

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

MONDAY, THE 23RD DAY OF FEBRUARY 2015/4TH PHALGUNA, 1936

CRL.A.No. 656 of 2014 ()

AGAINST THE ORDER/JUDGMENT IN SC 62/2012 of SPL. COURT (NDPS
ACT CASES), VADAKARA DATED 18-02-2014
CRIME NO. 6/2012 OF KUTTIPPURAM EXCISE RANGE OFFICE ,
MALAPPURAM

APPELLANT(S) :

KAJAL .S.K., C.NO.2573, CENTRAL PRISON, KANNUR.

BY ADV. V.O.PHILOMINA (STATE BRIEF)

RESPONDENT(S) :

STATE OF KERALA

R BY PUBLIC PROSECUTOR SRI.GITHESH.R

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
23-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.ABRAHAM MATHEW J.

Crl. Appeal No.656 of 2014

Dated this the 23rd day of February, 2015

JUDGMENT

The accused in Sessions Case No.62 of 2012 on the file of the Special Court (NDPS Act Cases), Vatakara who has been convicted of the offence under Section 20(b) (ii)(B) of Narcotic Drugs and Psychotropic Substances Act and sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.90,000/- and in default of payment of fine to undergo rigorous imprisonment for a further period of 2 years has come up in appeal challenging his conviction and sentence.

2. The accusation against him was that he was found to be in possession of 1.300 Kg ganja in front of Kottaram bus waiting shelter at Valanchery at 11.15 a.m on 14.6.2012. On his pleading not guilty the Special Court tried and found him guilty of the offence.

3. The Excise Inspector and the Preventive Officer attached to Excise Range Office, Kuttippuram, who detected the offence, were examined as PW1 and PW2 respectively. Their initial examination in chief was not conducted in the open court in the presence of the appellant. They filed affidavits in lieu of their examination in chief, and it relates to the material facts. Thereafter, a part of their examination in

chief was conducted in the open court in the presence of the appellant.

4. From the records of the case, I could not find an order passed by the learned Special Judge directing PW1 and PW2 to file affidavits in lieu of their examination in chief. It is not known how they happened to file affidavits.

5. Section 36(C) NDPS Act is the relevant provision relating to the procedure to be followed by a Special court. It is extracted below:

“Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceeding before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.”

The Special Court was bound to follow the procedure prescribed for the trial of Sessions Cases. Section 273 of the Criminal Procedure Code mandates that except as otherwise expressly provided all evidence taken in the course of the trial of a case shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader. The ordinary rule is that trial in a criminal case should take place only in open court. In-camera trial is an

exception provided in Section 327 Cr.P.C. In the Narcotic Drugs and Psychotropic Substances Act there is no provision for trial except in open court and in the presence of the accused.

6. Section 1 of the Indian Evidence Act makes it clear that an affidavit is not evidence. But if there is a provision in any other statute permitting filing of affidavit to prove a fact, an affidavit may be accepted as evidence in the proceedings. Sections 295 and 296 of the Criminal Procedure Code provide for filing affidavit in proof of certain facts by certain persons. No other provision in the Code empowers the court to take affidavit as evidence in a criminal case.

7. The learned Special Judge went wrong in accepting and acting upon the affidavits filed by PW1 and PW2 in lieu of their examination in chief and those affidavits are liable to be excluded from consideration. The result is that the witnesses were cross-examined without their being examined in chief. This is a procedure unknown to law. The only order this court can make is to set aside the judgment and order of conviction and remit the case to the trial court for disposal in accordance with law.

8. Examination of the accused under Section 313 Cr.P.C also leaves much to be desired. About six decades ago the Supreme Court in ***Tara Singh Vs. The State (AIR 1951 SC 441)*** discussed the manner

in which an accused shall be examined under Section 313 Cr.P.C. The court observed “.....it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.” The appellant (accused) does not understand Malayalam. The judgment of the trial court shows that to interpret the evidence and examine him it took the assistance of a court staff who is an ex-service man. Several facts were clubbed together in a single question and put to the appellant in his examination under Section 313 Cr.P.C. No doubt, he could not have understood the meaning of the questions properly.

Prejudice is evident from the questions put to him. To the extent possible only one fact shall be made the subject matter of a question. The sentence should be a simple one. The learned Special Judge completely ignored the binding precedents and the guidelines given by the Supreme Court and various High Courts as to the nature of examination of an accused under Section 313 Cr.P.C.

9. For the reasons stated above, I hold that the trial is vitiated. The impugned judgment will be set aside. But it is not necessary to recall all the witnesses. Only PW1 and PW2 will be recalled and examined afresh. Examination of the accused shall be conducted in accordance with the guidelines given in various judgments of the Supreme Courts and the High Courts.

In the result, this appeal is allowed. The impugned judgment and the order of conviction of the appellant are set aside. The matter is remanded to the trial court for fresh disposal in accordance with the law as directed above.

**K.ABRAHAM MATHEW,
JUDGE.**