IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

TUESDAY, THE 6TH DAY OF AUGUST 2024 / 15TH SRAVANA, 1946

CRL.A NO. 2337 OF 2006

AGAINST THE ORDER/JUDGMENT DATED 29.11.2006 IN SC NO.482 OF 2004

OF THE COURT OF SESSIONS, KASARAGOD

APPELLANT/ACCUSED NO.1:

K.G.DENNY
AGED 30 YEARS
S/O GEORGE, KANDATHIL HOUSE,
N.R.CITY, RAJAKKAD, IDUKKI.

BY ADVS.
R.ANIL
SRI.ANIL K.MOHAMMED

RESPONDENT/COMPLAINANT:

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

SRI.SANAL P.RAJ, PP

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 02.08.2024 ALONG WITH CRL.A.2338/2006, THE COURT ON 06.08.2024 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

TUESDAY, THE 6TH DAY OF AUGUST 2024 / 15TH SRAVANA, 1946

CRL.A NO. 2338 OF 2006

AGAINST THE ORDER/JUDGMENT DATED 29.11.2006 IN SC NO.482 OF 2004 OF THE COURT OF SESSIONS, KASARAGOD

APPELLANTS/ACCUSED NOS.2 AND 3:

1 BABU JOSEPH
AGED 38 YEARS
S/O.JOSEPH, VALAYAMVELAVIL HOUSE, MUKKUDY,
UDUMBANCHOLA, IDUKKI.

2 APPUKUTTAN
AGED 35 YEARS,
S/O.GOPALAN, AKKARAKUNNIL HOUSE, N.R.CITY,
RAJAKKAD, IDUKKI.

BY ADV M.VIVEK

RESPONDENT/COMPLAINANT:

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

SRI.SANAL P.RAJ, PP

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 02.08.2024 ALONG WITH CRL.A.2337/2006, THE COURT ON 06.08.2024 DELIVERED THE FOLLOWING:

C.S.SUDHA, J.

Crl. Appeal Nos.2337 & 2338 of 2006

Dated this the 6th day of August 2024

J U D G M E N T

In these appeals filed under Section 374(2) Cr.P.C., the appellants, who are accused nos.1 to 3 in S.C.No.482/2004 on the file of the court of Session, Kasaragod, challenge the conviction entered and sentence passed against them for the offence punishable under Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act (the Act).

2. The prosecution case is that, on 25/04/2000 at 22:00 hrs, PW2, the then Assistant Superintendent of Police, Kasaragod, received reliable information that the accused persons were selling ganja from a vehicle bearing registration no.KL-02D/9034 parked on the northern side of M.G. Road, Taluk Head Quarters Hospital, Kasargod. PW2 along with PW1 and PW5

reached the place of occurrence and seized the contraband articles. The accused were arrested at the place of occurrence and crime no.195/2000, Kasargod police station was registered. Ext.P5 is the FIR. PW5, the then Circle Inspector of Police, Kasargod completed the investigation and submitted the charge sheet before the court.

3. On appearance of the accused persons before the trial court, copies of all the prosecution records were given to them. On 24/05/2006, a charge for the offence punishable under Section 20(b)(ii)(B) of the Act was read over and explained to the accused persons, to which they pleaded not guilty. On behalf of the prosecution, PW1 to PW5 were examined and Exts.P1 to P11 and MO1 to MO5 were got marked in support of the case. After the close of the prosecution evidence, the accused were questioned under Section 313(1)(b) Cr.P.C with regard to the incriminating circumstances appearing against them in the evidence of the prosecution. The accused denied those

circumstances and maintained their innocence.

4. As the trial court did not find it a fit case to acquit the accused under Section 232 Cr.P.C., the accused were asked to enter on their defence and adduce evidence in support thereof. DW1 was examined and Exts.D1 and D2 were marked on the side of the accused persons.

5. The trial court on an appreciation of the oral and documentary evidence and after hearing both sides, by the impugned judgment, found the accused guilty of the offence charged against them and hence sentenced them to undergo rigorous imprisonment for three years and a fine of ₹25,000/- and in default of payment of fine to undergo imprisonment for one year each. Aggrieved, the accused persons have come up in appeal.

6. The only point that arises for consideration in these appeals is whether the conviction entered and sentence passed against the accused by the trial court are sustainable or not.

7. Heard both sides.

8. The prosecution relies on the testimony of PW1, PW2 and PW5 to substantiate the case. According to PW2, the detecting officer, on 25/04/2000 at about 09:15 p.m., he got reliable information that three persons in a jeep bearing registration no.KL-2D/9034 were trying to sell ganja in front of the Taluk Head Quarters Hospital, Kasargod. He forthwith reported the matter over phone to the Superintendent of Police, Kasargod. He went to the Kasargod police station and along with PW1, the then Sub Inspector of Police, Kasargod, and PW5, the then Circle Inspector of Police, Kasargod, proceeded to the place of occurrence. When they reached the place of occurrence, they found the jeep along with three persons sitting inside the vehicle. On seeing the police team, the accused persons who were sitting inside the vehicle tried to flee by starting the jeep. PW2 blocked the vehicle of the accused with his official jeep and identified himself to the accused persons. PW2 informed the accused that

they had the right to be searched in the presence of a Gazetted Officer or Magistrate. The accused gave their consent to be searched by PW2. PW2 conducted a body search of the accused as well as a search of the jeep. A secret cell was found in the middle portion of the jeep at the bottom. The accused were asked to open the cell. The 1st accused opened it with a key in his possession. The cell on being examined was found to contain 10 plastic packets. The plastic packets were found to contain ganja. The accused were arrested at the place of occurrence and Exts.P1 to P3 arrest memos were prepared. After conducting the necessary sampling, the contraband was seized, packed and sealed. MO1 series to MO3 series are the material objects seized from the accused. Ext.P4 is the seizure mahazar prepared when the contraband was seized. After the search, seizure and arrest, he along with the accused persons and the contraband, returned to the police station where he registered the crime. Ext.P5 is the FIR.

9. PW1 and PW5, who are alleged to have been in the team along with PW2, support the prosecution case. PWs.1 and 2, the independent witnesses, admitted their signature in Ext.P1 mahazar and Exts.P3 and P4 paper slips prepared when the sample was taken from the contraband seized. However, both of them deposed that they had affixed their signature in the mahazar at the police station and not at the alleged place of occurrence. Therefore, there is only the testimony of PWs.1, 2 and 5, the police officials, to support the prosecution story. It is true that merely because there are no independent witnesses to support the prosecution case, is no ground to discard or disbelieve the prosecution case provided the testimony of the police officials are creditworthy and inspires confidence in the mind of the court.

10. A disturbing aspect pointed out in this case is the presence of the crime number in Exts.P1 to P3 arrest memos alleged to have been prepared at the scene of occurrence. According to PW2, the accused were arrested at the place of

occurrence and then Exts.P1 to P3 arrest memos prepared. It was after reaching the police station, Ext.P5 FIR had been registered. The incident in this case is alleged to have taken place on 25/04/2000 at 22:00 hrs. Ext.P5 FIR is seen registered on 26/04/2000 at 00:10 hrs. PW2 has no case that he had entered the crime number, that is, crime no.195/2000, in Exts.P1 to P3 arrest memos after he had reached the police station and registered Ext.P5 FIR. No explanation is forthcoming from PW2 as to how the crime number finds a place in the arrest memos alleged to have been prepared at the scene of occurrence. As PW2 was the police officer, who had arrested the accused persons, registered the crime and prepared Ext.P5 FIR, he was supposed to explain the presence of the crime number in the arrest memos. No explanation is offered by the prosecution with regard to the presence of the crime number of the case in the arrest memos. This creates a doubt about the manner in which the seizure and arrest were effected. The presence of the crime number of a case

in the arrest memo prepared in the scene of occurrence, in the absence of any explanation offered by the prosecution can only give raise to either of the two inferences, namely, that the FIR was recorded prior to the alleged recovery of the contraband or that the number in the FIR was inserted in the arrest memo after its registration. Both the situations would seriously affect the veracity of the prosecution version of the incident and would create a great deal of doubt about the recovery of the contraband in the manner alleged by the prosecution. (See **Zofar v. State, 2000 KHC 2209; Kailash @ Kuddu v. State of Delhi**, **2000 KHC 2334; Karunakar Bindhani v. State of Kerala, 2016 KHC 758 and Rafeeque v. Sub Inspector of Police, Kunnamkulam Police Station 2020 (3) KHC 715**). That being the position, the case of arrest and seizure at the place of occurrence is doubtful. In these circumstances, I find that the accused are entitled to the benefit of doubt.

In the result, the appeals are allowed. The impugned

judgment by which the accused have been convicted and sentenced is set aside and the accused acquitted under Section 235(1) Cr.P.C. Their bail bonds shall stand cancelled and they shall be set at liberty forthwith, if not required in any other case.

Interlocutory applications, if any pending, shall stand closed.

Sd/-

C.S.SUDHA
JUDGE

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