

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

MONDAY, THE 26TH DAY OF OCTOBER 2015/4TH KARTHIKA, 1937

CRL.A.No. 1502 of 2012 ()

AGAINST THE JUDGMENT IN SC 166/2012 of ADDITIONAL DISTRICT COURT
(ADHOC-I), ERNAKULAM DATED 26-11-2012

APPELLANTS/ACCUSED NOS 1 AND 2:

1. KHIRAT MISHAL AGED 27 YEARS
PRABHULLKUMAR MISHAL, KADAGULAMI VILLAGE, SAHADA POST
BISSAM KATTAK POLICE STATION, RAYAGAD DISTRICT
ORISSA.

2. MADHAV HORIPAL AGED 29 YEARS
S/O.RALY HORIPAL, DAYKKAL VILLAGE
MANIGUDA POLICE STATION, RAYAGAD DISTRICT, ORISSA.

BY ADVS.SRI.R.PREM SANKAR
SRI.V.A.NAVAS
SRI.A.S.SASIDHARAN
SRI.P.J.JOSEPH PANIKKASSERY

RESPONDENT/COMPLAINANT:

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

BY PUBLIC PROSECUTOR: SMT M G LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.No.1502 of 2012

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Dated this the 26th day of October, 2015

JUDGMENT

Both the accused who stands convicted in S.C.No.166 of 2012 of the Additional Sessions Judge (Adhoc-I), Ernakulam for offence punishable under Section 20(b)ii(B) of the NDPS Act are the appellants herein.

2. The allegation of the prosecution is that on 14.02.2012, PW3 the Circle Inspector of Excise, while on a regular patrol duty, got a secret information that two persons were dealing with ganja near a Mosque. He immediately recorded it and thereafter, proceeded to the spot. Two persons belonging to Orissa were found there and on seeing the excise party, they reportedly got perplexed. They were intercepted and the intention of the Detecting Officer to have a body search was disclosed to them. One among them was carrying a shoulder bag. On being informed that they have a right to be searched in the presence of a Gazetted Officer or a Magistrate, they both declined and informed that they would be satisfied if the search is conducted by the Detecting Officer himself. However, the presence of a Gazetted Officer, Circle Inspector of Kunnathunadu excise range, was procured and the body search was

conducted. Ganja having a weight of 5kgs was recovered from the bag carried by one of the persons. After completing the formalities of search, sample was separated from the contraband. The contraband articles and sample were sealed, labelled and after preparation of the contemporaneous documents, both the accused were arrested. Thereafter, the crime and occurrence report was submitted. Further investigation was taken over by PW6, the Circle Inspector of Excise Range, Kunnathunadu. After completion of the investigation, both the accused faced trial before the court below.

3. Based on the evidence of PWs.1 to 6, documentary evidence of Exts.P1 to P12 and the materials objects identified as MOS.1 to 6, the court below concluded that the accused have committed the offence alleged against them and convicted them under Section 20(b)ii(B) of the NDPS Act. Both were sentenced to undergo simple imprisonment for five years and to pay a fine of Rs.50,000/- each in default of which, they were to undergo rigorous imprisonment for two years for the above offence.

4. This is assailed in this appeal. Heard learned counsel for the accused and the learned Public Prosecutor. Examined the records.

5. The allegation against the accused was sought to be proved through the oral testimony of PW2, PW3, PW4 and PW5. PW3 is the Detecting Officer who was supported by PW5, the Excise Guard. PW4 was an independent witness who was the former grama panchayath president. These three witnesses were stated to be persons who have witnessed the search and seizure. PW2 was summoned to the spot to witness the search and seizure in purported compliance of Section 50 of the NDPS Act.

6. The oral testimony of the above four witnesses have to be appreciated along with the contemporaneous documents to find out whether the prosecution has succeeded in establishing the case against the accused. PW2 in his brief evidence has stated that he was intimated to be present to witness the search. He had also deposed about the search conducted by PW3. There was no cross examination of the above witnesses. PW3 in his detailed evidence had deposed about the process of inspection, search and seizure. He has also spoken about drawing of the samples, the details of sealing and labelling of the contraband articles and the samples. The labels were signed by the accused, the witnesses and the Detecting Officer. PW5 has also specifically supported the version of PW3. This is further corroborated by PW4, an independent

witness who has given oral testimony, touching upon the search and seizure.

7. Ext.P3 is the seizure mahazar which gives the meticulous details of the inspection, search, sampling, labelling and sealing of the contraband articles. The evidence tendered by the crucial eye witnesses are in conformity with the recitals in Ext.P3. Ext.P5 is the arrest memo of both the accused which also corroborates the above version spoken by the witnesses.

8. Learned counsel for the accused vehemently attacked the prosecution case alleging that the version of PW3 is unbelievable. There were inter se contradictions in between the version of PW3 with that of PWs.4 and 5. It also did not get sufficient corroboration from the contemporaneous documents. Learned counsel further contended that the prosecution case as such was unbelievable.

9. Learned counsel further contended that both the accused persons belonged to Orissa and were not conversant with the local language. This has resulted in a communication gap and that they could not effectively conduct the case. Regarding the search and seizure, language issue acted as a barrier. However, PW3 has specifically mentioned that both the accused have

revealed that they have been in the locality for the past few years and were working. The evidence also shows that they could speak Malayalam. They also intimated that they can understand the local language without difficulty. It is further stated that they were in fact communicating in the local language. Above all, the evidence also indicates that the Detecting Officer communicated with the accused with the assistance of one Niyaz, who is a Hindi knowing person, as well as PW5 who was conversant with Hindi. In the light of the above, there is nothing to assume that the language barrier stood in the way of proper inspection, search and seizure.

10. Learned counsel further contended that even according to the prosecution, the contraband articles were seized only from the possession of the first accused. Learned counsel vehemently contended that there was nothing to show that there was any recovery from the second accused. It was further contended that there was nothing to show that the second accused was in any way involved in the transaction. Ext.P3 coupled with the version of PW3 indicates that Detecting Officer got the secret information that two persons were in joint possession of ganja. When the excise party reached the spot, both persons were standing together. Both are persons belonging to another State. The inspection was at about

8.15p.m. They could not reasonably explain about their presence at the spot. In the above circumstance, there are reasons to believe that they were acting in combination. An element of concerted activity among both the accused is available from the evidence tendered by the crucial eye witness. In the above circumstance, I am not inclined to accept the contention of the learned counsel for the accused.

11. It is pertinent to note that even though the incident happened during night, the evidence of PW3 indicates that he could conduct the search and seizure in the streetlight and also the lamp near the offering box of the Mosque, where the interception took place. It is also pertinent to note that even though the search was on 14.02.2012, the contraband articles and the contemporaneous documents reached the Court on the next day itself. PW3 has deposed that till the production of the contraband articles, it was in his possession.

12. Even though, PW3 got the information while he was on patrol duty, he has stated that he had recorded it in writing. It is true that a copy of the relevant entries to show that he was recorded it in writing are not available. However, there is no cross examination on this aspect. Further Ext.P8 is a report sent to the

Assistant Excise Commissioner in purported compliance of Section 42 of the NDPS Act. This aspect is also not seen seriously challenged in the cross examination. Hence, there is sufficient indication on record to show that there was due compliance of Section 52 of the NDPS Act.

13. Ext.P3 specifically refers to the intimation given by PW3 to the accused regarding the right of the accused to be searched in the presence of a Gazetted Officer or Magistrate. Both the accused did not avail that opportunity and they informed that they will be satisfied with the search conducted by the Detecting Officer. However, in an attempt to make the search more transparent and credible, the presence of another Gazetted Officer, PW2 was procured. PW2 in turn has deposed that he was summoned to the spot and he had witnessed the search. Even though body search was not conducted, compliance of Section 50 of the Act were there. This is also not seriously challenged in the cross examination.

14. PW3 in his evidence had deposed that immediately after the search and seizure, the report was forwarded to his superior officer. Ext.P9 is the report under Section 57 of NDPS Act, which indicates that it was received by the superior officer on 15.02.2012. PW6 in his evidence had acknowledged the receipt of this

intimation. Evidently, section 57 of the NDPS Act has also been duly complied.

15. An appreciation of the entire evidence leads to the conclusion that the trial court had considered the above aspects correctly and concluded that the prosecution case against the accused stood proved. I find no reason to take a different view or to hold that the prosecution did not succeed in proving the case or that there was any infraction of the provisions of the NDPS Act. Hence, finding arrived at by the court below is only to be sustained.

16. Learned counsel for the accused vehemently contended that the sentence imposed by the court below was excessive. It was further contended that it has no rational nexus with the guilt proved against the accused. Learned counsel further contended that both the accused were young and that they had come to Kerala in search of livelihood. Learned counsel pleaded for a lenient view.

17. There is nothing on record to show that the accused are involved in any other offence. As pointed out by the learned counsel, they are young. Judgment of the court below indicates that they are married with minor children and had parents. However, the offence alleged against the accused cannot be lightly seen. Having regard to the above facts, I feel that rigorous imprisonment

for three years would serve the interest of justice with a fine of Rs.20,000/- with a default clause of simple imprisonment for one month in case of non-payment of the fine. This, I feel, would satisfy the interest of justice, especially when the accused had been undergoing imprisonment since the date of trial court judgment.

In the result, the appeal is allowed in part. While sustaining the conviction, sentence imposed by the court below is modified to rigorous imprisonment for three years and a fine of Rs.20,000/- (Rupees Twenty Thousand Only) payable by each of the accused, failing which, each of them shall undergo simple imprisonment for one month more. Set off is granted.

Sd/-

SUNIL THOMAS
Judge

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P.A to Judge