

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 11TH DAY OF SEPTEMBER 2015/20TH BHADRA, 1937

CRL.A.No.132 of 2009 (B)

AGAINST THE JUDGMENT IN SC 884/2005 of II ADDL. SESSIONS COURT,
PALAKKAD DATED 12-01-2009

APPELLANT/ACCISED:

RAJAN, S/O.CHOYI,
MALAYIL VEEDU, CHIRAPADAM, PUNCHAKODE,
MANNARKKAD, PALAKKAD.

BY ADV. SRI.NIRMAL. S

RESPONDENT/COMPLAINANT:

STATE OF KERALA REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY SRI.C.K.JAYAKUMAR, PUBLIC PROSECUTOR.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
11-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Crl. Appeal No.132 OF 2009

Dated this the 11th day of September, 2015.

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 20(b)(ii)(B) of Narcotic Drugs and Psychotropic Substances Act. He was found guilty and was therefore convicted and sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.25,000/- with default clause of rigorous imprisonment for one year. Set off as per law was allowed.

2. The incident is said to have taken place on 17.11.2004. On that day, in the afternoon, PW1 accompanied by other officers of the Police Station were on their way to investigate Crime No.365/2004 and when they were proceeding through the Olavakkode railway station road, they happened to see a person coming along carrying a plastic bag. As soon as he saw the police jeep, he tried to hide himself. Feeling suspicious about his conduct, PW1 alighted from his jeep and questioned the accused. On enquiry as to what the plastic bag contained, he said that it

contained paper plates which have been thrown on the railway track. Feeling suspicious about the answer given by the accused, he was asked to open the bag. When he partially opened the bag, he found a plastic cover inside the bag and then he saw contraband articles in the bag. He was intercepted and presence of two independent witnesses were procured. The contents in the plastic cover was examined in the presence of the witnesses and it was found to be ganja. He was informed that he has committed an offence and he was arrested as per Ext.P1 arrest memo. Since PW1 did not have necessary equipments with him, he asked one of his associates to go to the Police Station and get the equipments. He returned along with a gold smith by name Manikandan. They went to a shop nearby by name 'Lee dress makers' and in the presence of witnesses, contraband articles were weighed. It weighed 1470 gms. PW1 then took 10 gms as samples and three such samples were separately packed and sealed. He had labels affixed on the sample containing the signature of PW1, accused and the witnesses. It was then tied and sealed. After taking the samples, balance ganja was put in a

cover wrapped with a brown cover on which he obtained signature of the witnesses and the accused and tied the same and affixed seal on that packet also. PW1 claims to have prepared seizure mahazar on the spot itself and Ext.P2 is the said mahazar. He thereafter returned to the Police Station along with the accused and the contraband articles seized by him from the accused and registered a crime as Crime No.402/2004 for the offence punishable under Section 20(b)(ii)(B) of NDPS Act and Ext.P3 is the First Information Report. He then prepared the report to be sent to the superior officer as enjoined by Section 57 of NDPS Act and Ext.P4 is a copy of the report. As per the instructions given by Assistant Superintendent of Police, on the same day itself, PW6, to whom accused and the contraband articles were handed over by PW1, took over the investigation. PW6, at the relevant time, was functioning as Circle Inspector of Police at Hemambika Nagar Police Station. He took the investigation on 17.11.2004 and questioned CWs 1, 7 and 9. On 18.11.2004, he went to the scene of occurrence and prepared Ext.P5 scene mahazar. He recorded the statement of other

witnesses and produced the accused and the contraband articles before court. The property list is produced as Ext.P7. The forwarding note prepared by him is Ext.P8 and Ext.P9 is the chemical analysis report. He completed the investigation and laid charge before court.

3. Cognizance of the offence was taken by the court concerned and on appearance of the accused, all legal formalities were complied with. After hearing both sides, charge for the offence punishable under Section 20(b)(ii)(B) of NDPS Act was framed and to the charge, accused pleaded not guilty and claimed to be tried. The prosecution, therefore, had PWs 1 to 6 examined and Exts.P1 to P9 marked. M.Os 1 to 6 were also got identified and marked.

4. After the close of the prosecution evidence, accused was questioned under Section 313 Cr.P.C wherein he denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent. He denied of having been arrested from the place as alleged by the prosecution. He also denied that any articles have been recovered from him. He

maintained that he has been falsely implicated.

5. Finding that the accused could not be acquitted under Section 232 Cr.P.C, he was asked to enter on his defence. He chose to adduce no evidence.

6. On appreciation of the materials before it, court below came to the conclusion that offence has been made out and accordingly convicted and sentenced the accused as already mentioned. The said conviction and sentence are assailed in this appeal.

7. Learned counsel appearing for the appellant contended that a perusal of the arrest memo, Ext.P1, would clearly reveal that the whole prosecution case is false and cooked up. Going by the evidence furnished by PWs 1 and 2, arrest was effected from the place of incident and the time of detection was at 2 p.m. Going by the evidence furnished by the prosecution, PW1 returned to the Police Station and crime was registered at 15 hours on the same day. If that be so, according to the learned counsel, it is inconceivable that arrest memo which is prepared at 14 hours would contain the crime number. No explanation is

offered by the prosecution for this anomaly. Learned counsel then contended that a reading of the evidence of PW3, independent witness, would clearly reveal that search and seizure is not as alleged by the prosecution and the time is inconsistent with the time spoken to by PW1.

8. Referring to the evidence of PW2, learned counsel appearing for the appellant contended that in cross examination he had admitted that no sealing was done at the spot which is contrary to the evidence furnished by PW1. This glaring inconsistency was overlooked by the court below and it is a material object which vitiates the whole proceedings.

9. Learned counsel appearing for the appellant relied on Section 50 of the NDPS Act and contended that on the facts of the case, procedure under Section 50 ought to have been followed. For the said purpose, reliance was placed on the decisions in **Namdi Francis Nwazor vs. Union of India and another** ((1998) 8 Supreme Court Cases 534), **Vijaysinh Chandubha Jadeja vs. State of Gujarat** ((2011) 1 Supreme Court Cases 609) and in **Suresh and others vs. State of**

Madhya Pradesh ((2013) 1 Supreme Court Cases 550).

Learned counsel therefore contended that these vital aspects have not been noticed by the court below and the detection is doubtful and suspicious and the benefit should gone to the accused. Accordingly, it is contended that the conviction and sentence are clearly unsustainable in law.

10. Learned Public Prosecutor, on the other hand, contended that there may be slight inconsistencies and contradictions in the evidence of witnesses. But, that by itself is not sufficient to throw out the prosecution case. The evidence of the prosecution has to be appreciated as a whole and it has to be seen whether the substratum of the prosecution is affected by the contradictions and inconsistencies pointed out by the defence. If the core of the prosecution case remains in tact in spite of the deficiencies, merely because there is discrepancy in the evidence of witnesses, the accused cannot claim acquittal.

11. As regards the appearance of crime number in Ext.P1, learned Public Prosecutor pointed out that no question was put to PW1 while he was in box regarding this apparent defect. He has

no opportunity to explain the same and without bringing the defect to the notice of PW1, the accused cannot rely on the same.

12. As regards the timing pointed out by the learned counsel for the appellant, learned Public Prosecutor contended that the time spoken to by the witnesses are only approximate and therefore not much relevance can be given to the same. Learned Public Prosecutor also pointed out that there is nothing to show whether there was any false implication or there was any ill motive on the part of the police officials in implicating the accused.

13. Referring to the evidence of PW2, learned Public Prosecutor pointed out that though, in cross examination, he submitted that sealing has not been done at the spot, in chief examination he says that after sampling was done and balance was taken, all of them was sealed by the officer.

14. Learned Public Prosecutor pointed out that reliance placed on Section 55 of NDPS Act is also misconceived. There is no case for the defence that PW1 is not a Station House Officer. In the articles seized from the accused, seal of the Station House

Officer is affixed. There is nothing illegal about the same. Section 55 deals with a situation where a person other than the Station House Officer or the person deputed for the concerned purpose takes charge and keeps in safe custody of the articles seized and affixed seal and also does sampling etc. That has no application to the facts of the present case.

15. Learned Public Prosecutor contended that reliance placed on Section 50 of NDPS Act is also misconceived. There was no search of person of the accused and the contraband articles were seized from the bag carried by him. In the absence of search of person of the accused, Section 50 has no application and the decisions cited by the learned counsel for the appellant deal with a situation where search of a person is involved. The decision in **Namdi Francis Nwazor vs. Union of India and another** ((1998) 8 Supreme Court Cases 534) is no longer a good law. In view of the circumstances pointed out in the case, it was held that Section 50 is attracted only when search of a person is involved. It is therefore pointed out that there are no grounds made out to interfere with the conviction and sentence

passed by the court below.

16. After having heard the learned counsel appearing for the appellant, learned Public Prosecutor and also after having perused the records, there seems to be considerable force in the submission made by the learned Public Prosecutor.

17. PW1 is the detecting officer. PW2 was also with him at the relevant time. Both of them would say that they were on their way to investigate a particular crime and when they reached the place, they happened to see the accused coming along the road carrying a bag. Both of them would say that seeing the jeep he became panicked. PW1 intercepted him and questioned him. With regard to the contents of the bag, the answer given by the accused was not satisfactory and therefore he was asked to open the bag. When it was opened, ganja was detected. PW1 then says that he arrested the accused and prepared Ext.P1 arrest memo. He then speaks about having sent a constable to the Police Station to get a kit for further proceedings and having obtained the same he, in the presence of witnesses, weighed the contraband articles which is 1470 gms. He then speaks about

the samples taken by him and packing of balance ganja after taking samples. PW1 speaks about preparation of Ext.P2 seizure mahazar. He also speaks about labeling and he is definite about the fact that on the samples as well as on the balance ganja labels were affixed and the signature of PW1, accused and the witnesses were obtained. He also speaks about having affixed his seal on those packets.

18. It is true that PW2 in his cross examination says that sealing was not done at the spot. But, as rightly pointed out by the learned Public Prosecutor, his evidence has to be read as a whole and in chief examination he does say that seal was affixed on the packets. The attention of PW2 was not specifically drawn to such a contradiction and no explanation was obtained from him. PW6 investigating officer was also not questioned in this regard. In the absence of any such attempt, even if there is any inconsistency in this regard, it cannot be given undue significance.

19. The contention based on Section 55 of NDPS Act is without foundation. That have no application to the facts of the

case. The defence has no case that PW1 is not a Station House Officer and PW1 has stated that he has no independent seal other than the seal of the station which he had affixed on the samples and the balance ganja seized from the accused. As rightly pointed out by the learned Public Prosecutor, Section 55 has no application to the facts of the case and therefore the argument is only to be rejected.

20. Equally misconceived is the contention based on Section 50 of NDPS Act. True in the decision in **Namdi Francis Nwazor** vs. **Union of India and another** ((1998) 8 Supreme Court Cases 534), the view taken was that if ganja or whatever may be the packet carried by the person concerned which is inextricably connected with the accused, Section 50 has to be complied with. Unfortunately for the defence, that decision is no longer a good law. Two other decisions relied on by the learned counsel for the appellant namely, **Vijaysinh Chandubha Jadeja** vs. **State of Gujarat** ((2011) 1 Supreme Court Cases 609) and **Suresh and others** vs. **State of Madhya Pradesh** ((2013) 1 Supreme Court Cases 550) deal with a situation where search of

person was involved and question arose was whether absolute adherence to Section 50 is necessary. It is trite that if search of a person is involved, there can be no leniency and Section 50 has to be strictly complied with. There is cantena of decisions that if search of a person is not involved, Section 50 has no application. Therefore, this contention has to fail.

21. The evidence of PWs 1 and 2 are sufficient to come to the conclusion that there was seizure as alleged by the prosecution. Even though there may be slight inconsistencies as regards the time as spoken to by PWs 1 and 2, there is no dispute regarding the fact that PW3 had witnessed the seizure of articles, labeling, sampling etc. As rightly pointed out by the learned Public Prosecutor, any difference in time spoken to by the witnesses is natural inconsistency due to passage of time and one cannot give undue importance to it.

22. The court below has appreciated the evidence in considerable detail and had come to the right conclusion that offence is made out. On re-evaluation of the evidence, this Court finds no ground to take a different view. The court below was

justified in coming to the conclusion that offence has been made out.

23. What next remains to be considered is the question of sentence. There is nothing to indicate that the accused is a habitual offender. The sentence imposed is slightly harsh considering the quantity of contraband articles seized from the accused. In other words, sentence imposed is disproportionate to the offence.

In the result, while confirming the conviction of the accused for the offence punishable under Section 20(b)(ii)(B) of NDPS Act, sentence awarded by the court below is set aside and instead he is sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.25,000/- in default of payment of which to suffer simple imprisonment for further six months. Set off as per law is allowed.

Sd/-

P.BHAVADASAN
JUDGE

smp

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P.A to Judge.