

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

THURSDAY, THE 26TH DAY OF NOVEMBER 2015/5TH AGRAHAYANA, 1937

CRL.A.No. 1813 of 2011 ()

AGAINST THE JUDGMENT IN SC 285/2010 of ADDL.SESIONS COURT (ADHOC)-II,
ERNAKULAM DATED 09-08-2011

PETITIONER/ACCUSED:

K.B.GAFOOR @ ERACHI FAISAL,
A1, S/o. BHAVA, C.NO.9361
CENTRAL PRISON, VIYYUR, THRISSUR

BY ADV. B .PREMOD (STATE BRIEF)

RESPONDENT:

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

BY ADV. PUBLIC PROSECUTOR: SMT.M.G.LISHA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 08-10-2015, ALONG
WITH CRA. 1488/2011, THE COURT ON 26-11-2015 DELIVERED THE FOLLOWING:

SUNIL THOMAS, J.

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Crl.A.Nos.1813 and 1488 of 2011
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Dated this the 26th day of November, 2015

JUDGMENT

These appeals are filed by the first and second accused respectively, challenging the judgment, conviction and sentence in S.C.No.285 of 2010 of the Additional Sessions Court, Adhoc-II, Ernakulam for offence punishable under Section 22(c) of the NDPS Act.

2. The prosecution alleged that on 25.04.2010 while the SI of police, Palarivattom was on a patrol duty, got information that two identifiable persons were standing near the public road dealing with narcotic drugs. He went to the spot and intercepted the accused. Narcotic drugs were recovered from them at about 5.15 p.m. According to the prosecution, from the first accused, 74 ampules of lupigesic, 50 ampules of starlium and 24 ampules of phenergan were recovered. From the second accused, 40 ampules of lupigesic, 37 ampules of starlium and 20 ampules of phenergan were recovered. After the initial formalities of sampling, labelling and preparation of contemporaneous documents, the accused were arrested and produced before the Court. After investigation,

they faced the trial before the Sessions Court. On the side of the prosecution, PWs.1 to 7 were examined and Exts.P1 to P13 were marked. MOs.1 to 3 series were identified. On the side of the accused, DW1 was examined and Ext.D1 copy of the remand report was marked. The court below, on an evaluation of all materials concluded that the accused had committed the offence punishable under Section 22(c) of the NDPS Act, convicted and sentenced them to undergo rigorous imprisonment for 10 years each and to pay a fine of Rs.1,00,000/- with a default sentence of rigorous imprisonment for one year each. This is challenged by both the accused separately.

3. The second accused is represented through the counsel of his choice. The first accused has preferred this appeal from jail and Adv.Premod B. was appointed as counsel on State Brief. Heard both sides and examined the records.

4. Lengthy arguments were advanced by both the counsel on merits, touching upon the evidence tendered by the court below. It was vehemently contended that there was no evidence to indicate that accused were in possession of and involved in the sale of narcotic drug. The defence set up by them was that they

were innocent, taken into custody for different reasons, at different places and the contraband articles were thrust upon them to create a false case. There is absolutely nothing on record to show that both of them were jointly involved in any activity, much less commission of the offence.

5. Apart from the merits of the case, both the counsel addressed their arguments assailing the conviction arrived at by the court below on two technical grounds also. It was contended that though Ext.P13 chemical analysis report was obtained by the Court, it was marked without examining any of the witnesses and it appeared from the proceedings that it was marked by consent. It was contended that they have not consented to the marking of a document, which was prejudicial to their interest. It was further contended that though this document was heavily relied on by the prosecution, in the questioning under Section 313 Cr.P.C, the Court did not formulate any question touching upon Ext.P13. It was again contended that Ext.P13 was the sole document relied on by the court below to conclude that the samples recovered from the accused were narcotic drugs as defined in the NDPS Act. It was contended that the court below thereby committed a serious

irregularity in its procedure and thereby resulted in manifest injustice. The accused thereby lost a valuable opportunity to set up a valid defence.

6. It was further contended that the specific allegation of the prosecution was that the quantity recovered from the accused were commercial quantity. The court below has also proceeded on the basis that the quantity recovered from them was commercial quantity. The chemical analysis report relied on by the court below indicated that atleast one of the sample was not a narcotic drug. According to the learned counsel for the accused, the court below has not independently considered the question of actual quantity of the drug recovered from each of the accused to decide whether it fell within the category of small, intermediary or commercial quantity.

7. Since both the above contentions rest on an alleged substantial irregularity committed by the court below, which may touch upon the final conclusion arrived at by the Court, I am not inclined to go into the merits of the case, at present.

8. A perusal of the proceedings of the trial court indicate that documents upto Ext.P12 forwarding note were marked

through PW7 the Investigating Officer. He was examined on 03.04.2011. The witness for prosecution was lastly examined on 07.04.2011. The chemical analysis report was not available at that time, since the subsequent proceedings show that the Court adjourned the case to 12.04.2011 awaiting chemical analysis report. Thereafter, there were few postings and ultimately on 26.05.2011, Ext.P13 was marked on consent as seen from the proceeding sheet. Both the counsel contended that they did not consent to the marking of the above document and that it was marked behind their back.

9. However, I am not inclined to accept this contention which is contrary to the materials on record. Proceedings indicate that after marking of Ext.P13, the evidence was closed. It was adjourned to 03.06.2011 for questioning under Section 313 Cr.P.C. Thereafter both sides were heard under Section 232 Cr.P.C. on 09.06.2011. There was sufficient time in between the marking of the document and the final hearing. Naturally, both the accused should have noticed that Ext.P13 had, by that time, been marked as per the records. It was not a case where the documents were marked and thereafter the case was taken for judgment.

10. Paragraph 22 of the judgment shows that the court below relied on Ext.P13 and concluded that the samples drawn from the contraband at the spot were that of psychotropic drugs. In the questioning under Section 313 Cr.P.C, nothing was asked about Ext.P13, which was heavily relied on by the court below to arrive at a finding against the accused. The Honourable Gauhati High Court in **State of Assam v. Manik Chandra Dey [1989 CRI.L.J.1495]** had held that when the trial court did not put any question with regard to confession statement of an accused stated to have been made to the registry, such circumstances shall have to be completely excluded from consideration. In **State of U.P. v. Mohd. Iqram and Another [2011 KHC 4526]** it was held that no matter how weak or scanty the prosecution evidence is in regard to certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation on incriminating material that has surfaced against him. Section 313 Cr.P.C. is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the Court is under a legal obligation

to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. In the above circumstance, without putting any question on Ext.P13 to the accused under Section 313 of the Cr.P.C, court below was not justified in arriving at a finding against the accused.

11. As per Ext.P13, the items were identified as buprenorphine, diazepam, promethazine. It was revealed that promethazine does not come under the purview of NDPS Act. Regarding each of the other drugs, the quantity mg/ml was stated. Ext.P13 indicates that quantitative analysis of the sample was done and the chemical analysis report indicates the content in each of the sample.

12. Court below on the basis of the above available materials had concluded that commercial quantity was recovered from the accused. Varying number of ampules were recovered from each of the accused. The judgment does not disclose as to what was the total quantity of drug recovered from each of the

accused. The judgment does not disclose as to how the court below arrived at a finding that the quantity recovered from each of the accused was commercial quantity. This is all the most crucial since the sentence to be imposed on the accused varies considerably depending on the quantity involved.

13. In the light of the above two irregularities committed by the court below, I feel that the impugned judgment and the conviction is not legally sustainable. It is pertinent to note that these are irregularities which the Court committed inspite of evidence available on record. In the circumstance, the matter is liable to be remanded to the court below for the limited extent of enabling the court below to bring to the notice of the accused the incriminating material available on record in the form of Ext.P13 and to solicit his reply. The Court also has to decide on the basis of the evidence available on record, the quantity of drug recovered from each of the accused and decide whether it falls within the category of commercial quantity. Since no new evidence was neither sought to be adduced by either side, nor is permitted to be tendered, the remand is not for filling up any lacuna, but only for the limited purpose of completion of the procedural irregularity,

which involves the valid right of the accused. The remand is limited to the above two aspects. Since the accused are already undergoing sentence, I feel that the matter will have to be completed within a specified time frame.

In the result, the appeals are allowed. The impugned judgment, conviction and sentence are set aside. The matter is remanded to the court below for enabling the court below to frame appropriate questions under Section 313 Cr.P.C. touching upon Ext.P13. After giving an opportunity of being heard to both sides, the Court shall consider afresh on available records and pass judgments untrammelled by any of the observation above, including the question of quantity alleged to have been recovered from each of the accused. The court below shall take up the matter on 04.12.2015. The accused shall be produced before court below on 04.12.2015, for which the Court shall issue production warrant in advance. It shall complete the entire proceedings at the earliest, at any rate before 05.01.2016.

Sd/-
SUNIL THOMAS
Judge

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P A to Judge