

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 14TH DAY OF SEPTEMBER 2015/23RD BHADRA, 1937

CRL.A.No. 1112 of 2006 ()

**AGAINST THE JUDGMENT IN SC 3/2005 of SPECIAL COURT (NDPS ACT CASES),
VADAKARA DATED 30.05.2006**

APPELLANT(S)/ACCUSED::

**C.P. KUNHU MUHAMMED, S/O. PAREED,
CHENTHARA HOUSE, MOOZHICKAL P.O., MARAMBILLI AMSOM
VAZHAKKULAM DESOM, PERUMBAVOOR, ERNAKULAM.**

**BY ADVS.SRI.SOORAJ T.ELENJICKAL
SRI.M.A.JOSEPH**

RESPONDENT(S)/COMPLAINANT::

**STATE OF KERALA
THROUGH SUB INSPECTOR OF POLICE
KASABA POLICE STATION, KOZHIKODE, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA.**

BY PUBLIC PROSECUTOR SRI. C.K. JAYAKUMAR

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 1112 of 2006

Dated this the 14th day of September, 2015

J U D G M E N T

The accused was caught red handed with 1.050 Kgms of Ganja and prosecuted for the offence punishable under Section 20(b)(ii)(B) of the NDPS Act. He was found guilty. Accordingly, he was convicted and sentenced to suffer rigorous imprisonment for two years and to pay a fine of ₹10,000/- with a default clause of six months. Set off as per law was allowed.

2. The incident is said to have occurred on 22.03.2004 at about 4.30 p.m.. PW1, the detecting officer, who was the Circle Inspector of Kasaba Police Station while on duty, received reliable secret information that a person was attempting to sell Ganja near the IVS Womens College wearing a cream shirt and white dhoti. PW1 immediately prepared Ext. P1 report to his superior officer as enjoined by law and then proceeded to the spot. PW2 had

accompanied him. When they reached the place, they found a person standing near the compound wall of Kottakkal Arya Vaidyasala and he answered description of the secret information received by PW1. He approached him and told him that PW1 intended to conduct personal body search of the accused and whether he wanted the presence of a gazetted officer or a Magistrate as required under Section 50 of the NDPS Act. The accused declined any such need and gave Ext.P2 consent for body search. When the body of the accused was searched, he was found to have been in possession of some article in a plastic cover tied to his body which on verification turned out to be ganja. He had the weighing balance brought to from the Kasaba Police Station and on weighing the contents, it had the weight of 1.050 Kgms. PW1 has ensured that the search and seizure was in the presence of the independent witness. Out of the total quantity of ganja so seized by him, he weighed 10gms each and made two samples as is required. Label was affixed on

that samples and that it contained the signature of PW1, the accused and the witness. The rest of the ganja was packed and sealed and label was affixed on that also which too contained the signature of PW1, the witness and the accused. PW1 prepared Ext.P3 mahazar on the spot and then returned to the Police Station along with the accused and the contraband articles after preparing Ext.P4 memo at the time of arrest. On reaching the Police Station, he registered Crime No.112/2004 as per Ext.P5 FIR. He ensured that a report to the superior officer about the detection is made which is evident by Ext.P6. Further investigation was done by another officer.

3. PW4 took over investigation. He went to the place of occurrence and prepared Ext.P7 scene mahazar. He recorded the statement of witness and he produced Ext.P8 which indicated that the documents and the material objects were produced before the court on the very next day itself. Ext.P9 is the forwarding note submitted by the officer

concerned. Ext.P10 chemical analysis report was obtained which showed that the articles sent for analysis is ganja and therefore after completing investigation, charge was laid before court.

4. Cognizance of the offence was taken by the court below and on appearance of the accused, all formalities were complied with. After hearing the prosecution and defence, charge for the offence punishable under Section 20(b)(ii)(B) of the NDPS Act was framed and accused was questioned with reference to the charge. He pleaded not guilty and claimed to be tried.

5. The prosecution therefore had PWs 1 to 4 examined and Exts.P1 to P11 marked. MOs 1 to 3 series were identified and marked.

6. After the close of prosecution evidence, the 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.

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

8. The trial court, finding the evidence of PWs 1 and 2 without blemish supported by contemporaneous documents, came to the conclusion that the prosecution has established the case beyond any reasonable doubt and held the accused guilty. Conviction and sentence as already mentioned followed.

9. The said conviction and sentence are assailed in this appeal.

10. The learned counsel appearing for the appellant contended that there are no convincing materials to show the seizure as claimed by the prosecution and there is no strict compliance of Section 50 of the NDPS Act. Further, the independent witness namely PW3, who is alleged to have witnessed the seizure and who is alleged to have signed on the various documents, denied having seen the seizure and

that weakens the prosecution case. Therefore, according to the learned counsel, the case solely rests on the evidence of PWs 1 and 2, who are officials of the department and they are interested witnesses and their evidence without independent corroboration, cannot be accepted in law. Finally, the learned counsel contended that at any rate, the sentence imposed is very harsh and is disproportionate to the offence committed by the accused.

11. After having heard the learned counsel for the appellant and the learned Public Prosecutor and after having perused the records, it is difficult to accept the plea raised on behalf of the appellant that he is innocent. PW1 is the detecting officer. PW2 was accompanying him. They gave a uniform and consistent version about the incident. Both of them say that on 22.03.2004, on the basis of reliable information received by PW1, they proceeded to the place and found a person answering the description given to them was seen standing in front of the compound wall of Kottakkal

Arya Vaidyasala. PW1 has stated that before he proceeded to the spot, he prepared Ext.P1 report as is necessary under the provisions of NDPS Act namely Section 42 and forwarded it to his superior officer. From the endorsement on Ext.P1, it is seen that the senior officer received it on 22.03.2004 itself. PWs 1 and 2 are definite that on reaching the place and finding the person, they found him to be standing in suspicious circumstances and PW1 is said to have gone ahead and told the accused that he intended to search the accused. Both of them say that the statutory right available to the accused was made known to him and he was asked whether he wanted to be searched in the presence of a gazetted officer or a Magistrate. The witnesses say that he replied in the negative and a written consent was given to examine his body which is produced as Ext.P2. PW1 then speaks about having searched the body of the accused and recovered a plastic packet tied to his body. On verifying the contents of the bag, he identified the contents as Ganja. He

speaks about having weighed the same and it weighed 1.050Kgms. Both PWs 1 and 2 then speak about the sampling done by PW1 and seals affixed by PW1 on the samples which containing the signature of PW1, the independent witness and also the accused. These witnesses also say about the packing of balance ganja and affixing of label on that too containing the signature of the above persons. PW1 then says that he arrested the accused as per Ext.P4 arrest memo. Both PWs 1 and 2 say that they returned to the Police Station with the accused and the contraband articles and registered crime as per Ext.P5 FIR.

12. The prosecution examined PW3 as an independent witness, who had witnessed the search and seizure. He denied having seen the incident and any acquaintance with the accused. He also denied the allegation that he had seen the seizure of the articles. However, he admitted that he had signed on Ext.P3. He also admitted that Ext.P2, MOs 1 and 2 contained his signature. PW4 is the Investigating

Officer.

13. As regards the contention based on Section 50 of the NDPS Act is concerned, it is without any basis whatsoever. Both PWs 1 and 2, the detecting officer and the officer who accompanied him had categorically stated that the statutory right was made known to the accused, who replied that he did not require the presence of either a gazetted officer or a Magistrate for the search and that PW1 could proceed with the search. Ext.P2 is claimed to be the written consent given by him.

14. The learned counsel appearing for the appellant contended that the statute does not envisage any written consent to be obtained from the accused and that creates suspicion.

15. It is quite so. The statute does not prescribe any written consent to be obtained. But judicial precedent insists that in order to give authenticity to the so called claim made by the detecting officers that the accused stated

that he did not require the presence of a gazetted officer or a Magistrate, it would be better to get a written consent from him. That is how Ext.P2 came into existence. It is significant to notice that there is no suggestion to PW1 in cross examination that Ext.P2 is either fabricated or is procured by threat and coercion. In fact, there is no cross examination with reference to this document at all. In the absence of any challenge to Ext.P2, there is no reason as to why its authenticity should be doubted.

16. As far as the independent witness PW3 is concerned, true, he does deny having seen the actual search and seizure. But unwittingly enough, he admitted the signature on Ext.P3 mahazar, Ext. P2 document and also on the MOs 1 and 2, the sample packets and the balance ganja seized by PW1. He had no explanation to offer as to how his signature happened to be on those documents. It is quite evident that he was deliberately resiling from his earlier stand to help the accused.

17. Even otherwise, it is not the law that once the independent witness refuses to support the prosecution, the prosecution case should be thrown out. It is well settled by now that if the evidence furnished by the Police Officers is found to be convincing and cogent enough there is no reason as to why it should be rejected simply on the ground that it does not receive corroboration from independent sources.

18. Here the evidence of PWs 1 and 2 have already been referred to. Even though they were cross examined at length, no contradiction or inconsistency could be brought in their evidence or as between their evidence and the documents produced by the prosecution. They stood their ground. PW4 is only an investigating officer who done the routine things. There is no suggestion to either PWs 1 and 2 that they had any axe to grind against the accused and that he has been falsely implicated.

19. On perusal of the records and the evidence of PWs 1 and 2, there is nothing to show that either there has been violation of statutory requirements or that the accused has been falsely implicated. The trial court has considered the evidence in considerable detail and found it to be convincing enough to come to the conclusion that the accused is guilty of the offence alleged against him. That finding does not call for any interference. That means the conviction has to stand.

20. Faced with the above situation, the learned counsel appearing for the appellant pleaded that the sentence imposed is rather on the high side and it is disproportionate to the offence committed by the accused. The learned counsel will emphasis that there is no previous history of such illegal transactions conducted by the accused and some leniency may be shown to him.

21. Even though the offence is a serious one and affects the society, the fact remains that the sentence has to

be proportionate to the offence committed. The quantity seized is only a little over, it is a small quantity even though it is contraband article. Considering the various aspects namely that the quantity seized, the fact that there is no previous history of the accused having been engaged in such nefarious activities, it is felt that some leniency can be shown in this regard.

22. Hence, while confirming the conviction of the accused for the offence punishable under Section 20(b)(ii)(B) of the NDPS Act, the sentence of two years rigorous imprisonment is set aside and he is directed to undergo rigorous imprisonment for a period of one year and to pay a fine of ₹10,000/- with a default clause of six months. Set of as per law is allowed.

With the above modification, this appeal is dismissed.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge