

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

FRIDAY, THE 25TH DAY OF SEPTEMBER 2015/3RD ASWINA, 1937

CRL.A.No. 1318 of 2014 ()

AGAINST THE JUDGMENT IN SC 76/2011 of SPL. COURT (NDPS ACT CASES),
VADAKARA DATED 25-07-2014
CRIME NO. 5/2009 OF KUTTIPPURAM EXCISE RANGE OFFICE, MALAPPURAM

APPELLANT:

HANEEFA,
S/o. HASSANKUTTI C.NO.3093,
CENTRAL PRISON, KANNUR

BY ADV. ALEX.A.K

RESPONDENT:

STATE OF KERALA
EXCISE RANGE, KUTTIPPURAM
MALAPPURAM (CR.NO.5/2009)

BY ADV. PUBLIC PROSECUTOR: SMT M G LISHA
BY SRI.ALEX A.K (STATE BRIEF)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.1318 of 2014

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Dated this the 25th day of September, 2015

JUDGMENT

This appeal from jail is preferred by the first accused, who stands convicted in Crime No.5 of 2009 of Kuttipuram Excise Range for offence punishable under Section 20(b)(ii)(b) of the NDPS Act, by the judgment dated 25.07.2014 in Sessions Case No.76 of 2011.

2. The allegation of the prosecution is that on 28.08.2009, at about 6.15p.m., the appellant herein, along with the second accused, was found in possession of 1.050kg of ganja in a plastic bag, while being transported on a bicycle. They were intercepted by PW4, Excise Inspector and his party. After search and seizure, the contemporaneous documents were prepared and accused were arrested. PW5 conducted the investigation and laid the charge against both the accused. Pending the proceedings before the Sessions Court, the second accused died and the charge against him abated. The first accused alone faced the trial.

3. On an evaluation of the materials adduced before the court below, learned Sessions Judge found the accused guilty, convicted and sentenced him to undergo rigorous imprisonment for one year and to pay a fine of Rs.20,000/- for the offence punishable

under Section 20(b)(ii)(B) of the NDPS Act. A default sentence of four months simple imprisonment was also imposed. This appeal was submitted from the jail and on his request, Adv.Alex A.K. was appointed as the counsel on State Brief. Heard the learned counsel for the State Brief and the learned Public Prosecutor. Examined the records.

4. The prosecution case is sought to be sustained on the basis of the oral testimony of PW1, PW2 and PW4 and the contemporaneous documents which are Ext.P1 mahazar, Ext.P3 Section 50 consent report and Ext.P4 arrest memo. Ext.P14 chemical analysis report proves that the sample that was forwarded for testing was ganja.

5. PW1 is an independent witness to the search, seizure and arrest. He supported the prosecution case and deposed in terms of the prosecution allegation. PW2 is the Excise Guard who deposed in accordance with the versions spoken to by PW4 the Detecting Officer. All the three witnesses stated uniformly regarding the essential aspects touching upon the process of interception, search, sampling and the arrest of the accused.

6. Learned counsel on State Brief, who effectively defended the accused, contended that the prosecution evidence is not proved through the version of PWs.3 and 4. Learned counsel contended that there were several material contradictions in the versions

spoken to by both the witnesses. It was contended by the learned counsel that PW2 deposed that the contraband articles were weighed with a weighing balance and weights. Ext.P1 was also in accordance with that version. However, PW4 in his version deposed that an electronic weighing machine was used for the purpose of weighing. It is true that there is a contradiction on this aspect. If the weighing balance is used, there is no question of weight being used for weighing. However, that part alone does not constitute a material contradiction in the oral testimony. There does not appear to be any other major inconsistency, omission or contradiction touching upon the substratum of the case.

7. Learned counsel for the accused further contended that according to the prosecution version, as revealed from the evidence of eye witnesses as well as the documentary evidence, the contraband item which was allegedly recovered weighed 1.050kg. This is seen in Ext.P1 also, where, it is recorded that the contraband articles weighed 1kg and two samples of 25 mg each were separated. That makes a total of 1.050kgs as stated by the prosecution. However, the counsel took me through Exts.P7 and P9 which showed that the main contraband item had a weight of 1.050gm and the sample weighed 35gms each. Evidently, there is a minor difference in the total weight. However, it is pertinent to note that Exts.P7 and P9 indicate the total weight of the samples of the

contraband which were in sealed covers and produced before the magistrate court. It definitely includes the weight of the wrapping papers, the thread used for tying, as well as the weight of the seal even. This makes the marginal difference with the actual contraband weight, which is seen disclosed in Ext.P1. Hence, that does not indicate any other contradiction.

8. Learned counsel for the accused relying on **Palayan Vs. State of Kerala (2002 KLT 874)** contended that there is a infraction of Section 42 of the NDPS Act. It was contended by the learned counsel that PW4 in his evidence admitted that the report under Section 42(2) was not admittedly sent. On that basis, learned counsel contended that the accused is entitled for an acquittal for the non-compliance of the mandatory provision. However, it is pertinent to note that Section 42 has no application to the facts of the case since it did not involve a search of any building or an enclosed place or a vehicle. Even though a vehicle was involved, the contraband was taken from a plastic cover hung on the handle of the bicycle. Evidently, there was no search of any conveyance involved. Further, the vehicle was stationed in a public place. Hence, I am not inclined to accept the contention of the learned counsel for the accused that there was infraction of Section 42 of the NDPS Act.

9. Learned counsel contended that Ext.P1 coupled with the evidence of PW4 indicate that the contraband having a weight of 1.050kg was transported by both the accused together under a common intention as revealed from the evidence. Learned counsel contended that since it was a case of joint possession, according to the prosecution, the liability has to be joint and hence, the conscious possession of the individual accused should be considered as a small quantity as defined under the NDPS Act. The counsel, to buttress his argument, relied on the decision reported in **Muthu Kumar Vs. Station House Officer (2008(2) KLT 890)**. That was a decision wherein the Court found that each of the two accused were found in separate physical actual possession of the contraband. It was not a case of joint possession. On the basis of the above, a Bench of this Court had held that even though the ganja seized from different persons collectively amount to commercial quantity, Section 20((b)(i) will not be applicable if the quantity found in possession of each such person does not amount to a commercial quantity. Evidently, that finding was based on a clear factual finding to support the individual possession of contraband by each of the accused. That benefit cannot be extended to the facts of this case.

10. On an evaluation of the entire evidence, the conclusion that is possible is that the prosecution has succeeded in proving the case alleged against the accused. There is nothing to hold that the accused was not in conscious possession of the contraband and hence, not liable for offence punishable under the NDPS Act.

11. Court below, after having found that the accused was in possession of about 1kg of ganja, imposed a sentence of rigorous imprisonment for one year and to pay a fine of Rs.20,000/- having regard to the fact that the maximum sentence possible was 10 years. To that extent, it appears to be not much on the higher side. Still, there is nothing else to show that the accused was convicted in any other case, though there is an indication that he is already involved in one another case. Learned counsel for the accused informed that the accused has now been released after undergoing the full sentence. This is also confirmed from the concerned jail. Having regard to the facts of this case in this background, I am not inclined to interfere with the sentence also, except to hold that the period already undergone by him will be treated as sufficient sentence, inclusive of default sentence for non-payment of fine.

The appeal is dismissed as above.

Sd/-

SUNIL THOMAS
Judge

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