

**Usman Vs. State of Kerala**

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**SooperKanoon Citation :** [sooperkanoon.com/1017862](http://sooperkanoon.com/1017862)

**Court :** Kerala

**Decided On :** Jul-31-2013

**Judge :** Honourable Mr.Justice V.K.Mohanan

**Appellant :** Usman

**Respondent :** State of Kerala

**Judgement :**

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE V.K.MOHANAN WEDNESDAY, THE 31ST DAY OF JULY 2013 9TH SRAVANA, 1935 CrI.MC.No. 3202 of 2013 ()  
----- CMP.NO.124/2013 IN SC. NO.64/2011 SPECIAL COURT(NDPS ACT CASES) VADAKARA. ....

PETITIONER(S)/PETITIONER/ACCUSED:

----- USMAN, AGED 4 YEARS S/O.MOHAMMED, PALATHINKAL HOUSE, PERUMUDIYOOR DESOM OTTAPALAM TALUK, PALAKKAD DISTRICT. BY ADVS.SRI.R.BINDU (SASTHAMANGALAM) SRI.PRASANTH M.P RESPONDENT(S)/RESPONDENT-STATE: ----- STATE OF KERALA REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA ERNAKULAM

031. BY PUBLIC PROSECUTOR SMT.HYMA THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 31-07-2013, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: tss CrI.MC.No. 3202 of 2013 ()

----- APPENDIX PETITIONER(S)' EXHIBITS  
----- ANNEXURE 1 CERTIFIED COPY OF THE ORDER  
PASSED BY THE SPECIAL JUDGE (NDPS ACT CASES), VADAKARA IN  
CRIMINAL MISCELLANEOUS PETITION NO.124/2013 DATED 17 05/2013.  
RESPONDENT(S)' EXHIBITS ----- NIL TRUE COPY  
P.A. TO JUDGE tss V.K.MOHANAN, J.

----- Crl.M.C.No. 3202 of 2013  
----- Dated this the 31st day of July, 2013

## ORDER

The petitioner who is an accused in S.C.No.64/2011 in the Court of the Special Judge (NDPS Act Cases), Vadakara, aggrieved by order dated 17/5/2013 in Crl.M.C.No.124/2013, by which the learned Sessions Judge dismissed the above petition filed under Section 233(3) of Cr.P.C for issuance of summons to the Manager, Idea Cellullar Limited to produce the call details and tower details of PW1's Mobile Phone No:9747608061 dated 19/7/2010, preferred the above M.C filed under Section 482 of Cr.P.C. with a prayer to quash the same and to allow the above petition.

2. Heard the counsel for the petitioner and the learned Public Prosecutor.

3. The substance of the allegation against the petitioner who is the sole accused in the above sessions case is that he was found in possession of 1.100 kg of ganja at about 6.a.m., on 19/7/2010 and thereby he committed the offences punishable under Section 20(b), (ii), (B)of the NDPS Act, 1985. The further allegation is that the petitioner was Crl.M.C.No. 3202 o

2. arrested then and there. When PW1, the officer who detected the crime was examined, disposed before Court that he effected the seizure on 19/7/2010 in pursuance to a telephonic call received by him from PW2 and also stated that from his mobile he conveyed the information to his superior officer namely Circle Inspector of Excise one Mr.Muhammed Ubaid and PW1 further claimed that he made telephonic calls in between 6 am and 8 am on 19/7/2010 from his mobile phone No.9747608061. According to the petitioner he was taken into custody from

his house on 18/7/2010 and the evidence given by the PW1 to effect referred the above are incorrect and false. Thus, according to the petitioner it is inevitable to produce the call details of the mobile phone of PW1 and therefore he filed the Crl.M.P.No.124/2013 under Section 233 as part of his attempt to adduce defence evidence to prove his innocence. But the learned Magistrate dismissed such petition.

4. Learned counsel for the petitioner vehemently submitted that the reasons given by the learned Sessions Judge to decline the request is unsustainable and against the spirit of Section 233 and contrary to the provision contained Crl.M.C.No. 3202 o

3. Sections 124 and 125 of Evidence Act. The learned Public Prosecutor supporting the impugned order submitted that, the petitioner approached the trial Court belatedly that too only with a view to protract the proceedings and there is no scope for any interference with the impugned order.

5. I have carefully considered the submission made by the counsel for the petitioner and the learned Public Prosecutor. I have perused the impugned order carefully.

6. In the given facts and circumstances involved in the case it is up to the defence to demolish the case of the prosecution against him that seizure was effected from him at 6 a.m. on 19/7/2010 and such the accused dispute the seizure itself. According to PW1 as discernible from the facts stated in paragraph-2 of the impugned order, he effected the seizure on 19/7/2010 pursuant to a telephonic call received by him from PW2. Towards his further deposition he has stated before the Court that from the very same mobile phone of PW1, he informed his superior officer, the steps taken by him, in terms of Section 42 of NDPS Act. In this juncture it is relevant to note that any failure on the part of the officer while Crl.M.C.No. 3202 o

4. exercising the powers under Section 42 of the NDPS Act, in informing his superior officer, on getting information, will go against the prosecution and in favour of the defence. So also it is important to convince Court as to how he

effected the seizure in terms of Section 42 of the Act based upon any information received by him. Thus as far as the accused is concerned all the facts which led to the seizure are very material and relevant and it is for him to shape his defence not only on the basis of those materials produced by the prosecution but also on the basis of any evidence or materials connected there with for which the accused can approach the trial Court under Section 233 in exercise of the right given to him towards defence evidence. Thus, on the production of those documents if it is found that there was no such incoming and outgoing call from the mobile phone of PW1, certainly it will go in favour of defence unless there is satisfying and convincing explanation.

7. As rightly pointed out by the counsel for the petitioner such a request can be rejected only if the Court is of the opinion in the same is made for the purpose of vexation or CrI.M.C.No. 3202 o

5. to delay the process or for defeating the ends of justice. According to me, in the present case, justice demand to allow the petition moved by the defence to substantiate his defence. It is also relevant to note that the defence moved the petition under Section 233 and not at a belated stage and that too closing the prosecution evidence and after questioning the accused under Section 313 of Cr.P.C. The documents sought to be produced and marked are not coming under the any privilege class as contemplated under Section 125 of Evidence Act. The only fact sought to be proved by examining the officer concerned and producing the call details of mobile phone of PW1 is whether PW1 had got any call from PW2 at the relevant point of time as claimed by PW1 and also whether PW1 made any call to his superior officer from the very same mobile phone. So according to me, the learned Judge of the trial Court ought to have allowed the petition for the ends of the justice. But in the present case on grounds which is extraneous to Section 233 of Cr.P.c and contrary to the provisions contained in Sections 124 and 125, rejected the relief sought for and dismissed the petition. According to me, the reason given by CrI.M.C.No. 3202 o

6. the learned Judge is unfounded. In the result, this M.C is allowed, setting aside Annexure-I order of the Court below and allowing CrI.M.P.No.124/2013. The

learned Special Judge is directed to take steps to summon the witness and documents as prayer for in the above petition. Sd/- V.K.MOHANAN, JUDGE AS

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