issued on 25.12.1998 itself strictly in compliance with the Section. Further court below should not have relied on the defence evidence to disbelieve the case of the prosecution especially

when acceptable evidence was adduced on the side of the complainant to prove the arrest and seizure of the contraband articles. So according to the learned counsel, the court below was not justified in acquitting the accused.

9. On the other hand, the learned counsel for respondents 1 and 2 submitted that on the basis of the evidence available on record, the prosecution has failed to prove that there was compliance of Section 42(2) of the NDPS Act. Further the documentary and oral evidence adduced on the side of the accused probalised their case that they were in fact taken into custody on 24.12.1998 in connection with some other incident and they have been falsely implicated in the case. So the court below was perfectly justified in acquitting the accused. Further, in the case of acquittal, appellate court should be slow in interfering with the order of the acquittal if the view taken by the court below is possible on the basis of the evidence available.

10. The case of the prosecution in nutshell was that on 25.12.1998, at about 2.30 pm, while PW-4 the detecting officer was in his office, he got information that two persons by name Shajahan and Madhusoodhanan were in Chathurthi Lodge, Aristo Junction and they were in possession of Heroin and

immediately he recorded that information as required in Section 42(1) of the NDPS Act and thereafter sent the same to his higher authority namely Director, Narcotic Control Bureau, Zonal Unit, Madras and thereafter he went to the lodge at 3.15 pm and knocked the Door No.108 of that room in the presence of witnesses and at that time, they saw the accused persons in the room with one plastic carry bag in the possession of the 2nd accused and after complying with the formalities under Section 50 of NDPS Act they conducted the search of the bag in the possession of the 2nd accused and found that it contained 510 grams of Heroin. Thereafter, he took sample as required and then seized the same, arrested the accused and produced before the court. It is in a way admitted that earlier after full fledged trial, the trial court found the accused persons guilty under Section 21 read with 29 of the NDPS Act and they were convicted and sentenced for the said offence. Dissatisfied with the same, they filed Crl.Appeal Nos.152/2002 and 1238/2001 by accused Nos. 1 and 2 respectively and this Court set aside the order of conviction passed by the Court below and remanded the case for fresh disposal with the following direction.

(a) Crl.M.P.-2150/2000 will stand allowed. Trial

Court will issue summons for production of the documents mentioned therein, if motion is made by the defence to call for any other documents in support of the contention based on Section 42 of the Act. Such opportunity will also be allowed and the prospective evidence considered.

(b) Acceptability of statement recorded from accused Nos. 1 and 2 u/s. 67 of the NDPS Act will be considered afresh based on the prospective evidence adduced on the point.

(c) In case the accused are found not entitled to get an acquittal the question of their conviction for offence u/s-21 and 29 will be considered independently and not as though Section 29 is a provision to be read alongwith Section 21 for the purpose of conviction under the latter.

(d) Since the accused are suffering imprisonment and not under bail, the trial court will dispose of the matter afresh at the earliest and in any event within a period of 3 months from the date on which the records received back in that Court.

11. After remand, PWs. 5 and 6 were examined and Exts.P20 and 21 were marked on the side of the prosecution. On the side of the defence DWs. 6 and 7 were examined and Exts.XI, XI(a), D4(a) and D4(b) were marked on their side and it is on the basis of the subsequent evidence adduced that the Special Judge

found that the case of the prosecution is not believable and there is non-compliance of mandatory provisions under Section 42(2) of the Act and acquitted the accused.

12. Section 42(2) of NDPS Act as then stood says that the Officer who recorded the information shall forthwith send a copy thereof to his immediate official superior. According to the prosecution, namely, the evidence of PW-4 was that he had recorded the information and sent the same to the Director of Narcotic Control Bureau, Zonal Unit, Madras by fax and thereafter he sent a report dated 25.12.1998 which was received by him on 29.12.1998. After arresting the accused he had sent Ext.P15 report to the superior officer and that report was sent on 27.12.1998 and the same was received by the Director on 29.12.1998. The court below had appreciated the evidence and came to the conclusion that there was no possibility of Ext.P6 report being sent on 25.12.1998 and that could have been sent alongwith Ext.P15 report only on 27.12.1998 and that was the reason why both these reports reached the Director at Chennai on 29.12.1998. Further, though they have produced Exts.P20 and P21 being the fax message sent, court below found that it could not be the report sent as it is found blank without any

message. So under the circumstances, court below had come to the conclusion that the prosecution has failed to prove the compliance of Section 42 (2) of NDPS Act forwarding the information received recorded by the detecting officer before proceeding to the place of detection to his superior officer and thus that is fatal and come to the conclusion that since the mandatory provision under Section 42(2) of NDPS Act has not been complied with, the accused is entitled to get that benefit.

13. As regards the merits of the case regarding arrest and seizure also, the case of the accused was that they were taken into custody on 24.12.1998 evening itself from Vallakkadavu when they went to see commotion happened in that area pursuant to the mob releasing an accused person taken into custody by the officials of N.C.B, Thiruvananthapuram Unit. Misunderstanding that the present accused were the persons, they were taken into custody on 24.12.1998 itself and thereafter they were compelled to give some statement, on that basis they were falsely implicated in the case. The case of the prosecution was that they were arrested only on 25.12.1998 at 7 pm after completing the seizure of Heroin from their possession from Room No.108 of Chathurthi Lodge, Aristo Junction, Thampanoor.

14. In order to prove the case of the accused, they have produced Exts.D4(a) and D4(b) which will go to show that complaints regarding forceful taking of some statement from them were sent to the Home Secretary and also to the Chief Justice of this High Court and it is seen from Ext.D4(b) that it was acknowledged by the High Court on 26.12.1998. Further, the fact that there was commotion occurred and one accused was escaped from the custody of the N.C.B, Thiruvananthapuram unit though denied by the prosecution witnesses, it was proved by the accused by adducing cogent evidence by examining the Assistant Commissioner of Police earlier that such an incident occurred. Further Ext.D2 is the complaint filed by the 1st accused to the Home Department and Ext.D4 is the postal records and it was delivered to the Home Department on 28.12.1998 and the complaint sent to the High Court of Kerala was delivered on 26.12.1998. It is seen from the documents produced that these complaints were sent by the accused persons through somebody after they were taken into custody on 24.12.1998 and that is relating to the statement said to have been taken by the N.C.B. authorities on 24.12.1998. But according to the prosecution, they were arrested only on

25.12.1998 at about 7 pm and it is thereafter that the statement under Section 67 of the NDPS Act was recorded. If the evidence adduced on the side of the accused is believable that they were taken into custody on 24.12.1998 and some statements were obtained by force and a complaint has been filed regarding the same on 24.12.1998 itself, then Exts.P9 and P10 statements said to have been recorded by the detecting cum investigating officer said to have been given by the accused under Section 67 of the NDPS Act could not have been recorded at the time at which it was said to have been recorded by the prosecution and it cannot be said to be a voluntary statement and that could not be relied on by the court for any purpose.

15. Further the court below had considered Exts.D1 to D3 documents produced by the accused coupled with the evidence of DWs. 1 to 3 and found that on 24.12.1998 at about 11.50 pm, the local people of Vellakkadavu took away one accused from the custody of the Superintendent of N.C.B. after causing damage to their vehicle as it was proved by Ext.D1 record maintained by the Flying Squad No.15. But this fact was denied by PW-4 and that throws suspicion about the case of the prosecution that they were arrested on 25.12.1998 at 7 pm from Room No.108 of

Chathurthi Lodge, Aristo Junction, Thampanoor.

16. So under the circumstances, court below had come to the conclusion that there was no acceptable evidence adduced on the side of the prosecution that PW-4 had sent a fax information on 25.12.1998 at about 2.30 pm to the Director, Narcotic Control Bureau, Zonal Unit, Madras regarding the information received by him of this alleged incident on the basis on which he had conducted the search and seizure and the case of the prosecution that they were arrested only on 25.12.1998 at 7 pm as claimed by the prosecution is not believable as the evidence adduced on the side of the accused shows that they were in custody of the N.C.B. authorities on 24.12.1998 itself and some statements were obtained from them by force and complaints have been filed by them regarding the same and rightly came to the conclusion that the case of the accused is more probable and the case of the prosecution creates doubt regarding its genuineness and that benefit was given to the accused and they were rightly acquitted by the court below.

17. On the basis of the evidence, it cannot be said that the view taken by the court below is not probable or possible. It is settled law that if two views are possible and one of the view

taken by the court below is possible and that benefit is given to the accused. Then the appellate court should be slow in interfering with the order of acquittal passed by the court below unless the appellate court is satisfied that the view taken by the court below is perverse and no such view could be possible on the basis of the evidence. Such a conclusion cannot be possible in this case on the basis of evidence available on record. So the appeal lacks merits and the same is liable to be dismissed.

In the result, the appeal fails and the same is hereby dismissed. The order of acquittal passed by the court below against respondents 1 and 2 is hereby confirmed.

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

sd/-
K. RAMAKRISHNAN,
JUDGE

JV