

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

THURSDAY, THE 26TH DAY OF NOVEMBER 2015/5TH AGRAHAYANA, 1937

CRL.A.No. 481 of 2015 ()

AGAINST THE JUDGMENT IN SC 361/2011 of ADDITIONAL DISTRICT & SESSIONS
COURT - VIII, ERNAKULAM DATED 19.03.2015
CRIME NO. 583/2011 OF THOPPUMPADY POLICE STATION , ERNAKULAM

APPELLANT/2nd ACCUSED:

ABDUL KAREEM AGED 39 YEARS
S/O.ALI, PALACKATTU HOUSE, THURUTH
VADAKKUMUKKU, ALUVA

BY ADV. SRI.T.D.ROBIN

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY S.I. OF POLICE THOPPUMPADY POLICE STATION
CRIME NO 583/2011 OF THOPPUMPADY POLICE STATION)
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM

BY PUBLIC PROSECUTOR : SRI ABHIJITH LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26-11-2015,
ALONG WITH CRA. 618/2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

APPENDIX

PETITIONERS EXHIBITS:

ANNEXURE 1 : PHOTOCOPY DISCHARGE SUMMARY ISSUED BY Dr.GREGORY
K.NAINAN DATED 17.8.2012 OF PVS MEMORIAL HOSPITAL

RESPONDENTS EXHIBITS:NIL

True Copy /

P.S to Judge

SUNIL THOMAS, J.

Crl.A. Nos. 481 & 618 of 2015

Dated this the 26th day of November , 2015

JUDGMENT

These appeals are filed by the second and first accused respectively, who stand convicted for offences punishable under Section 22(c) to undergo RI for 12 years and to pay a fine of Rs.1,00,000/- each with default sentence of SI for one year and for RI for six months each and to pay a fine of Rs.5,000/-each, in default to undergo SI for one month each under Section 20 (b)(ii)(A) of the NDPS Act in SC No.361/2011 of the Additional District & Sessions Judge-VIII, Ernakulam .

2. The case of the prosecution was that on 13/03/2011 at about 4.30 pm, the Sub Inspector of Police, Thoppumpady police station got a secret information that narcotic drugs were being transported in a Scorpio vehicle bearing registration No.KL50 7023. After recording it and informing his Superior Officer, he, along with three other police constables, proceeded to a junction at Thoppumpady.

Thereafter, the vehicle came and when they tried to intercept the vehicle, it sped away. It was chased and was stopped. Two persons who were in the vehicle tried to escape, but were apprehended. In a bag kept in the rear seat of the vehicle, contraband items were found and after affording them an opportunity of being searched in the presence of a Gazetted Officer, personal search was conducted. 1105 ampules of lupigesic, 60 ampules of Phenergan, 8 syringes, 14 needles and 90 gms of ganja were recovered from the above bag. A sum of Rs.6,000/- and two mobile phones were recovered from the second accused. From the first accused, one mobile phone was recovered. They were arrested, and after completion of all formalities, taken to the police station. Ext.P14 FIR was registered. PW4, the Circle Inspector of Palluruthy Police Station, completed the investigation and laid the final charge.

3. Before the court below, both the accused pleaded innocence and demanded trial. On the side of the prosecution, PWs 1 to 4 were examined and Exts.P1 to P20 were marked. MOs 1 to 14 were identified.

4. The court below, on an evaluation of the entire materials,

found both the accused guilty, convicted and sentenced them as mentioned above.

5. Aggrieved by the above conviction and sentence, both the accused have preferred these separate appeals. Heard Adv.Mr.Anilkumar on behalf of the first accused and Mr.T.D.Robin on behalf of the second accused. Learned Public Prosecutor Mr.Abhijith Leslie defended the prosecution. Examined the records.

6. The prosecution essentially relied on the oral testimony of the detecting officer, SI of Police, Thoppumpady, who was examined as PW3. PW2 was the CI of Mattancherry Police station, whose presence was procured by PW3 to oversee the search, as contemplated under Section 50 of the NDPS Act. PW1 was a motor cycle rider who, while traveling along the road, reached the spot and is claimed to have witnessed the process of search, seizure and sampling. The above three witnesses generally spoke in terms of the interception, search, seizure and preparation of the contemporaneous documents. To corroborate the oral testimony of the above witnesses, the prosecution relied on Ext.P1, which was the seizure mahazar. The other

contemporaneous documents relied on were Exts.P2 and Ext.P3 series, which were the labels affixed on the samples of contraband items, bearing the signature of the accused, the independent witnesses, the investigating officer and the Circle Inspector of police. Ext.P5 was a letter issued by PW3 to PW2, Ext.P6 was a report under Section 42 of the NDPS Act, Ext.P7 was the arrest memo of accused 1 and 2, Exts.P8 and P9 were the inspection memos of both the accused, Exts.P10 and P11 were the custody memos of the accused and Exts.P12 and P13 were the Consent statement allegedly given by both the accused. These documents were pressed into service to contend that the oral evidence of the crucial witnesses were in complete agreement with the contemporaneous documents.

6. The defence set up by the accused was a case of total denial. According to the first accused, the case was false one and that he was arrested from the house. He met the second accused only at the police station. The second accused also contended that he was innocent, that the case was a fabricated one, and that he was also picked up by the police from the house. Cross examination of the witnesses were also in accordance with the

above defence.

7. PW1, the independent witness, deposed that he came to the scene after the interception of the accused. According to him, on the relevant day while he was traveling along the road on a bike, he saw the crowd and stopped the vehicle. He saw the accused, their vehicle and the police. The bag kept on the rear seat was opened by the accused and ganja and ampules were seen inside the bag. He deposed that the detecting officer before conducting search had enquired as to whether they required the presence of the gazetted officer, to which they replied in the affirmative. Immediately, a letter was forwarded to the CI of Police through a police constable and after some time, he reached the spot. Physical search was conducted thereafter. The accused was arrested, sampling was done and the contraband articles were wrapped and sealed. Labels were affixed and the mahazar was prepared. He identified all the material objects produced in the court and asserted that they were seized on the relevant day and necessary documents were also prepared at the spot.

8. PW2 was the Circle Inspector of Police, who deposed

that on receipt of Ext.P5 intimation from PW3, the Sub Inspector of Police, he rushed to the spot in his official jeep. He was introduced and search was conducted in his presence. The bag taken from the rear seat was opened and samples were drawn from the contraband articles. All the contraband were sealed, labeled and after completion of all the formalities, they were taken to the police station. PW3, the detecting officer also gave the meticulous details of the entire process of interception, search, drawing of samples, packing, sealing and preparation of contemporaneous documents. Though all the three witnesses were cross examined in detail, absolutely neither any inter se contradiction nor with their respective previous statements given to the police were brought out. The accused could also not establish any omission in their deposition.

9. Exts.P2 and P3 series were stated to be the labels affixed on the contraband articles. Sealed packets were opened in court, labels taken out and separately marked. All the above labels bear the signature of the accused, witnesses, CI of Police and that of the detecting officer. Ext.P2 series were labels affixed on the sealed packets which had the seal and thread

attached to it. These labels can hence also be considered as contemporaneous documents. Ext.P15 is the property list which reached the court on 14/3/2011. The contraband articles and the samples reached the court on 21/3/2011. Ext.P6 is a copy of the forwarding note by which samples were forwarded for chemical analysis. Ext.P20 is the chemical analysis report which shows that Buprenorphine was detected in item Nos. MOP2 and MOP4 and the material object MOP5 was identified as ganja. Promethazine hydrochloride was detected in sample covered by item No. MOP9. It was reported that promethazine does not come under the purview of the NDPS Act.

10. The learned counsel for the accused vehemently contended that the evidence of PW1 was artificial, spoke parrot like and did not inspire confidence. According to the learned counsel, entire details regarding the search, seizure and the other activities that followed were meticulously spoken by the above independent witness. All the documents of the prosecution were marked through him. According to the counsel, this was sufficient to create suspicion in the mind of the court about the artificiality of the evidence tendered. It is true that PW1 was

present at the spot after the vehicle was intercepted and till the police party left the spot. He has also signed several contemporaneous documents. In the light of the above facts, his presence at the spot and competency to depose cannot be doubted. Even in the chief examination, he had clearly stated several facts with minute details. At the same time, certain facts which were not seen by him, were clearly answered accordingly. To a specific question touching upon the recovery of money from the accused, his reply was that he had not noticed it. Hence, it cannot be said that his evidence was parrot like or artificial. On the other hand, it appears to be too natural. In spite of lengthy cross examination, he withstood it and no contradiction or omission were brought out in his evidence.

11. It was contended by the learned counsel for accused that the alleged interception took place near a tollgate. It was brought out in evidence that at the tollgate, vehicles used to slow down. According to the detecting officer, the police party stood 30-35 meters away from the tollgate. Learned counsel contended that, even in the cross examination, it was suggested that the tollgate would have been the ideal spot for interception

of the vehicle and the selection of another place was suspicious and was sufficient to cast doubt on the version of the prosecution. It was contended that this was justified by the fact that the vehicle, though asked to stop by the police party, did not stop and the police party had to chase it. It is true that the evidence shows that the police party was waiting at a distant place from the toll gate. PW3 replied that though the vehicles stopped at the tollgate, there was no facility for interception there. It was brought out in evidence that they stood at a position, where they could have easily seen the vehicle from a distance. In fact, the evidence also indicate that even at the tollgate, the vehicle involved did not stop. In the above circumstance, the wisdom of the police, who are more experienced, in having selected a place other than tollgate, cannot be doubted, on a reasoning that there would have been many other better choices for interception.

12. The counsel for the accused vehemently attacked the prosecution case on the further ground that there was a delay in registering the FIR. According to PW1, the police party had left the spot at about 6 p.m. However, FIR shows that the crime was

registered at 7.50 p.m. FIR further shows that the place of the incident was only one k.m. away from the police station. Relying on this, learned counsel for the accused contended that either the case of the prosecution that interception was done at the relevant time and in the manner as alleged by them was false or that all the documents were prepared at the police station in the light of long time gap of about one and half hours after interception. However, I am not inclined to accept this argument for the reason that PW3 in his evidence had stated that the police party left the spot at about 7.40 p.m. It appears that immediately thereafter, the crime was registered. Further, PW1 was not certain about the exact time of departure.

13. PW1 in his evidence was specifically asked about the person who prepared Ext.P1 mahazar. He answered that he did not know who among the police officers prepared it. However, he asserted that it was not in the handwriting of PW3. On the other hand, PW3 admitted that Ext.P1 was prepared by him in his handwriting. Relying on this contradiction, the learned counsel for the accused contended that though PW1 gave evidence meticulously and had stated that he had spent about

an hour at the spot and had watched the entire activities, could not reply regarding a most crucial factor as to the author of Ext.P1. It is true that after having spent about an hour at the spot, it could not be expected that PW1 did not see about the author of Ext.P1. This is a circumstance casting doubt on the version of PW1, which has to be weighed against other evidence let in by prosecution.

14. According to PW1, both the accused were sitting in the vehicle till PW2 reached the spot. PW2 in his evidence deposed that he did not see the accused sitting in the vehicle. In the cross examination, PW2 further stated that he had seen accused leaning to the vehicle. Relying on this contradiction, the counsel contended that this shows a serious contradiction in the version of PW1 and PW2. It is pertinent to note that PW2 did not say that when he reached the spot, both the accused were standing outside the vehicle and were leaning to the vehicle. He did not refer to the actual point of time at which he saw accused standing outside the vehicle. That does not mean that it was at the time of arrival of PW2. Hence, there is no contradiction in the version.

15. In the course of cross examination, PW1 replied that police had not recorded his statement after the date of the incident. Then a specific suggestion was put to him that his statement was seen produced in the court. PW1 replied to it that it was recorded at the spot and volunteered to state that PW3 had put questions, which were recorded by the police and that it was signed by him. The learned counsel for the accused relying on this, contended that, admittedly PW1 had given a signed statement to the police on the date of the incident. This signed statement has not been brought on record. It was contended that in fact after the investigation officer had taken over the investigation, he had purportedly recorded the statements of the witnesses and the answer tendered by PW1 as above, did not tally with the prosecution case. According to the learned counsel, if PW1 was believed, there was a previous signed statement, which was suppressed by the prosecution. Even though apparently some confusion was raised regarding the signed statement, it was clarified in the re examination PW1 was asked to clarify as to why his statement produced by the police did not bear the signature, he replied that he does not

recollect about all the documents signed by him, since he has been signing the documents one after the other. The evidence of PW1 shows that though he has been consistent through out, though few contradictions as above have been brought out. There is nothing on record to doubt the general version of PW1, which is in conformity with the evidence of PW2 and PW3.

16. The learned counsel for the accused vehemently contended that there was serious infraction of Section 42 of the NDPS Act. It was contended that though PW3 had deposed that he received the information and recorded it, the GD entry to prove it was not produced. Ext.P6 was the report sent under Section 42 dated 13/3/2011, written by PW2 to PW4. It was received by PW4 and acknowledged by him by an endorsement on Ext.P6 dated 13/3/2011. The counsel contended that though the evidence of PW1 indicated that there was a GD entry relating to the information received, oral testimony of the witnesses cannot be accepted, unless it is proved by documentary evidence itself. The learned counsel for the accused contended that it was the duty of the prosecution to prove the mandatory compliance of Section 42 of the NDPS Act by cogent documentary evidence,

when, the prosecution itself had a case that it was recorded in writing. To buttress his argument, the learned counsel relied on Section 91 of the Indian Evidence Act. According to him, the second limb of it mandates that whenever the law prescribes any matter to be reduced to the form of a document, it shall be proved by production of document itself or by secondary evidence. It is pertinent to note that section 42 does not require that the information received should always be reduced in writing. Though the compliance under Section 42 is held mandatory by the Hon'ble Supreme Court, that does not mandate that information received must be reduced in writing. Since recording is not mandated by law, section 91 may not apply as such and can be proved by parol evidence. Further under Section 91, the contents of document can be proved only by the production of the document and not by the oral testimony. Proof under Section 42 of the NDPS Act is not regarding the proof of contents of the entry made, but as to whether an entry has been made, or not. Hence, it can be proved by convincing oral evidence, especially in this case where there is no challenge that there was no such entry.

17. Another limb of the argument of the learned counsel for the accused in this regard was that the version of PW3 that he had recorded the information in writing is unbelievable. To support his contention, the learned counsel relied on the entry in the FIR itself. Column No.3(b) of FIR relates to the date and time of the information received at the police station, which is recorded as 7.50 p.m. on 13/3/2011. Column 3 (c) of the FIR relates to the general diary entry and the corresponding details are given as entry No.28, with time as 7.50 p.m. According to the learned counsel, this proves that the time of GD entry and the time shown regarding the receipt of the information in the police station are the same as 7.50 p.m. On this premise, it was contended that the claim of PW3 that he had recorded in the GD at 4 p.m. is either false or that the documents were subsequently created at 7.50 p.m. According to the learned counsel, in this case, while creating evidence, inadvertently truth has come out with the correct time of recording of GD as 7.50 p.m. and not 4 p.m. as claimed by the prosecution. There is some force in the above contention and the learned public prosecutor also could not explain as to how GD entry time as

well as the receipt of information came to be recorded as 7.50 p.m.. However, in the absence of any challenge regarding the claim of PW3 regarding the GD entry at 4 o'clock and without inviting the attention of PW3 regarding this entry in FIR, no adverse inference can be drawn. Hence, it is only concluded that the available materials prove that there was strict compliance of Section 42 of the NDPS Act.

18. According to the prosecution, in compliance of Section 50 of the NDPS Act, PW3 had apprised the accused about their right to have search conducted in the presence of the concerned judicial magistrate or a Gazetted Officer. Individual offer seems to have been made by PW3. This was replied by both the accused separately by Exts.P12 and P13. Intimation given to PW3 requiring his presence at the time of search was marked as Ext.P5. The learned counsel for the accused vehemently contended that Exts.P12 and P13 were subsequently created to make it appear that there was compliance of Section 50, at the spot. To support this contention, the learned counsel relied on the evidence of PW3 wherein he stated that Exts.P12 and P13 were made before PW2 arrived at the spot. Learned counsel

drew the attention to the entry in Exts.P12 and P13 which states that the accused was satisfied of search being conducted in the presence of CI Ajaynath(PW2) "who has arrived". According to the learned counsel, this indicates that at the time of preparation of Exts.P12 and P13, PW2 had arrived at the spot. It did not tally with the version of PW3 that Exts.P12 and P13 were prepared even before PW2 had arrived at the spot since recitals itself indicated that by that time PW2 had arrived at the spot.

19. Even though at first blush, this may appear to be a very valid contention, evidently PW3 had only stated that Exts.P12 and P13 were prepared before the arrival of PW2. Evidently by that time, intimation regarding compliance of Section 50 was put to the witness. Their reply was also received and intimation in the form of Ext.P5 had been forwarded to PW2. In the above circumstance by that time it appears that Section 50 of the NDPS Act had been complied with. Merely because the wording in Exts.P12 and P13, did not fully tally with the version of PW3, it cannot be believed that there was no compliance of Section 50 at all.

20. An appreciation of the entire evidence indicates that

the accused had not succeeded in proving very serious inconsistency in the prosecution case except those mentioned earlier. On the other hand, the entire evidence led by the prosecution through the oral testimony of PWs 1 to 3 is uniform, consistent and is corroborated completely by the contemporaneous documents and outweighs considerably than the doubts raised in earlier paragraphs. Prosecution has completely succeeded in proving the case. Findings arrived at by the court below that both the accused have committed offence under the NDPS Act is only to be confirmed.

21. The court below on a valid consideration and having regard to the huge quantity of the contraband seized, has concluded that the accused have committed offence in relation to the commercial quantity. The quantity recovered from the accused is very huge. Evidently, the court has also taken into consideration the social and moral aspects involved while dealing with such a crime. Considering the above facts, the court below has imposed sentence of 12 years each and to pay a fine of Rupees One Lakh with a default sentence of SI for one year for offence under Section 22(c) and RI for six months and

a fine of Rs. 5,000/- in default to undergo SI for one month for offence under Section 20(b)(ii)(A) of the NDPS Act. Considering all the circumstances, no leniency is liable to be shown to the accused.

In the result, the appeals fail and are dismissed confirming the conviction and sentence.

Sd/-

SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.

