

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 4TH DAY OF NOVEMBER 2015/13TH KARTHIKA, 1937

CRL.A.No. 65 of 2014 ()

AGAINST THE ORDER/JUDGMENT IN SC 1346/2012 of THE COURT OF THE ADDL.
SESSIONS JUDGE - I, THIRUVANANTHAPURAM DATED 31-07-2013

APPELLANT(S) :

RAJENDRAN @ THAMPURAN,
S/O.BHANU, CANALPURAMBOKKU VEEDU,
CHALUVILA, KANNAMBA DESOM,
VARKALA VILLAGE,
CHIRAYINKEEZHU TALUK.
C.NO.1162, CENTRAL PRISON, VIYYUR,
THRISSUR.

BY ADV. SRI.LAVARAJ M.G.

RESPONDENT(S) :

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

BY PUBLIC PROSECUTOR SRI.ABHIJITH LESLIE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
04-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

Crl. Appeal No. 65 of 2014

Dated this the 4th day of November, 2015

J U D G M E N T

The sole accused, who was convicted by the First Additional Sessions Judge, Thiruvananthapuram for offence punishable under Section 20(b) II(B) of the NDPS Act in Crime No.4/2012, has preferred this appeal.

2. The prosecution allegation was that, while the Excise Inspector was on a regular patrol duty, he got a secret information that one person was dealing with ganja. He sent two Excise Officers in mufti to have a surveillance, who confirmed the truth of the secret information. Thereupon the Excise Inspector along with his party went to the spot and intercepted the accused who tallied the distinct features conveyed in the information received by him. He introduced himself and expressed his intention to conduct a body search. On being informed about right of the accused to be searched in the presence of a Judicial Magistrate or a Gazetted Officer, the accused did not make any reply. Hence intimation was passed on to the Excise Circle Inspector for procuring his presence. After he reached the spot, the search was conducted. From the plastic bag which accused

was carrying, 1.100 kgs of ganja was recovered. Samples of 25 gms each were drawn from it. Thereafter, the accused was arrested. In the meanwhile, the contemporaneous documents which were the seizure mahazar, the arrest memo and the arrest intimation were also prepared. After the arrest, the accused was taken to the Excise Office and the Crime and Occurrence Report was prepared. Another Excise Inspector conducted the investigation and filed the final report under Section 20(b) II(B) of the NDPS Act. The accused was produced before the Sessions Court and he denied the allegations. On the side of prosecution, PW1 to PW6 were examined and Exts.P1 to P12 were marked. MOs 1 to 7 were identified. On an evaluation of the entire evidence, the court below found the accused guilty, convicted and sentenced to undergo rigorous imprisonment for 4 years and to pay a fine of ₹10,000/- in default of which, he was to undergo rigorous imprisonment for one year for the offence proved. He is undergoing conviction and an appeal has been preferred from the jail.

3. Mr. Lavaraj M.G. has filed vakalath on behalf of the accused. Heard both sides and examined the records.

4. The prosecution allegation is sought to be established

essentially through the evidence of PW1, the Detecting Officer, PW2 is the Circle Inspector of Excise, PW4 the Preventive Officer and PW5 an independent witness. All the above witnesses deposed uniformly in accordance with the prosecution case. The Detecting Officer as PW1 deposed that, he got a secret information whereupon the veracity of the information was confirmed through his subordinates. Thereafter, he intercepted the accused. The accused was offered his right to be searched in the presence of a Gazetted Officer or a Judicial Magistrate, to which he did not make any reply. Thereafter, search was conducted in the presence of PW2, the C.I. of Excise. The samples were drawn and contemporaneous documents were prepared. He has given the meticulous details of the entire process of interception, search, sampling, packing, labelling and the preparation of the contemporaneous documents. This version spoken to by PW1 is corroborated by PW2 who was summoned to the spot to witness the search.

5. The version spoken by PW1 is supported by PW4 who also formed a member of the patrol team. PW5 is an independent witness who also spoke uniformly in accordance with the prosecution case. The oral testimony of the above witnesses get

its due corroboration from Ext.P1 seizure mahazar, Ext.P3 the seizure report, Exts.P4 and P5 which are the arrest memo and the arrest intimation. All are contemporaneous documents which support each other. There is no material contradiction in the versions spoken by PW1, PW2, PW4 & PW5. They get their sufficient corroboration from the contemporaneous documents.

6. Ext.P9 is a report sent by the Detecting Officer to the Commissioner of Excise. This was in a purported compliance of the provisions of Section 42 NDPS Act. Even though, the witness was cross examined in detail, nothing could be brought out to doubt the compliance of Section 42 NDPS Act. The learned counsel for the accused contended that, statute prescribes that the information shall be conveyed under Section 42(2) by reporting to the immediate official superior, the Assistant Commissioner of Excise is not the official immediate superior of PW1. Hence, there is an infraction of Section 42(2) of the NDPS Act. I am not inclined to accept this contention because essentially the provision is intended to safe guard the interest of the accused. Merely because the notice contemplated under Section 42(2) is not given to his immediate superior, but to an officer much above in the hierarchy will not by itself vitiate the

proceedings since it amounts to a strict compliance of the procedure contemplated under Section 42 as held in **Kamalasanan V. State of Kerala (2006 (1) KLT 38)**.

7. According to PW1, the accused was informed about his right to have a search in the presence of a Judicial Magistrate or a Gazetted Officer. The accused did not give any reply. Though this could be presumed to be a case wherein he in spite of being informed about his statutory right, he did not avail the opportunity and could have proceeded on the assumption that there was compliance of Section 50 of the NDPS Act, to be on the safer side, PW1 proceeded to ensure the presence of PW2. PW2 in turn has deposed that, he was intimated about the requirement to be present in compliance of Section 50 of the NDPS Act. He reached the spot and thereafter the search was conducted. This is seen recorded in Ext.P2 also. In Ext.P1, PW2 has counter signed confirming his presence at the time of search. Evidently, Section 50 NDPS Act has been complied with.

8. The available materials indicate that, the evidence on record substantially proved the guilt of the accused. There is nothing on record to show that, there was any infraction of the statutory provisions. Hence the Court below has correctly arrived

at a conclusion that the prosecution had succeeded in proving the guilt of the accused.

9. The learned counsel for the accused vehemently contended that, though the quantity recovered from the accused fell within the lower part of the intermediary quantity, the court has imposed a substantive punishment which was not commensurate with the nature of the guilt proved. However, Mr. Abhijith Leslie, the learned Public Prosecutor referred to the deposition of PW6, which showed that the accused was involved in several other cases of similar nature. Definitely, the court below had also borne this in mind while moulding the sentence. Evidently, there was justification in imposing a slightly higher sentence which was not directly proportionate to the quantity of the contraband seized. Evidently, the quantity alone is not the sole criteria while awarding the appropriate sentence. However, having regard to the fact that the accused is about 52 years old and belongs to the lower strata of the society as evident from the available materials though the guilt against the accused cannot be lightly viewed, especially in the back ground that he is involved in the other cases, a slightly lower sentence will satisfy the interest of justice. The available records indicate that, the

accused has been in custody since 25.04.2012. Through out the proceedings before the Court below, the accused was in custody. Thereafter, the appeal was preferred from jail and bail has not been granted by this Court. Evidently it indicates that, he has almost completed more than 3 years of imprisonment.

10. Having regard to the entire facts of the case, I feel that the sentence already undergone would serve the interest of justice in this case. Hence, it is only to be held that the sentence which the accused has undergone till now can be regarded as sufficient sentence for the guilt proved in this case.

In the result, the appeal is allowed in part. While maintaining the conviction, the sentence imposed by the court below is modified, as the sentence already undergone by the accused, inclusive of the default sentence of fine. The accused shall be released forthwith, if his further presence is not required in connection with any other case.

Sd/-

SUNIL THOMAS, JUDGE.

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P. A. to Judge