

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 16TH DAY OF DECEMBER 2015/25TH AGRAHAYANA, 1937

CRL.A.No. 301 of 2015 (A)

AGAINST THE JUDGMENT IN SC 654/2014 of ADDL. DISTRICT & SESSIONS
COURT - V, KOLLAM DATED 04-02-2015

APPELLANT(S)/1ST ACCUSED:

PRAMOD, AGED 46 YEARS,
S/O.CHELLAPPAN, PREETHI VILASOM, THAMARAKUDI MURI
MYLOM VILLAGE, KOTTARAKKARA TALUK, KOLLAM DISTRICT.

BY ADV.SRI.N.SUNIL JOSEPH

RESPONDENT(S)/STATE:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM - 682 031
REPRESENTED BY THE CIRCLE INSPECTOR OF EXCISE,
EXCISE CIRCLE OFFICE, KOLLAM DISTRICT.

BY PUBLIC PROSECUTOR SRI.ABHIJITH LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
16-12-2015, ALONG WITH CRA. 130/2015, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

Pn

SUNIL THOMAS, J.

Crl. Appeal Nos. 301 of 2015 & 130 of 2015

Dated this the 16th day of December, 2015

J U D G M E N T

These appeals are filed by the 1st and 2nd accused in S.C. No.654/2014 of the Additional District and Sessions Judge-V, Kollam, in which both the accused were found guilty, convicted and the 1st accused sentenced to undergo rigorous imprisonment for 5 years and to pay a fine of ₹50,000/- and the 2nd accused convicted and sentenced to undergo rigorous imprisonment for 2 years and to pay a fine of ₹10,000/- with a default sentence.

2. The case of the prosecution was that, on 29.03.2014 at about 9.15 p.m., while PW6, the Excise Circle Inspector was on a regular patrol duty, he intercepted an Auto rickshaw driven of the 2nd accused. The 1st accused was riding on the back seat. Vehicle was stopped 10 meters east of where the witnesses were standing. Both the persons rushed out of the vehicle and ran away from the spot. Both of them were arrested and a search of the vehicle revealed that a bag containing 1.500 Kgs of Ganja was kept behind the rear seat. The Detecting Officer communicated to them, his intention to have a body search of both the accused

and the options under Section 50 of the NDPS Act were offered to them. They conveyed that the search may be conducted in the presence of the Detecting Officer himself. Body search did not reveal any contraband articles. Sampling was done at the spot and two samples of 25 grms each were separated, packed, sealed and affixed with labels. The remaining contraband articles were also packed and sealed. After preparation of the contemporaneous documents, they were taken to the Excise Office and subsequent formalities were completed. After investigation, final report was laid against the accused for the offence punishable under Section 20(b)(ii)(B) of the NDPS Act. Both the accused pleaded not guilty and faced the trial.

3. On the side of the prosecution, PWs1 to PW6 were examined and Exts.P1 to P24 were marked. MO1 to MO3 were identified. Exts.X1 to X3 were marked as the Court documents through CW1 and CW2, the Court witnesses. On the side of the accused, DWs1 to DW3 were examined and Exts.D1 and D2 were marked. The Court below on an evaluation of all the materials found both the accused guilty, convicted and sentenced them. With respect to the 1st accused, the Court below found that he has

already been convicted in another offence, the judgment copy of which was produced. Hence an enhanced sentence of 5 years was imposed on him. The 2nd accused was imposed with a sentence of 2 years. This is under challenge in both the appeals.

4. Heard Advs. Sri. N.Sunil Joseph & Sri. M.K.Chandramohan Das on behalf of the appellants 1 and 2 respectively and the learned Public Prosecutor. Examined the records.

5. The prosecution case is sought to be established essentially through the oral testimony of PW6, the Detecting Officer. This was sought to be corroborated by the oral testimony of PW1, who was the Preventive Officer attached to the Excise party. Both of them have given evidence substantially touching upon the crucial aspect of search and seizure. Their version was sought to be further corroborated by the evidence of PW5, who was projected as the independent witness. Not only that he did not support the prosecution case, he went to the extent of denying the signature on Ext.P1 seizure mahazar.

6. The contemporaneous documents that were pressed into the service to corroborate the version of PW1 and PW6 were

Exts.P1 mahazar, Ext.P4 search list, Exts.P8 & P9 arrest memos, Exts.P10 and P11 arrest notices. They also to a limited extent corroborate the prosecution case in general.

7. Ext.P19 is the Forwarding Note dated 24.12.2014, by which samples were forwarded to the forensic lab. The evidence on record indicates that the samples as well as the accused were produced before the Court on 30th itself. The supporting document indicates that the sealed packets were produced before the Court and there was no indication of interpolation. However, the Forwarding Note was forwarded from the Court Office only on 02.07.2014. It was received by the forensic lab on the same day. It appears that, there was substantial delay in forwarding it to the chemical analysis lab. This delay was sought to be explained by examining CW1 and CW2, the Officers attached to the Court, through whom Exts.X1 to X3 were marked. Exts.X1 and X2 indicate that the Thondi was received by the Thondi Clerk in sealed condition though the document indicates that it was only sealed, but not labelled. Evidence of CW2 coupled with Ext.X3 indicates that it was dispatched only on 02.07.2014. In other words, though the Forwarding Note was prepared much earlier, it

was sent for chemical analysis only on 02.07.2014. Evidently, it was in Court till it was forwarded. Hence the delay in forwarding it to the chemical analysis lab stands explained. Further, Ext.P23 indicates that the samples reached the lab without any tampering, the seals remaining in tact and it tallied with the sample seal. Hence it is clear that the sample which was taken at the spot were properly sealed and it reached the Court without much delay and in turn it reached the chemical analysis lab in tact without any apparent indication of interpolation. Ext.P23 chemical analysis report further indicates that the sample was Ganja.

8. The defence set up by the accused was that, the 1st accused was arrested from his house at about 5 p.m. on 29.03.2014. The defence of the 2nd accused was that he was arrested from a distant place at Cheerankavue while he was driving his auto rickshaw. The contention of both the accused was that they were arrested at a different place and they were not involved in the transportation of Ganja. To establish this, they not only tried to elicit answers through the cross examination and asserted it in their reply to Section 313 Cr.P.C. questioning.

Further, DW1 to DW3 were examined to establish this defence. DW1 is the wife of the 1st accused, who deposed that he was arrested on 29.03.2014 at 5 p.m. from their house. She had visited the husband in the Excise Office during that night, when she was informed that the accused will be produced before the court on the next day. DW2 and DW3 who are strangers have also deposed that the 2nd accused was arrested at around 3.30 to 4 p.m. The date was not properly elicited through the above witness.

9. This version spoken by the defence witnesses will have to be appreciated in the back ground as to whether the defence set up by the accused is more probable and is entitled for the benefit of doubt. The learned counsel for the accused contended that the versions spoken by the independent witness was to the extent inconformity with the defence version. However, regarding the evidence of PW5, the independent witness did not say in many words that he was not aware of the incident. He was trying to establish a slightly different version from that of the prosecution case. There is no reason as to why the prosecution should falsely project him as a witness. Hence, it is evident that,

for reasons best known to him, he denied his own signature in Ext.P1 seizure mahazar. The learned counsel further contended that in several documents especially in Exts.P10, P11 and P14 etc. there were over-writing in the dates shown either as 29 or 30 ie; the date 29th was corrected as 30th or 30th corrected as 29th. This, according to the counsel, established the defence case. It was also further contended that, it cast serious doubt on the prosecution case and supports the case of the defence, that the documents were executed subsequently after falsely implicating the accused in a case. I have referred to all the disputed documents. It is true that, there are certain corrections of the dates written by PW6 alone. In few of the documents, in which he appears to have corrected the date either as 29th or as 30th, I am not inclined to accept it as a defence for two reasons. Firstly, the version of PW1 indicates that the seizure was at sometime at 9.15 p.m. and the entire formalities went up to late night. Hence the possibility of an inadvertent mistake in mentioning the date cannot be ruled out. Further in all the documents wherein such corrections are made, it else where bears the correct date either in the body of the document or entries made by other signatories

to those documents. These rule out any malafide interpolation.

10. The learned counsel for the accused contended that there was serious infraction of Section 50 of the NDPS Act. The learned counsel referred to the version of PW6 as well as Ext.P1 to contend that, PW1 while purporting to make an offer under Section 50 of the NDPS Act, stated that they can avail the presence of a Judicial Magistrate or a Gazetted Officer and added that he himself was a Gazetted Officer. Relying on the decision of the Hon'ble Supreme Court in **State of Rajasthan V. Parmanand [2014 (1) KLT 1030 (SC)]**, it was contended that while giving a third option, the spirit of Section 50 was frustrated. To buttress the same argument, the learned counsel relied on the decision reported in **State of Haryana and others V. M.P. Mohla (2007 (1) SCC 457)** to contend that if the evidence of independent witness is lacking, the evidence of the official witnesses will have to be approached with great caution. In the earlier decision, the Hon'ble Supreme Court had found that the Detecting Officer has given an option as contemplated under Section 50 and in addition had informed that they can also have the search before DW5, J.S. Negi. This was a clear case of carving

out a third option. It was not contemplated under the statute. That is not the case in the case at hand. In the present case, PW1 had only disclosed that he himself was a Gazetted Officer. Probably it may indicate that an indirect hint was given to the witness that if they choose, he himself can be opted for. Since it did not specifically and categorically carve out a new options and further, the decision in **Parmanand's case** revolved on other infractions also, I am not inclined to accept the contention of the learned counsel for the appellants.

11. Relying on the **paramanand's case** again, the learned counsel further contended that the search list was signed by the 2nd accused only thereby, there was an infraction of Section 50. A reference to the version of PW6 coupled with P1 indicate that both the options under Section 50 were made known to both the accused separately, though it is not recorded separately. It was accepted by both the accused. Merely because, in the search list, 2nd accused alone had signed, does not by itself frustrate the specific offer made under Section 50 to the accused. Further such a suggestion was not put to PW1 and his explanation solicited as to why there was signature of the 2nd

accused alone.

12. The learned counsel, further relying on the decision reported in **Ulrichweitz V. State of Kerala (2012 (KHC) 108)**, contended that the source of Ganja was not proved. It was further contended that on the lables, the Crime numbers were seen mentioned. Regarding the 1st argument, it is true that the source from where the Ganja was brought was not found out by the Investigating agency. That by itself will not absolve the accused of their liability, since the possession of the contraband is alleged against them. Further regarding the Crime number seen on the label, PW6 has given an explanation that he knew the crime number.

13. An appreciation of the above facts indicate that, the omissions, contradictions and embellishments projected by the accused as well as the defence set up by them is not sufficient to displace the evidence tended by PW6, corroborated by PW1, which gets corroboration from the contemporaneous documents. There is no reason to believe that the prosecution has failed in proving the aspect of recovery.

14. It is also pertinent to note that, the accused is not

charged with an offence under Section 29 of the NDPS Act. However, even though the 2nd accused was the owner of the vehicle, he alone being answerable for a conscious possession, the question whether the conscious possession can be attributed to the 1st accused who was appears to have been only travelling in the vehicle was also raised by the learned counsel for the 1st accused. It is true that, A2 was the driver of the vehicle which is also proved through the evidence of PW2. However, the conduct of the accused has also to be appreciated. The version of the eye witness indicates that, after the vehicle was directed to be stopped, the vehicle stopped 10 meters east where the witness was standing. Both the accused ran out of the vehicle. They were stopped and intercepted thereafter. This conduct of the accused will go a wrong way in casting doubt on complexity of the accused and the conscious possession of the article. Having regard to these facts, I find that both the accused are liable for offence alleged under the NDPS Act and the conviction arrived at by the Court below is hence liable to be sustained.

15. The Court below after having found both the accused guilty, had imposed the sentence of two years rigorous

imprisonment on the 2nd accused coupled with a fine of ₹10,000/- and in default, to undergo rigorous imprisonment for 2 months. However, regarding the 1st accused, rigorous imprisonment of 5 years with a fine of ₹50,000/- and a default sentence of 10 months was imposed. The Court has relied on the judgment in SC No.23/2011. The learned counsel for the 1st accused vehemently contended that had a plea for an enhanced punishment being sought either there should have been a charge for that or the accused should have been cautioned on the judgment which was proposed to be relied on against him. Evidently, no separate charge was framed on the basis of an enhanced punishment. Further, he appears to have been not heard on the evidence proposed against him. However, there are materials on record through the evidence of DW1 himself that he is involved in two other crimes though there is no conviction as such proved through DW1. Considering this fact, I feel that the sentence of 5 years is slightly on the higher side and a sentence of 3 years would serve the interest of justice. The conviction of the accused with regard to all other aspects is retained.

In the result, Crl. Appeal No.301/2014 is allowed in part,

modifying the sentence imposed on the 1st accused to a sentence of 3 years rigorous imprisonment coupled with a fine of ₹50,000/- (Rupees fifty thousand only) in default of which he shall undergo rigorous imprisonment for 10 months. Crl. Appeal No.130/2015 is dismissed, confirming the sentence to the 2nd accused of 2 years rigorous imprisonment with a fine of ₹10,000/- (Rupees ten thousand only) and in default to undergo rigorous imprisonment for 2 months.

Sd/-

SUNIL THOMAS, JUDGE.

/true copy/

P. A. to Judge

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