

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 14TH DAY OF OCTOBER 2015/22ND ASWINA, 1937

CRL.A.No. 842 of 2015 ()

AGAINST THE ORDER/JUDGMENT IN SC 446/2013 of ADDL.SESIONS COURT -
VII, ERNAKULAM DATED 31.08.2015

APPELLANT/ACCUSED:

ASHRAF AGED 56 YEARS
S/O PAREETH, KLAPPURAVEETIL HOUSE, KANJIRAKKAD BHAGOM
KANJIRAKAD KARA, PERUMBAVOOR VILLAGE

BY ADVS.SRI.MATHAI VARKEY MUTHIRENTHY
SRI.IEANS.C.CHAMAKKALA

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA - 682 031

BY PUBLIC PROSECUTOR: SMT M G LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07.10.2015, THE
COURT ON 14.10.2015 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.842 of 2015

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Dated this the 14th day of October, 2015

JUDGMENT

The sole accused in S.C.No.446 of 2013 of the Additional Sessions Court-VII, Ernakulam, who stands convicted for offence punishable under Section 20(ii)b(B) of the NDPS Act, is the appellant herein.

2. The allegation of the prosecution is that on 01.08.2013, at night, PW1, Additional Sub Inspector of Police got an information that the accused was engaged in the sale of ganja and he proceeded to the spot. He intercepted the accused near a footpath at about 11.10p.m. Before conducting search, the presence of PW4 who was the Excise Circle Inspector, Perumbavoor, was procured and the search was conducted. Accused was found holding a big shopper containing a plastic cover. On opening it, it was found to contain ganja. 2 Samples of 25 gms each were drawn from it, packed in two sample bags and wrapped. Balance contraband item was also wrapped. The contraband and the samples were affixed with labels, sealed and

thereafter, accused was taken to the Police Station. After completion of the investigation, final report was laid and the accused faced prosecution before the court below. On the side of the prosecution, PWs.1 to 5 were examined and Exts.P1 to P11 were marked. MOs.1 to 4(a) were identified. On the basis of the available materials, the court below found the accused guilty, convicted and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs.25,000/-. In default, he was to undergo rigorous imprisonment for one year.

3. Aggrieved by the above conviction and sentence, the accused has preferred this appeal. Heard both sides and examined the records.

4. The prosecution is essentially relying on the oral testimony of PW1, the Detecting Officer and that of PW4 the Excise C.I. who witnessed the seizure. He has spoken in accordance with the interception, detection of the contraband articles and also drawing of the samples. This was sought to be supported by PW2, independent witness. However, he did not support the prosecution case except admitting his signature. PW4 in his evidence deposed that on receipt of a written request, he

reached the spot and in his presence, search and seizure were conducted. He also deposed about the weighing, sampling and sealing. Hence, prosecution is exclusively relying on the oral testimony of PW1, drawing corroboration from the oral testimony of PW4 who supported the version of PW1 regarding the search and seizure and on the contemporaneous documents which are Ext.P1 seizure mahazar, Ext.P3 and Ext.P5 arrest memo.

5. Ext.P7 is the property list and Ext.P9 is the forwarding note. A perusal of Ext.P8 remand report and Ext.P2 FIR indicate that the samples were produced before the court below without much delay on 2/8/2013 itself. Even the accused has no case that the contraband articles were belatedly produced before the court below. By the original of Ext.P9 forwarding note, samples were forwarded for chemical analysis and Ext.P10 chemical analysis report was received. It shows that the samples, were detected as ganja.

6. Learned counsel for the accused vehemently contended that there was infraction of Sections 42 and 50 of the NDPS Act. Ext.P3 is stated to be a report sent under Section 42 of the NDPS Act. Ext,P1 seizure mahazar and Ext.P2 FIR indicates that PW1

the Detecting Officer got a prior intimation regarding the incident. The information received by him at 10.30p.m was that the accused was in possession of ganja, meant for sale. PW1 proceeded to the spot, after a purported compliance of the Section 42 of the NDPS Act, which is specifically stated in Ext.P1 itself. The recital in Ext.P1 indicates that he prepared a letter to his superior officer regarding his proceeding towards the spot on the basis of the secret information received. This letter was personally handed over on the way. Ext.P3 is addressed to the Circle Inspector of Perumbavoor and is endorsed by the recipient officer on same day at 10.45 p.m.. This is admitted in evidence by PW5, the Circle Inspector of Police. However, learned counsel for the accused vehemently contended that this only indicates compliance of Section 42(2) of the NDPS Act and not Section 42 (1). Section 42 mandates that if the Officer receives an information and it is recorded down as contemplated under Section 42(1), a copy of it shall be forwarded under Section 42(2) of the NDPS Act. Evidently, Section 42 contemplates two parts ; first one being, a compliance by recording it down about the information and under Subsection (2), to forward it to the superior officer. Since Ext.P1

as well as the evidence of PW1 clearly shows that Ext.P3 letter was one issued by him under Section 42 of the NDPS Act, evidently, Ext.P3 is one in compliance of Section 42(2) of the NDPS Act. Once it is claimed that Section 42(2) of NDPS Act was complied, it pre-supposes compliance of Section 42(1) also. Ext.P1 and the version of PW1 do not disclose of having complied with Section 42(1) NDPS Act. Specifically, this was suggested to PW1 as well as to the Investigating Officer PW5 at the time of cross examination. PW1 admitted that there is nothing to show the compliance of Section 42(1). He was also not sure whether the G.D extract was produced in court. In fact, it was not produced. PW5 also admitted that investigation did not reveal any document indicating compliance of Section 42(1) of the NDPS Act. Evidently, Section 42 NDPS has not been fully complied with. Honourable Supreme Court in the decision reported in **Sukhdev Singh Vs. State of Haryana (2012 KHC 4756)** held that total non-compliance with the requirements under Sections 42(1) and 42(2) is impermissible. It is clear that the mandatory provision under Section 42 has only been partly complied with. In **Krishachand v. State of Haaryana (AIR 2013 SCC 357)**

Supreme Court held that a strict compliance of Section 42 is required and a compliance under Section 57 will not be a compliance under Section 42 of the NDPS Act.

7. PW4 was summoned to the spot for a compliance of Section 50 of the NDPS Act. PW1 as well as PW4 have stated that, though the contraband was searched and retrieved from a bag which the accused was carrying, the body search of the accused was conducted. Whether or not, any contraband was recovered from the body search, if body search is conducted, it is mandatory that Section 50 NDPS is complied with. This has been categorically laid down in the decision in **State of Rajasthan Vs Parmanand and Anr. (2014 KHC 4138)**. In the present case even though a search was conducted in the presence of PW4, a Gazetted Officer, PW1 has not stated about the compliance of an offer being made to the accused appraising him about his right to be searched in the presence of Gazetted Officer or Magistrate. Ext.P1 also does not disclose that the accused was appraised about his right of being searched. In fact, the version of PW4 was that the accused was informed that he has come to supervise the search. Evidently, the accused was not only not appraised about

his right to have any of these officers of his choice before a search is conducted, it appears that the presence of Gazetted Officer thrust upon him, without being asked. Evidently, there is a clear infraction of Section 50 of the Act.

8. It has come out in evidence that the contraband was weighed in a nearby fruit stall. Learned counsel for accused further contended that a specific question was put to PW1 as to whether the weighing machine which was used for weighing the contraband was calibrated. There is nothing to show that it was either calibrated or was certified by the competent authority. A suggestion was put to PW1 that if the MOs were weighed in a calibrated balance, it would weigh only 850gms. This suggestion was admitted by PW1. Relying on this version; learned counsel contended that even admitting of 50gms of samples were taken, the total value of the contraband was less than 1kg, which is a small quantity as contemplated under the NDPS Act. There is substance in the contention of the learned counsel for the accused.

9. It has been consistently laid that both the above provisions are mandatory and if there is an infraction of the provisions, any search pursuant to such recovery is illegal. In the

light of the specific finding above that there was infraction of the mandatory provisions of Sections 42 and 50 of the NDPS Act, the recovery effected pursuant to such a search is legally not sustainable. Evidently, conviction based on such a search is legally not sustainable and is liable to be set aside. Hence, the conviction of the court below is liable to be set aside.

In the result, the appeal is allowed. The conviction and sentence imposed by the court below is set aside and the accused is acquitted. The bail bond executed by him shall stand discharged. He shall be released from jail, if he is undergoing sentence forthwith and if his presence is not required in connection with any other case.

Sd/-

SUNIL THOMAS
Judge

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