

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

MONDAY, THE 21ST DAY OF DECEMBER 2015/30TH AGRAHAYANA, 1937

CRL.A.No. 9 of 2014 (A)

AGAINST THE JUDGMENT IN SC 22/2011 of ADDL.DISTRICT & SESSIONS COURT-V,
KOLLAM DATED 17-12-2013

APPELLANT/2ND ACCUSED:

MURUKAN AGED 28 YEARS
S/O.DAS, CHARUVILAPUTHAN VEEDU, RAILWAY PURAMPOKKU
PUNALUR RAILWAY STATION WARD, PUNALUR VILLAGE
PATHANAPURAM TALUK, KOLLAM.

BY ADVS.SRI.C.RAJENDRAN
SRI.K.R.RANJITH
SMT.R.S.SREEVIDYA

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE CIRCLE INSPECTOR OF EXCISE
ENFORCEMENT AND ANTI-CARCOTIC SPECIAL SQUAD
KOLLAM THROUGH THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR: SRI ABHIJITH LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21-12-2015,
ALONG WITH CRA. 230/2014, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.Nos.9 and 230 of 2014

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Dated this the 21st day of December, 2015

JUDGMENT

These appeals are filed by the second and first accused respectively, challenging the conviction and sentence in S.C.No.22 of 2011 by which they were convicted and sentenced to undergo rigorous imprisonment for 5 years and to pay a fine of Rs.10,000/- each for the offence punishable under Section 20(b)(ii)(B) of the NDPS Act.

2. The case of the prosecution was that on 16.06.2010 at about 3.15 p.m., while PW2, the Circle Inspector of the Excise Enforcement and Anti Narcotic Squad was on a patrol duty, he got a secret information that the accused are dealing with narcotic drug at a specified place, near the railway station. He informed his superior officer over telephone and proceeded to the spot. They found three persons involved in some activity. On seeing the search party, they got perplexed, one of the member ran away and another attempted to escape. The police party apprehended two among them while the third person fled from the scene. They were intercepted and it was suspected that they were in possession of

ganja. The right of the accused to have a search conducted in the presence of a Gazetted Officer or jurisdictional magistrate was made known to them. Thereafter, PW3 Circle Inspector, Kollam was informed and was requested to reach the spot. He rushed to the spot and thereafter, a personal search was conducted. The search revealed 18 packets weighing 60gms in the possession of the first accused. From a bag carried by the second accused, 2.010kg was recovered. From them, two samples were drawn and after completion of all initial formalities, they were arrested, samples were sealed, packed, labelled and contemporaneous documents prepared. They were taken to the excise office and crime and occurrence report prepared. They were produced before the magistrate and remanded. After Investigation final report was laid. Both the accused pleaded not guilty and demanded trial. On the side of the prosecution, PWs.1 to 7 were examined and Exts.P1 to P12 were marked. MO1 to 3 were identified. The court below on an evaluation of the available materials concluded that both the accused have committed the offence alleged against them. They were convicted and sentenced to undergo rigorous imprisonment for the offence proved against

them. Both the accused have preferred separate appeals. Heard both counsel and examined the records.

3. Prosecution is essentially relying on the oral testimony of PWs.1, 2 and 7 to establish the prosecution case. They also seek corroboration from the contemporaneous documents which are Exts.P1, P4, P5 and P6. Ext.P3 is the secret information which was allegedly received by PW2 and recorded under his instructions. The informant who did not reveal his identity, conveyed about the alleged sale of the contraband. The version of PWs.1 and 2 is sought to be corroborated by the oral testimony of PW3. The version of PWs.1 to 3 generally appears to be consistent and substantially in content tallies with the main contemporaneous document, which is Ext.P1. Evidently, Ext.P1 contains the details regarding the receipt of secret information, interception, search, seizure, sampling, labelling, packing and the arrest of the accused. It also tallies with the compliance of Section 50 of the NDPS Act.

4. Learned Public Prosecutor, relying on the above materials contended that the court below was perfectly justified in concluding that the accused have committed the offence alleged against them. On the other hand, both the counsel appearing for

the accused contended that the version of the witnesses suffered from various infirmities, contradictions and the available materials in fact advanced the defence set up by them. In this regard, it is pertinent to note that defence set up by the first accused was that he was not arrested from the spot and in the circumstances as alleged by the prosecution. It was further contended that even if the prosecution case is believed, the first accused was in possession of only small quantity and the benefit of it should be extended to him.

5. On the other hand, learned counsel for the second accused contended that he was not arrested from the spot which was substantiated by the evidence of PW7 as well as his defence witness examined as DW1. It was further contended that the possession alleged against him was incorrect and there was a wrong implication of the accused herein. It was further contended that the evidence available on record, especially regarding the quantity allegedly recovered from the first accused, also varied. It is true that at some places, prosecution has a case that 18 small packets were recovered from the same accused whereas in several other places, it was mentioned as 17. However, regarding the

actual weight of the contraband allegedly recovered from the first accused there appears to be consistency that it is 60 gms.

6. Learned counsel for both the accused contended that the charge framed against them was irregular and did not specify the exact charge that was alleged against them. According to them, even though the prosecution case was that they were convicted of the offence under Section 20(b)(ii)(B) of the NDPS Act, charge framed by the Court did not specify the specific sub-clause of Section 20(b)(ii) of the NDPS Act. It is true that in the court charge, it is not clarified under which of the subsection of Section 20(b)(ii), offence was charged. However, the charge itself shows that from their possession, 2.070 kgms of ganja were recovered. They were charged with offence punishable under Section 20(b)(ii) of the NDPS Act, without specifying the sub-clause of the above provisions. In the light of the consistent prosecution case that individual quantity recovered from the first accused was 60gms and from the second accused 2.010 kgs, totalling to 2.70kgs and accused have proceeded for trial on the clear basis of the factual basis on which they were prosecuted, I am not inclined to accept the contention of the learned counsel for

the accused especially for the reason that no prejudice is seen caused to the accused.

7. Ext.P7 is the notice sent by PW2 under Section 42(ii) of the NDPS Act. The question of Section 42 subsection (i) of the NDPS Act may not apply since even as per the records, information was received while PW2 was on movement. The material on record clearly shows that there was compliance of Section 42(ii) of the NDPS Act. Ext.P8 is the evidence relating to the compliance under Section 57 of the NDPS Act. This is also not seriously challenged.

8. Regarding the compliance of Section 50 of the Act, the prosecution relied on the oral testimony of PW1, coupled with the entries in Ext.P1 seizure mahazar. This was sought to be corroborated by PW3, the Gazetted Officer and PW1 another witness. In Ext.P1, there was a specific recital that the right of the accused to have search conducted in the presence of jurisdictional magistrate or the Gazetted Officer was specifically conveyed to the accused. Thereafter, PW3 was summoned to the spot. All three witnesses namely, PWs.1 to 3 uniformly spoke about this. There is nothing on record to doubt this version. Hence, I am satisfied that

the evidence proved due and complete compliance of Section 50 of the NDPS Act.

9. Learned counsel for the accused contended that the defence set up by the accused that they were not arrested at the spot is further proved by the absence of service of arrest notice on the near relatives of the accused. It is true that the prosecution did not succeed in proving that due notice was served on the near relatives of the accused. Learned Public Prosecutor also could not find out that there was any material to show that notice was served on near relatives of the accused but, memo and arrest intimation were served on them which bears the signature of both the accused.

10. It was further contended by the learned counsel for the accused that there was considerable delay in producing the documents and the contraband before the court below and more crucially, the forwarding note was not produced before the court below. I am not inclined to accept the first limb of the argument since evidence indicates that all the contemporaneous documents were produced in Court on 17.06.2010 itself. There is an endorsement of the learned magistrate that the accused was also

produced along with the documents. There is absolutely nothing on record to show that the accused, the documents and the samples which were taken at the spot and sealed in the presence of the accused and the witnesses reached the Court, without any further delay.

11. However, regarding the forwarding of the document to the forensic lab, there is no documentary evidence. Forwarding note has not been produced before the court below and learned Public Prosecutor also could not give any explanation as to why the forwarding note was not marked before the court below. Relying on this, both the counsel specifically contended that the link evidence is absent and hence the accused is entitled for the benefit of doubt since it is a primary duty of the prosecution to establish the forwarding of the sample along with the sample seal by definite, cogent evidence. It is true that the forwarding note as such is not seen on record. However, Ext.P1 seizure mahazar bears the sample seal. In Ext.P12, FSL report, there is a specific reference that one sealed parcel sealed with an impression of seal corresponding with the seal impression forwarded and the seal was found intact. It further states that this was with reference to

T.R.No.194 of 2010 dated 29.06.2010 sent through the Excise Guard Sri.C.Sreekumar of the Excise Enforcement and Anti Narcotic Squad, Kollam in Crime No.3 of 2010 was received. The TR number and the crime number tallied with the prosecution case. In the above circumstance, merely for the reason that the forwarding note was not produced, though I am not completely convinced with the non-production, I am inclined to reject the prosecution case as such. Even otherwise, interpolation or tampering of the sample is not something which can be readily inferred. Of course, when all other doubtful circumstance arise, absence of forwarding note also will have much significance. Ext.P12 shows that the sample forwarded contained ganja. Hence, the prosecution has succeeded in proving that the sample which was recovered from the contraband article was ganja.

12. Learned counsel for the accused further contended that from the possession of the first accused, only 60gms was recovered and he is entitled for the benefit of Section 20(b)(ii) of the NDPS Act. It is pertinent to note that the very prosecution case was that both the accused was jointly dealing with the contraband. Ext.P3 which is the secret information itself shows that the information

was that two persons were dealing with the contraband articles. The details of each of the person was also conveyed through Ext.P3. When the detecting squad reached the spot, both were found together in the company of the third party who according to the prosecution was a customer. DW1 was the witness who was examined by the accused to prove that he was not involved in the offence and that the second accused was not arrested from the spot and that, he was falsely implicated. The version of DW1 itself show that both the accused were moving together, he has also said that the second accused was involved in another case and was jailed. He even said that there was cooperation among both the accused. These materials indicate that both the accused were dealing with the narcotic drugs jointly and it cannot be said that both the accused were in separate possession of separate quantity and hence, the charge against them should be dealt with separately and sentence imposed accordingly. Hence, I am not inclined to accept that contention of the learned counsel for the accused.

13. Having appreciated the above facts, available materials indicate that the prosecution has succeeded in proving the case

alleged against both the accused. Necessarily, the finding arrived at by the court below under Section 20(b)(ii)(B) of the NDPS Act is liable to be sustained,.

14. Regarding the complicity of the second accused, prosecution relied on Ext.P10 FIR to show that he was involved in one another case. The evidence of DW1 also shows that the second accused was involved in another case. However, that has not resulted in conviction. The court below imposed a punishment of 5 years. Having regard to the entire facts and circumstances of the case, it appears to be on the higher side. I feel that a substantive sentence of three years would serve the interest of justice, while retaining the fine of Rs.10,000/- with a default clause of one month rigorous imprisonment in case of non-payment. First accused is reported to be in jail. If the first accused has completed the above sentence, he shall be released from jail forthwith. The second accused is reported to be on bail. Hence, he shall surrender forthwith to undergo the remaining part of the sentence.

In the result, these appeals are allowed in part. While confirming the conviction, sentence imposed by the court below is modified to rigorous imprisonment for three years to each of the

accused with a fine of Rs.10,000/- (Rupees ten thousand only) in default of which, each shall undergo one more months' rigorous imprisonment. The first accused shall be released from jail forthwith, if he has completed the above sentence and his continued detention is not required in any other case. The second accused shall surrender before the court below to undergo the remaining part of the sentence.

Sd/-
SUNIL THOMAS
Judge

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P.A to Judge