

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

MONDAY, THE 30TH DAY OF NOVEMBER 2015/9TH AGRAHAYANA, 1937

CRL.A.No. 1119 of 2011 ()

AGAINST THE JUDGMENT IN SC 111/2010 of ADDITIONAL SESSIONS COURT
(ADHOC-I), ERNAKULAM DATED 02.07.2011

APPELLANT/A2:

BENCILY BOY @ RALPH, AGED 25,
S/O.VARGHESE, MARIYA BHAVANAM, KANDACHIRA DESOM
MANGATTU VILLAGE, KOLLAM TALUK, KOLLAM DISTRICT.

BY ADVS. SRI.KRISHNADAS P.NAIR
SRI.T.D.ROBIN
SMT.K.L.SREEKALA

RESPONDENT/COMPLAINANT:

STATE OF KERALA, REP. BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM

BY PUBLIC PROSECUTOR: SRI ABHIJITH LESLIE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17-09-2015, THE
COURT ON 30-11-2015 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

Crl.Appeal. No.1119 of 2011

Dated this the 30th day of November, 2015

JUDGMENT

The second accused, who stands convicted for offence punishable under Section 20(b)(ii)(B) of NDPS Act to undergo rigorous imprisonment for seven years and to pay a fine of Rs.50,000/-, by the Additional Sessions Judge (Adhoc-I) Ernakulam, is the appellant herein.

2. The case of the prosecution is that, on 14/5/2006 at about 3.00 p.m., the Circle Inspector of Excise Enforcement and Anti Narcotic Special Squad, Ernakulam, got a reliable information from the Excise Inspector, Karunagappilly, that two persons were carrying huge quantity of ganja in a suit case in Patna Express and were likely to alight at Aluva Railway Station. Immediately, the Excise Party was alerted and they proceeded to the Aluva railway station. They intercepted two persons, who were standing in the railway station, carrying two suit cases and one person carrying an air bag. They were searched and it was revealed that they were in possession of 30 kgs of dried ganja. The appellant herein was carrying a black suit case containing 14.400 kgs. and the air bag carried by the first accused contained 1.500 kgs of ganja. A suit case carried by the first

accused contained 14.100 kgs of ganja. After completion of the initial formalities, including drawing of samples, accused were arrested and taken into custody. The investigation was completed by PW9, who laid final report against the accused for offence punishable under Section 20 (b) (ii)(C) of the NDPS Act. In the meanwhile, the first accused absconded. The third accused, who was alleged to be the person for whom it was brought, could not be apprehended. Hence, the second accused alone was tried before the court below. On the side of the prosecution, PW1 to PW9 were examined and Exts.P1 to P13 were marked. MOs 1 to 21 were identified. On the side of the accused, DW 1 to DW 3 were examined and Ext.D1 was marked. The court below, on an evaluation of the available materials, found the accused guilty, convicted and sentenced to undergo simple imprisonment for seven years and to pay a fine of Rs.50,000/-. The second accused has approached this Court in appeal.

3. Heard both sides and examined the records.

4. The prosecution, to establish the allegation against the accused, relied on the oral testimonies of PW1 to PW5, corroborated by the contemporaneous documents marked as

Exts.P1, P2 and P3. The oral testimony of PW1 to PW5 were sought to be corroborated by the testimony of PW6 and PW8. PW1 is the detecting officer, who was the Circle Inspector of the Excise Special Squad. He deposed that on 14/5/2006, at about 3 p.m. he got a secret information from PW6 who was the Excise Range Inspector, Karunagapally that two persons were traveling with contraband items by Patna Express and it was expected to reach Aluva Railway Station. PW1 deposed that pursuant to this information, he deputed three officers for secret surveillance at Aluva Railway Station. On finding two persons carrying brief cases and air bag in suspicious circumstances, they alerted PW1 and his party, who reached the spot and intercepted the accused. The process, thereafter, resulting in the search, seizure and weighing of the contraband, drawing of samples, labeling, sealing and finally in the arrest of the accused and preparation of the contemporaneous documents were spoken in detail by PW1. The crucial contemporaneous document is Ext.P1, which is the seizure mahazar. It contains meticulous details of the entire process. Exts.P2 and P3 are the arrest memos in relation to accused 1 and 2. The allegation of the prosecution was that the contraband totaling 30 kgs recovered from both the accused

was intended to be delivered to the 3rd accused.

5. PW2 is an independent witness, who also supported the prosecution case. According to him, he was traveling in the train and was called to be a witness to the search and seizure. He admitted his signature in Ext.P1 as well as on the material objects and the samples. PW3 was the Excise Circle Inspector, who was summoned by PW1 to be an independent witness to the search. He also supported the prosecution case and deposed that he had put the signature on Ext.P1 and the labels affixed on the contraband. PW5 was a member of the Excise team which conducted search and seizure. He also corroborated in detail the process of search and recovery.

6. According to the prosecution, since the contraband was huge, weighing balance, which was available with the special squad, was found to be insufficient. Hence, the contraband articles were taken to nearby shop and were weighed with the help of PW4. This process of weighing is proved through PW4, who admitted the signature in Ext.P1 and corroborated the process of weighing. PW6, the Excise Range Inspector of Karunagapaly, deposed that on getting the secret information about the transport of huge quantity of contra band articles, it

was communicated to PW1. PW8, who was the Excise Inspector of Aluva, conducted a part of the investigation. PW9 completed the investigation.

7. The version of PW1 is uniform, consistent and substantially in accordance with Ext.P1 seizure mahazar. It gets general corroboration from the versions of PW2 to PW5. The fact that the accused was arrested at the spot is also evidenced by Exts.P2 and P3.

8. It is pertinent to note that there is no allegation that there was any delay in producing the contraband and the accused before the court. The materials on record show that the accused and the contraband along with the supporting documents were produced in the court on 15/5/2006. This is spoken to by PW5 and mentioned in Exts.P1 to P3. Property list marked as Ext.P6 also reached the court on 15/5/2006. Evidently, the documents evidencing the arrest, drawal of samples and labeling reached the court without any delay.

9. The process of sampling is spoken in detail by PW1 corroborated by the available witnesses. Samples were separated and labels were affixed on that. The samples, which were properly sealed at the spot, reached the court without

delay and from there it was forwarded for chemical analysis along with the forwarding note marked as Ext.P7. Ext.P13 is the chemical analysis report which shows that the samples reached the chemical analysis lab, without any tampering and with the seal in tact. To ensure that the seal and the signatures of the witnesses and that of the accused were not tampered and to ensure its confidentiality, MO 15 was also pressed into service. It is a paper slip bearing the names of PW1, the accused and the witnesses. Along with Ext.P1 seizure mahazar, the specimen seal was affixed on a white paper. Evidently, these procedures were adopted to ensure the reliability of the entire process of search and seizure.

10.Ext.P13 chemical analysis report indicates that the sample that was drawn from the spot contained ganja. Hence, the prosecution has established that the contraband which were recovered were ganja. This fact is also not seriously seen disputed in the cross examination.

11. However, the learned counsel for the accused vehemently challenged the evidence regarding sealing, sampling and labeling. The learned counsel contended that though it may appear that the versions spoken by PW1 to PW5 were uniform

and that it gets corroboration from Exts.P1 to P3, there were several embellishments and loopholes in the version and a closer analysis of the evidence, exhibited contradictions. It was contended by the learned counsel that the prosecution case was that the details regarding the transportation of ganja by two accused were passed on by PW6 at 3.p.m. itself. The version of PW1 also shows that he got a clear information with sufficient details. According to the learned counsel for the accused, with this details, the investigating agency was sufficiently cautioned to take necessary steps for a valid apprehension of the accused and for strict compliance of the mandatory provisions of NDPS Act. According to the counsel, in spite of furnishing the details, it is highly unbelievable that the special squad was ill equipped to meet such a contingency. It was contended that to conduct a search at the last moment, the Special Squad had to search for a reliable witness. It was also contended that the Special Squad did not even have a weighing balance to weigh the contraband and had to go in search of balance during night and ultimately had to cross the National Highway to get it weighed, in a vegetable shop. According to the counsel, this evidences unreliability of the evidence that was sought to be pressed into

service to establish the case against the accused.

12. It is pertinent to note that though detailed information was passed on by PW6 to PW1, there was no indication that very huge quantity of contraband was being transported. It has come out in evidence that 30 kgs of ganja was allegedly seized. Evidently, an information that huge or bulk quantity of ganja was being transported was not conveyed to PW1. Hence, the prosecution could not be found fault with for not being equipped with a weighing balance sufficient to weigh such a huge quantity. At the same time, PW1 in his evidence has deposed that the samples were weighed with a small weighing balance which were available with him.

13. Evidently, the accused were apprehended at 7p.m. PW1 in his evidence has stated that, since bulk quantity was recovered and that too kept concealed in two suit cases and one air bag, the available weighing balance could not be utilized. He has also stated that, being night time, most of the shops were closed. In this contingency, the Excise Party had to go in search of a shop which was open at that time, to get contraband articles weighed. Ultimately, they searched out the vegetable shop and the contraband articles were weighed there.

In this peculiar circumstance, there is nothing to disbelieve the prosecution version on the mere ground that the Special Squad had to go in search of a shop during night to get the contra band weighed.

14. The learned counsel for the accused very seriously attacked the procedure for weighing adopted by PW1. It has come out in evidence that after contraband items were detected, the accused were asked to remain in the railway Station under the guard of four officials of the Excise Party and the remaining members of the party including PW1 proceeded to the nearby shop to get the contraband weighed. This is mentioned in Ext.P1 also. The facts mentioned in sequence, as found in Ext.P1, discloses that the accused were left in the custody of four officials at the railway Station and the remaining persons proceeded towards the shop. The process of weighing and sampling is described in detail at page 5 of the seizure mahazar. Thereafter, it is stated that contraband was seized. Thereafter, along with PW4 who had weighed the contraband, the party returned in the vehicle of the excise party to the railway station and completed the process at the railway station.

15. The above evidence clearly indicates that the weighing

was done in the absence of the accused. The learned counsel for the accused vehemently challenged this process and contended that the search and seizure thereupon is tainted, legally not sustainable and the accused is entitled for acquittal on that score alone. It is evident that the accused were not present while contraband articles were weighed. It is true that such a procedure is unusual and the accused ought to have been present at the time of weighing to ensure the reliability of the process of weighing. However, it has to be appreciated in the background of the special circumstances, wherein unusually huge quantity of contraband was recovered at a railway station during night. The evidence indicates that all the contra band articles were kept concealed and wrapped in a plastic papers inside in suit cases as well as in an air bag. They were searched in the presence of PW3, an independent officer. PW3 was specifically summoned to ensure that the process of search was carried on in the presence of a gazetted officer. PW2 is another independent witness who had reached the railway station by train. Both the above witnesses had witnessed the process of interception and search. After completion of that process, the Excise Party proceeded for weighing to the shop at a distance.

Evidently, both the independent witnesses were taken along with them. Contraband articles were carried in a closed bag. Weighing process alone was done in that shop. This is witnessed by another independent witness. In the special circumstance, other option available to the detecting agency would have been to take the accused to the shop, which would not have been possible safely considering the distance and the time. Further the reasons that prompted the party to retain the accused at the station are the facts which are within the knowledge of the excise party, which have not been solicited. However, PW1 was not cross examined on this aspect touching upon the procedure adopted for weighing the contraband, in the absence of the accused. Had he been given such an opportunity, he would have explained the compelling circumstances, if any.

16. It is true that the accused has a specific case that he is innocent and was roped in a false case. However, the entire process of search and seizure was done in the presence of accused and witnessed by the independent witnesses. The versions of PW1 to PW5, who are the official witnesses, are in conformity with the versions of two independent witnesses. It is also pertinent to note that PW4, the shop keeper, had also

deposed that the Excise Party had reached the shop with suit cases and got the contraband articles weighed. He had also deposed that the contraband brought were ganja. In the absence of any challenge or in the absence of any suggestion casting doubt on this part of the process, I feel that the accused cannot get the benefit of doubt, especially when there is no suggestion that the contraband articles were thereafter planted or substitution of contraband alleged. In the above circumstances, notwithstanding the fact that the accused was not taken for weighing, there appears to have been sufficient guarantee in the procedure adopted to ensure that there was no tampering, interpolation or planting of contraband.

18. Another important defence set up by the accused was that the sampling was also done at the shop of PW4, which also vitiated the process of search and seizure. Perusal of the sequence of events, as mentioned in Ext.P1 above, clearly indicates that the contraband were taken to the shop of PW4 where it was weighed. Thereafter, the process of separation of samples and the process of drawing samples are narrated. Procedure of labeling is also mentioned therein. The sequence of events further indicates that after that, they returned to the

railway station and further process continued there. The learned counsel for the accused contended that it may appear that the sampling was done at the vegetable shop in the absence of the accused. However, it is pertinent to note that it is not spoken to by PW1 in clear terms that the sampling was done at the shop. His version was also not challenged by the accused touching upon this aspect.

19. The learned counsel for the accused contended that though the version of PW1 may indicate that the sampling was done at the shop and the labels containing the signature were pasted at the time of sampling, strangely it had the signature of the accused on the labels. According to the learned counsel, if it is believed that the sampling was done at the shop, there was no chance of signature of the accused being affixed on the labels, since at that point of time, they were at the railway station. According to the learned counsel, how the signature appeared on the labels is not explained by prosecution. It is true that the prosecution has a case that labels bear the signature of the accused. However, the version of PW1 is not very clear or categorical that labeling took place at the shop itself. Further the suggestion as to how the signature of the accused appeared on

the label, was not put to PW1. In the absence of any suggestion to PW1 as to how the signature appears on the label, and without giving an opportunity to PW1 to explain this part of evidence, no inference can be drawn doubting the prosecution case. The process of search, seizure, drawing of samples and labeling are consistently spoken by both the independent witnesses.

20. It was vehemently contended by the learned counsel for the accused that the accused was given an option as to whether they require the presence of a gazetted officer or a Magistrate while conducting the search. Both accused declined. However, PW3 was summoned to the spot to supervise the search. The learned counsel contended that this voluntary offer made by PW1 itself is sufficient to cast doubt on the prosecution case since a purported compliance of Section 50 was done to make it appear that Section 50 of the NDPS Act was also complied with. It is true that, according to the prosecution, the accused have refused the offer for search in accordance with Section 50. In spite of that, PW3 was summoned to the spot. One limb of the contention of the accused was that if it was in a purported compliance of Section 50, the procedure adopted by PW1 in summoning PW3 to the spot was wrong and hence, violates the

provision of Section 50. According to the learned counsel, if an option is exercised under Section 50, the accused shall be taken to the nearest gazetted officer or to the nearest Magistrate rather than the officers being brought to the spot. According to the learned counsel, this procedure was incorporated by the Parliament in his wisdom to ensure that the search was conducted at the place of the concerned authority rather than they being brought to the place of recovery. According to the learned counsel, this was intended to ensure the compliance of process of Section 50 in substance and not to be complied as an empty formality.

21. It is true that Section 50 states that the accused shall be taken to such authorities mentioned in Section 50. Though the Hon'ble Supreme Court in **State of Punjab.v. Baldev Singh** (AIR 1999 SC 2378) **Dilip and Another v. State of M.P.** [(2007) 1 SCC(Cri.) 377], **Vijaya Sinh Chandubha Jadeja v. State of Gujarat** [Laws(SC)-2010-10-72), **Kishan Chand v. State of Haryana** (AIR 2013 (SC) 357) and **State of Rajasthan v. Paramanand and Another** (2014 KHC 4138) and several other cases have consistently laid down that strict compliance of Section 50 of NDPS Act is mandatory, they are not authorities

that the accused shall be taken to be officers mentioned in Section 50 of the NDPS Act. In this case since the accused was given an offer to have the assistance of the officers, which they declined, compliance of Section 50 of the Act does not arise. Further statute demands strict compliance of search in the presence of the prescribed authority, whether accused is taken to the authority or vice versa. Consequently, not taking the accused to the gazetted officer is inconsequential and hence, not likely to vitiate the process. Summoning of PW3 is not to be treated as a purported compliance of Section 50 of the Act. It can only be considered as a step to ensure a more reliable process of search and seizure. Hence, I am not inclined to accept the contention of the learned counsel for the accused.

22. The prosecution tried to rely on the oral testimony of the above witnesses and the contemporaneous documents which were Exts.P2 and P3 arrest memos in relation to the second accused. It was contended by the learned counsel for the accused that there was infraction of Section 42 of the NDPS Act. According to PW1, on receipt of information regarding the alleged transportation of ganja, he had informed the superior officer, in writing. A copy of the intimation was marked as

Exts.P11 and P11(a). Ext.P8 is the copy of the report sent to the superior officer. In Ext.P1 also, there is a reference that the matter was informed to the Deputy Excise Commissioner. The above report was produced by PW1 himself, who, in the meanwhile, had assumed office as the Deputy Excise Commissioner and was in the possession of the file relating to the above. It was marked as Exts.P11 and P11(a). It shows that there is an endorsement that Ext.P11 was received by the Assistant Excise Commissioner.

23. The prosecution claimed that there was strict compliance of Section 50 of the NDPS Act. Though the contraband articles were recovered from the bag, there was evidently body search, as deposed by the Excise Circle Inspector of Kunnathunadu. The evidence of PW1 coupled with Ext.P1 indicates that after interception, the accused were informed about their right to have the presence of the judicial magistrate or a gazetted Officer at the time of search. Though both the accused declined, the presence of the Excise Circle Inspector of Kunnathunadu was procured and in his presence, search was conducted. The learned prosecutor relying on the decisions reported in *State of Punjab v. Baldev Singh* (supra), *Vijaya sinh*

Chandubha Jadeja v. State of Gujarat(supra), Kishan Chand v. State of Haryana(supra) and **State of Punjab v.Balbir Singh** (1994 Crl.L.J. 3702) contended that the above decisions imposed mandatory duty on the official concerned to strictly comply with Sections 42 and Section 50 of NDPS Act. No doubt, the settled law is that the provisions are mandatory, that strict compliance of the above provisions are contemplated and that substantial compliance of the provisions alone is not sufficient.

24. The learned counsel for the accused contended that though there was purported compliance of Section 50, it was not specifically put to the accused and that they have a right to seek for the presence of either of the officials. Version of PW1 as well as entries in Ext.P1 show that in fact both the accused were informed about their right to have search conducted in the presence of either of the officials. It was clearly stated that they were apprised of their right. The learned counsel further contended that the evidence only indicated that both the accused were informed in common about their right to have search done under Section 50 of the NDPS Act. Relying on the decision reported in State of Rajasthan v. Paramanand and Another

(supra), it was argued that each of the accused must have been individually informed about their right to be searched before the concerned authorities.

25. It is pertinent to note that PW1 in Ext.P1 has recorded that both the accused were informed about their right, whereupon both declined the presence of the officials. It evidently shows that both were informed . Though it does not specifically state that each accused was individually asked and that each of the accused refused, it does not either show that option was put to only one of the accused. The plain meaning of the entry is that it was put to both accused and both refused it. The above decision was rendered in the background wherein a written intimation was given to one of the accused and he acknowledged it on behalf of the other accused also. It was on that premise, the Hon'ble Supreme Court held that presumed authorisation was not valid and that there must be a clear intimation to each of the accused. The available materials in this case clearly indicate that there was strict compliance of Section 50 of the Act and both the accused were apprised of their right to have searched in the presence of the officials.

26. The appellant herein had set up a defence of total

denial. It is seen evident from the various suggestions put to the witnesses and the reply given by the accused in his answer to Section 313 Crl.P.C. questioning. He has a case that he had earlier studied in a seminary and one of person in Aluva Seminary had financially helped him in difficulties. According to him, on the relevant day he had occasion to reach Aluva to seek financial assistance. He got some money and on his way back to Kollam, which was his native place, he reached Aluva Station, where he was caught by the Excise Party, implicating him falsely in a narcotic case. His defence is sought to be established through oral testimony of DW1 to DW3.

27. The above defence set up by the accused was sought to be proved through DW3. In his evidence DW3 deposed that he know the second accused. He was a lecturer in Mangalappuzha Seminary. He deposed that he used to financially help the accused for his mother's treatment and other necessities. He deposed that on a day in May 2006, he had given Rs.10,000/- to the second accused. The above accused in his written statement had indicated that he had met DW3 on that day, collected money and while he was on his way to Kollam, he was intercepted by the police. He asserted that he was absolutely innocent.

However, there are several factors which make the above defence unbelievable and liable to be rejected. Though he stated that he was in a financially difficult condition and had borrowed Rs.10,000/- from DW3 on that day, from his possession, a sum of Rs.12,690/- was recovered. He has no explanation as to how he came in possession of a sum of Rs.2,690/-. Though he contended that he had not travelled in Patna Express as alleged and that he has also not travelled with 2nd accused and had a case that Patna Express comes late at about 10 p.m., this is falsified by two reasons. Firstly, MO 19 tickets(2 numbers) for traveling from Vishakapattanam to Cochin were recovered from the pocket of the second accused. He has no explanation as to how he came in possession of the travel tickets. If he had come to Aluva only and was waiting for return to Kollam, he has to explain as to how he came in possession of the two train tickets from Vishakapattanam. Secondly, PW2 in his evidence had stated that on that day he travelled in Patna Express from Palaghat, got down at Aluva and then witnessed interception by the Excise party. It clearly falsifies the case that Patna Express comes at about 10 p.m. Another important factor to be noticed is that a steel knife marked as MO17 was

recovered from the possession of the accused. He has no explanation as to why he was carrying a knife in his pocket if he had gone to Seminary on that day to get a loan from DW3.

28. Another circumstance that looms large against the accused is his conduct. After his interception, he disclosed that he was Ralph @ Shibu, S/oKunhikrishnan, Maria Bhavan, Kandachira, Kollam, Initial documents were prepared with this address. Later investigation revealed that he had given a false name and address. Hence, Ext.P4 report was laid before the court recording his correct address as Ralph @ Bensly Boy, S/o. Varghese, Mariya Bhavan, Kandachira, Mangad Village, Kollam. This conduct of giving a different name and changing even his father's name cast serious doubt on his credibility. Considering the above, the defence of the accused cannot be accepted. Further, there is no valid explanation as to why the Excise party should falsely implicate him in a narcotic case that has serious consequences.

29. The court below on a proper evaluation of the entire materials, rightly concluded that the accused was found in possession of the huge quantity of ganja and convicted him. The entire evidence is sufficient to prove the guilt of the

accused. I find no reason to take a different view.

30.The learned counsel also contended that the sentence imposed by the court below is highly disproportionate. It is pertinent to note that the quantity of ganja recovered from the possession of the appellant herein was 14.400 k.g. This is very huge quantity though falls within the category of intermediary quantity. The conduct of the accused cannot be light seen. He along with the second accused is attempted to have brought large quantity. Though he is liable for a sentence treating it as intermediary quantity, nature of the offence proved against him and its impact on the society does not call for any leniency.

31. The sentence imposed on him should no doubt have an element of deterrence considering the social impact also. Hence, I am not inclined to interfere with the sentence imposed.

In the result, the appeal is dismissed confirming the conviction and sentence.

Sd/-

SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.

