

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

FRIDAY, THE 18TH DAY OF DECEMBER 2015/27TH AGRAHAYANA, 1937

CRL.A.No. 440 of 2015 ()

AGAINST THE ORDER/JUDGMENT IN SC 209/2014 of ADDL.DISTRICT & SESSIONS
COURT-II, MAVELIKKARA DATED 27-02-2015
CRIME NO. 4/2012 OF CHENGANNUR EXCISE CIRCLE OFFICE, ALAPPUZHA

APPELLANTS/ACCUSED 1 TO 4:

1. VARGHESE @ TONY
S/O JHONY, PALLIPARAMBIL, CHATHANAD MURI
ARYAD VILLAGE, AMBALAPPUZHA TALUK, ALAPPUZHA DISTRICT

2. MANOJ @ KUTTAN
S/O VASUDEVAN, KALARIKAL VEEDU , THUMPOLY MURI
ARYAD VILLAGE, AMBALAPPUZHA TALUK, ALAPPUZHA DISTRICT

3. BYJU
S/O BABU, VALLANCHIRA HOUSE, THONDANKULANGARA MURI
ARYAD VILLAGE, AMBALAPPUZHA TALUK
ALAPPUZHA DISTRICT

4. RAHUL
S/O RAMESHAN, THOPPIL HOUSE, ASHRAMAM WARD
ARYAD VILLAGE, AMBALAPPUZHA TALUK, ALAPPUZHA DISTRICT

BY ADV. SRI.G.PRIYADARSAN THAMPI

RESPONDENT/COMPLAINANT & STATE:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA ERNAKULAM

BY PUBLIC PROSECUTOR:SMT.M.G.LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 30.11.2015, ALONG
WITH CRA. 621/2015, THE COURT ON 18.12.2015 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

Crl.Appeal. Nos.440 & 621 of 2015

Dated this the 18th day of December, 2015

JUDGMENT

These two appeals are filed by accused Nos. 1 to 4 and accused No.5, challenging the conviction and sentence in S.C.No.209/2014 of the Additional Sessions Judge II, Mavelikara, for offences punishable under Sections 8(c),22(c) 28 & 29 of the NDPS Act.

2. The allegation of the prosecution is that on 18/7/2012 at about 6 p.m.,PW1,the Excise Circle Inspector of Chengannur, got a secret information from one Ananda Raj, the Excise Guard, Mundakayam Range, that accused Nos.1 to 4 were likely to reach the KSRTC bus stand, Chengannur, on 19/7/2012 at about 5 a.m., carrying narcotic drugs. He further informed that he can identify the above persons and was willing to cooperate with search and seizure. Immediately, this was conveyed to the superior officer, the Assistant Excise Commissioner, and thereafter necessary arrangements were made for search. Next day, i.e.on 19/7/2012, PW1 reached the spot near the KSRTC bus stand,

Chengannur, along with the party and the excise guard Ananda Raj. They found four persons standing in a circle near the bus stand and one among them taking out a blue socks from a plastic kit and showing the inside of it to the other three persons. Ananda Raj identified them as the four persons, who were carrying the contraband articles. When the excise party approached them, they scattered and ran to different places. All of them were apprehended. On opening the socks, it was found to contain drugs. The intention of PW1, to have a body search of them, was conveyed and informed them about their right to have the presence of the judicial magistrate or a gazetted officer at the time of search. As desired by them, PW2, the Circle Inspector of Police, Chengannur was brought to the scene by a written communication and in his presence search was conducted. From the MO5 socks taken out from MO4 plastic kit of the first accused, 46 ampules containing liquid and 30 broken ampules were recovered. The labels disclosed that they were buprenorphine, a narcotic drug. Rs.700/- was recovered from the first accused. A mobile phone and Rs.180/- were recovered from the second accused. Nothing was recovered from accused

Nos.3 and 4. After sampling and preparation of the contemporaneous documents, accused were arrested. The crime was registered, investigation was completed and thereafter final report was laid by the investigating officer. In the meanwhile, it was found by the investigating officer that the contraband articles were supplied by the 5th accused who was also arrayed as an accused. All of them faced trial before the court below. On the side of the prosecution PWs 1 to P12 were examined and Exts.P1 to P41 were marked. MOs 1 to 5 were identified. On the side of the accused DW1 was examined. The trial court, on an evaluation of the entire materials, found all the accused guilty, convicted and sentenced them to undergo RI for ten years and to pay a fine of Rupees One Lakh each in default of which, to undergo RI for two and half years. This is under challenge in this appeal.

3. Heard both sides and examined the records.

4. Essentially the prosecution is relying on the oral testimony of PW1, the detecting officer, with corroboration from PWs 2, 3 and 4. They also seek corroboration from the contemporaneous documents which are Exts.P3 notice issued to

PW2, Ext.P4 series of search lists, Ext.P5 seizure report, Ext.P10 series of arrest memos, Ext.P12 seizure mahazar, Exts.P12 and P13.

5. PW1 deposed that he was the Circle Inspector of Excise Department, Chengannur. He deposed that on 18/7/2012 at about 6 p.m. he got information from one Ananda Raj about the transportation of narcotic drugs by four of the accused. On getting this information, permission was sought from the superior officers and said Ananda Raj joined the squad on the same night itself. On 19/7/2012 at 4.30 a.m. they proceeded to KSRTC bus stand Chengannur. When they reached the spot, it was found that accused 1 to 4 were standing in a circle and the first accused showing something kept inside a blue socks, to the remaining accused. Ananda Raj identified them as persons who were known to him and suspected to be transporting contraband. They immediately approached them and on seeing them, the accused fled to various directions. The first accused fell down and he was caught. The remaining accused were also apprehended. They were informed about the intention to conduct the search and the option under Section 50 was

suggested to them. As desired by them, the Circle Inspector of Police, Chengannur, was summoned to the spot. After search and seizure, contemporaneous documents were prepared. PW1 deposed that the socks held by the first accused was opened and it was found to contain 76 ampules of buprenorphin. It was deposed that out of 76 ampules, 30 ampules were broken while the first accused fell down. Two samples each of three sets of samples were made, wrapped, tied and sealed. Labels bearing the signature of the accused, witnesses and that of PW1 were affixed. MO2 was sealed packet, MO3 was the balance contraband, MO5 was the socks which they recovered and MO4 was the plastic kit in which socks were kept. All the accused were arrested at the spot. Thereafter, they were taken to the excise office.

6. PW2 was the Circle Inspector of Chengannur Police Station, who also deposed in accordance with the version spoken by PW1. PW3 was a shop owner at the KSRTC bus stand, Chengannur. He was claimed to be witness to the search and seizure, but, he turned hostile. Though he denied his signature on the mahazar, he admitted that he had signed the mahazar.

He deposed that it was done later in the night. According to him, the accused were brought to the bus stand some time in between 10 p.m. to 10 .30 p.m. He did not support the prosecution case in any manner. PW4 was a member of the excise team who deposed in accordance with the version of PW1.

7. The above versions of PW1, PW2 and PW4 tally with each other on material points. Though PW3 had admitted that he had signed the mahazar and deposed that the timing was different, there is no reason as to why the prosecution should come out with a false case. In the above circumstances, I do not find any merit in his version that the accused were brought to the scene in the night at 10 p.m. The version of eye witnesses are substantially uniform and gets due corroboration from the contemporaneous documents particularly Ext.P11, which is the seizure mahazar. Ext.P17 is the forwarding note by which the samples produced in the court were forwarded for chemical analysis. Ext.P41 is the chemical analysis report which shows that the samples contained buprenorphine of 2 mg. each. The quantity of the contents in it varied from 2 mg. to 3 mg.

8. Version of PW1 coupled with Ext.P11 shows that samples were separated, labeled and sealed. Sample seal was affixed on Ext.P11 also. Ext.P11 is the paper containing the specimen signature and the seal of PW1. The crucial documents which are Exts.P1, P4 series, Ext.P8 series, Exts.P11, P12, P13 reached the court on 19/7/2012 itself. The accused were produced on the same day at 5 p.m. This show that there was no delay in producing the accused in the court and also sending the samples to the court.

9. The prosecution contended that the mandatory provisions under the NDPS Act were complied with. To substantiate the claim of compliance under Section 42 of the Act, the prosecution relied on the oral testimony of PW1 and PW2. In Ext.P1, information received from Ananda Raj was noted down by PW1 on 18/7/2012 at 6.p.m. Ext.P2 is the intimation sent by PW1 to his superior officer PW5. It was sent by PW1 along with a copy of the information recorded by him. Ext.P2 reveals that it was received by PW5 on 19/7/2012. PW5 in his evidence had confirmed the receipt of Ext.P2. Ext.P14 was the report sent by PW1 to PW5 in compliance of Section 57 of the

NDPS Act.

10. Regarding the compliance of Section 50, the learned counsel for the accused relying on the decisions reported in **Vijaysinh Chandubha Jadeja v. State of Gujarat** [(2011) 1 Supreme Court Cases 609] and **Narcotics Central Bureau v. Sukh Dev Raj Sodhi** [Laws (SC)-2011-5-54], contended that there was no substantial compliance of Section 50 of the NDPS Act. However, PW1 in his evidence had deposed that he had informed all the accused about their entitlement to have the search conducted in the presence of a judicial magistrate or a gazetted officer. As desired by them, PW2, the Circle Inspector of Police, who was a gazetted officer, was brought to the scene. Ext.P3 is the notice issued by PW1 addressed to PW2 and forwarded through one Bijulal, who was the guard of the excise party. It was received by PW2 on the same day, as evidenced by an endorsement on it. PW2 in his evidence corroborated the version of PW1 touching upon the search and seizure conducted in his presence which was in full compliance of the provisions under Section 50 of the NDPS Act.

11. The defence set up by the accused was that they were

arrested on 18/7/2012 at 8.30. at Alleppey in front of Prince hotel. According to accused 1 to 4, they were drunk and were falsely implicated by PW1. Thereafter, they were taken to Chengannur and a false case was set up by PW1. This allegation was denied by PW1 as well as PW4 in their oral testimony. Both of them denied the allegation of the accused that they were at Alleppy on 18th. It was suggested that after the arrest, a complaint was submitted by the mother of the 4th accused on 20/7/2012 contending that accused 1 to 4 were taken into custody at Allapuzha and implicated in the NDPS offence falsely at Chengannur. To substantiate the above defence, DW1, the Deputy Excise Commissioner, was summoned. He produced Ext.X2 a copy of the complaint submitted by the mother of the 4th accused. After enquiry, Ext.X1 reply was given, wherein it was informed that the 4th accused was involved in a bad company and was implicated in a case. It was informed that enquiry did not reveal any truth in the allegations made.

12. The above defence was pursued by the accused in the course of cross examination also. The learned counsel for the accused contended that the version of the prosecution was

highly doubtful and not sufficient to inspire confidence. It was further contended that there were several doubtful circumstances in the prosecution case and that the evidence of the witnesses were tainted. It was contended that though one Ananda Raj was stated to have given a secret information and had taken an active and prominent part in the search and seizure, strangely he was not examined in the court. It was further contended that he was also not a signatory to Ext.P11 seizure mahazar. Even according to PW1, he got secret information about the transportation of contraband articles from the said Ananda Raj at about 6 p.m. Immediately thereafter, he took orders of the superior officer and Ananda Raj joined the search team at 9.p.m. This shows the undue interest shown by Ananda Raj which cast serious doubt on the prosecution case, goes the argument of learned counsel. I find no merit in the above contention of the learned counsel, since on getting secret information, quick action, which was expected from the excise party, was taken. Ananda Raj had claimed himself to be acquainted with the accused and was the only person who could have identified the accused. Hence, the excise party cannot be

found fault with for having caused him to join the party.

13. It was further contended that PW1 in his evidence has stated that the place of the incident was a straight road. It was contended that it was hard to believe that when the jeep of the excise party arrived, the accused did not see it from a distance and they suddenly intercepted the accused. Version of PW1 itself shows that they were busy engaged in watching the contraband articles. Hence, there is nothing to believe that the accused might have seen the jeep, even from a distance. It was further contended that the specific case of the prosecution was that MO5 was blue socks. In the course of cross examination of PWs1 and 4, it was brought out that it was a socks of check design with multiple colours. When PW1 was confronted with this, his explanation was that it appeared to be blue when seen against the light. On the other hand, PW4 in his evidence deposed that it was essentially with more blue colour. In the light of the above explanation, I am not inclined to give much weight to the contention of the defence.

14. The prosecution heavily relied on the mobile phone calls of the accused to contend that they were closely

communicating with each other. Their presence at the spot lead to a reasonable conclusion that they were in conscious possession of the contraband articles. It was also intended to prove the complicity of the accused in the transportation of the contraband articles. Materials on record disclose that the first accused disclosed that his mobile phone number was 9605239255. Second accused disclosed that his mobile number was 9288159799. The allegation of the prosecution was that this number belonged to PW8 who was the sister of the second accused. According to the prosecution, she used to keep her mobile phone at home while going for the work and it was used by the 2nd accused. Ext.P39 series are the call details in relation to that mobile phone. PW8 in his evidence admitted that he used to keep the mobile at home when she go for work. However, she denied the allegation that calls were made from that mobile to the other accused.

15. The 3rd accused had revealed that his mobile number was 9061186363. The 4th accused disclosed that his mobile number was 9809179100. According to the prosecution, this mobile connection was taken by PW9, who gave it to one

Sandeep, who was her sister's son. Sandeep's phone was allegedly used by PW9. However, the witness denied the suggestion of the prosecution in this regard. At the time of examination of PW9, she feigned ignorance to a specific question as to whether the 4th accused was using this number. When Sandeep was examined as PW11, he also denied the allegation that the 4th accused was using that number. The 5th accused was not arrested from the spot. The allegation of the prosecution was that on interrogation of accused Nos. 1 to 4 they revealed that contraband articles were supplied to them by the 5th accused. 5th accused had disclosed that his mobile number was 9526524038. The prosecution case was that the Sim card of that mobile belonged to PW10, who denied the suggestion. Call details regarding the above mobile phone were marked as Ext.P40 series.

16. With the above mobile numbers of the accused and the call details in the form of Exts.P39 and 40 series, the learned public prosecution vehemently contended that it proved the close acquaintance and mutual interaction between the accused and that they have been making frequent calls. No doubt, it is a

very weak form of evidence. Call details only indicate the close acquaintance with the persons or at the most that they have been contacting each other. That does not by itself prove that the accused were actively involved in the transportation of contraband articles.

17. According to the prosecution, the role of the 5th accused was revealed by accused numbers 1 to 4. Ext.P37 is the statement of the 5th accused recorded under Section 67 of the NDPS Act by PW12. Exts.P6 to P10 were the statements allegedly given by the accused numbers 1 to 4 under Section 67 of the NDPS Act after their arrest. The prosecution relied on it heavily and contended that accused had given statements confessing to their guilt. It appears that the court below has relied on the above statements to conclude that the accused had admitted their guilt and that it was admissible in evidence. The court below relied on the decision reported in **State of Kerala v. Intelligence Officer [2003 KHC 2642]** to hold that the above confession statement is admissible in evidence. However, the learned counsel for the accused relied on the decision reported in **Raju Premji v. Customs NER Shillong Unit v.**

Arun Kanungo v. D.Pakyntein[2009 Crl.L.J.3972] to contend that such confession made by the accused would be inadmissible in evidence. It was not relied on the facts also. In the case at hand also, the accused had not admitted that they had given any voluntary statement. In other words, the only way to connect the 5th accused with the other accused, according to the prosecution, is the alleged phone calls and also the alleged confession statement given by accused 1 to 4. Both are not sufficient to reach the conclusion that the 5th accused was involved in the present transaction with the remaining accused.

18. The learned counsel for the accused vehemently contended that the available materials at the most only indicate that the accused No.1 alone can be attributed with the conscious possession of the contraband. It was contended that the evidence to connect the complicity of the others was extremely weak. It was further contended that at the most conscious possession can be attributed to the first accused alone. However, there are several other materials to prove the complicity of accused numbers 2 to 4 in the crime. In the information received by PW1 recorded on 18/7/2012 at 6 p.m. the specific information

conveyed by Ananda Raj was that all the four accused who were identified by their names were proceeding to Chengannur and were likely to reach there the next day morning. The address of the accused indicate that all the four accused belong to Ambalapuzha Taluk. However, according to the prosecution, all of them were found at far away place at Chengannur and that too at early hours of 5.30 a.m. The accused in their section 313 Cr.P.C. questioning have not given any valid explanation regarding their presence at Chengannur. As mentioned earlier, there is absolutely no evidence to show that the accused were arrested on the previous night at Alappuzha in front of the hotel Prince.

19. According to the eye witnesses and also as per the contemporaneous documents, when the excise party reached the spot, the first accused was found opening the socks and showing the contents to the remaining accused. They were keenly watching the activity of the first accused. When the excise party approached them, all of them ran to separate directions. If they are not involved in crime, there was no reason for them to attempt to escape. The court below relied on decision quoted in

Jagadeesh Rai v. State of Punjab [JT 2011 (3) SC 196] to hold that the conduct of the accused evidenced their complicity and also about conscious possession. Having regard to the above facts, culpable state of mind of the accused 2 to 4 can be deducted in the light of Section 35 of the NDPS Act. Hence, accused 1 to 4 are found to be in conscious possession of the contraband and the finding of the court below to that extent is liable to be confirmed. On the other hand, the evidence clubbing the 5th accused with conscious possession is very weak and hence, he is entitled for the benefit of doubt .

20. It is pertinent to note that 46 ampules of buprenorphin were recovered from the accused. 30 broken ampules were also recovered. PW1 in his evidence had indicated that the above 30 ampules were broken when the first accused fell down. It also shows that they were in possession of 30 ampules of buprenorphin. Evidently, this cumulatively constitute commercial quantity in the light of the notification- S.ONo. 1055 (E) dated 19/10/2011 of the Government. In the light of the above and also the decision reported in **Binu v. Union of India and Others** [2011 (2) KHC 810], the only conclusion is that the contraband

recovered from the accused numbers 1 to 4 was of commercial quantity and the finding of the court below to that extent is also liable to be confirmed.

21. The court below has imposed a substantive sentence of ten years and to pay a fine of Rupees One Lakh each in default, to under rigorous imprisonment of two and half years . I find no reason to hold that the sentence imposed on accused 1 to 4 is on the higher side. On the other hand, the prosecution did not succeed in proving the complicity of the 5th accused beyond any shadow of doubt. Hence, the 5th accused is entitled for acquittal.

22. In the result, while confirming the conviction and sentence imposed by the court below on accused Nos.1 to 4, in his entirety the 5th accused is granted benefit of doubt and is acquitted. Bail bond executed by him shall stand discharged. He shall be released from jail, if his further continuation in jail is not warranted in connection with any other case.

Crl.A.No.621/2015 is allowed. Crl.A.No.440/2015 is dismissed.

Sd/-
SUNIL THOMAS
Judge

/true copy/ PS to Judge.

dpk

