

Renjith vs State of Kerala

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Court : Kerala

Decided On : Dec-22-2023

Judge : Honourable Mr.Justice P.G. Ajithkumar

Appeal No. : CRL.A/556/2020

Appellant : Renjith

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR
FRIDAY, THE 22ND DAY OF DECEMBER 2023 / 1ST POUSHA, 1945
CRL.APEAL NO. 556 OF 2020 AGAINST THE JUDGMENT DATED
30.10.2019 IN SC 802/2018 OF III ADDITIONAL SESSIONS COURT,
KOLLAM CRIME NO.2/2018 OF KOTTARAKKARA EXCISE CIRCLE
OFFICE, KOLLAM APPELLANT/ACCUSED: RENJITH, AGED 33
YEARS, S/O.RAMANAN, MANU BHAVAN, RADIO JUNCTION,
PARUTHANPARA, EZHUKONE VILLAGE, NOW RESIDING AT
RENJITH BHAVAN, ELAVOOR DESOM, NEDUMPANA VILLAGE,
KOLLAM DISTRICT. BY ADVS. K.V.ANIL KUMAR LAVARAJ M.G.
RESPONDENT/COMPLAINANT: STATE OF KERALA REPRESENTED

BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM-682 031. BY SMT.MAYA M.N., PUBLIC PROSECUTOR
THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING
ON 17.11.2023, THE COURT ON 22.12.2023 DELIVERED THE
FOLLOWING:

P.G. AJITHKUMAR, J.

----- Dated this the 22nd day of
December, 2023

JUDGMENT

The accused in S.C.No.802 of 2018, who stands convicted and sentenced for an offence under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) by the III Additional Sessions Judge, Kollam, is the appellant. He challenges the correctness and legality of the said

judgment in this appeal filed under Section 374(2) of the Code

of Criminal Procedure, 1973 (Code).

2. The charge against the appellant was that at about 7.45 a.m. on 01.02.2018 he was found possessed with 5.1 kgs. of Ganja in front of the Ezhukone Railway Station at Kottarakkara-Kollam public road. He possessed the contraband for the purpose of sale.

3. The charge was denied by the appellant. The

prosecution therefore examined PWs.1 to 6, and produced Exts.P1 to P22 and MOs.1 to 8 to prove the charge. All the incriminating circumstances in the evidence were put to the appellant during his examination under Section 313(1)(b) of the Code. He denied all such circumstances and stated that he was innocent. His case was that he was arrested from Kayamkulam Railway Station and falsely implicated in the case. No evidence was let in by the appellant.

4. The learned Sessions Judge, after appreciating the

evidence, took the view that evidence of PW2, the detecting officer and PW4, his colleague, was reliable and when that evidence gets necessary corroboration from the evidence of PW1 and the other attending circumstances, the guilt of the appellant stands proved beyond reasonable doubt. Accordingly, the appellant was found guilty and convicted. He was sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/-. The appellant assails the said findings of the trial court, both on factual and legal grounds.

5. Heard the learned counsel for the appellant and the learned Public Prosecutor.

6. Having regard to the contentions raised by the learned counsel for the appellant, the questions require consideration are; 1) Could the prosecution prove that the appellant was found

in possession of 5.1 kgs. of Ganja? 2) Is Ext.P6 confession relevant and acceptable in evidence? and 3) Whether the prosecution is vitiated for non-compliance of any of the provisions in the NDPS Act?

7. Points 1 to 3: PW2 was the Excise Circle Inspector,

Kottarakkara during the relevant period. It was on 01.02.2018. He along with his subordinates was on patrol duty. When they reached in front of the Railway Station, Ezhukone he saw the appellant standing in front of the Railway Station holding a bag, at around 7.45 a.m. On seeing the Excise Party, the appellant perplexed and tried to elope. It is the version of PW2 that he along with his colleagues intercepted and searched the bag in the possession of the appellant. There were three packets wrapped in brown paper. On examination, the packets were found to contain Ganja.

8. PW2 deposed that body search of the appellant was

also found necessary, and the appellant was informed about his right to be searched in front of a Gazetted Officer or a Magistrate. He endorsed waiving that right, and therefore PW2 himself had conducted his body search, which did not

fetch anything except an amount of Rs.240/-. The contraband was seized after preparing samples as per Ext.P1 mahazar. It is the further version of PW2 that he took samples from all the three packets.

9. PW4 was a Preventive Officer in the office of the

Excise Circle Inspector, Kottarakkara. He also deposed about the circumstances in which the appellant was intercepted, search of the bag in his possession and seizure of the contraband. Besides their evidence, the prosecution placed reliance on the oral testimonies of PWs.1 and 3, who are the attestors to Ext.P1 mahazar and also the notice given to the appellant, his arrest memo and search list.

10. Both PWs.1 and 3 deposed admitting that they signed

Ext.P1 at the place of occurrence. PW1 is a petty shop owner and PW3 a carpenter. The shop of PW1 is adjacent to the gate of the Railway Station, Ezhukone. While PW1 deposed that he saw seizure of the Ganja from a person in front of the Railway Station and preparation of Ext.P1 wherein he signed, he did not identify the appellant as the person from whom the contraband

was seized. His version was that when he noticed, the appellant was with the officials and the Ganja was in the possession of the officials. When he reached the place, going by his version, examination of the bag in the possession of the appellant was over.

11. PW3 did not state even to that extent. The version of

PW3 is that on reaching the place of occurrence, the appellant was sitting in the department jeep and the officials showed him the bag and the Ganja. However, he also admitted that he had signed Ext.P1 at that place. Both PWs.1 and 3 admitted their signature in Exts.P2 to P4, which are the notice given to the appellant, arrest memo and search list.

12. As regards reliability of PWs.2 and 4, the learned

counsel for the appellant urged that the inconsistencies in their evidence make them unreliable, especially when PWs.1 and 3 did not fully support their version. In

this regard the learned counsel placed reliance on Krishnan Chand v. State of Himachal Pradesh [(2018) 1 SCC 222]. In that case, there was no independent evidence. While observing that evidence of official witnesses can be believed even without corroboration, it

was held that the evidence of the official witnesses in that case contain several material contradictions making the same doubtful. The learned Public Prosecutor, on the other hand, would submit that the evidence of PWs.2 and 4 is devoid of any such infirmities and therefore reliable.

13. As stated, PWs.1 and 3 did not state that they had

witnessed the act of search and seizure of the contraband. However, when they deposed before the court that they signed Ext.P1 under which the contraband was seized at the place of occurrence and there is nothing on record to show that they had any interest in the matter in issue, their evidence lends support to the version of PWs.2 and 4 to the extent that they intercepted the appellant and seized contraband. Ext.P1 is the contemporaneous document prepared by PW2. The contents in it are quite in tandem to the oral testimony of PWs.2 and 4 in court. The cross-examination did not fetch anything to show that PW2 or PW4 in any way had tried to create a false case. It was during their routine patrol duty, they happened to detect the crime. A few intra and interse contradictions are pointed out by the learned counsel and canvassed to discard the evidence of

PWs.1 to 4. The contradictions in the evidence of PWs.2 and 4 are not concerning any material particulars, and do not have the effect of making them untrustworthy. Only defence of the appellant regarding his arrest and seizure is that he was arrested not from there but from the Railway Station, Kayamkulam. Such a statement given by him during his examination under Section 313 of the Code is unsupported by any evidence or circumstance. Taking into consideration the entire evidence, I am of the view that the prosecution has succeeded in proving that on 01.02.2018 the appellant was found in possession of the contraband, which was enclosed in a bag.

14. It is contended by the learned counsel for the

appellant that the provisions of Section 50 of the NDPS Act were not complied with and therefore the search and seizure is illegal. Although the contraband was in a bag, it was held close to the body of the appellant and the search without complying with the provisions of Section 50 is illegal. Further, it is contended that the body search was conducted not in the presence of a Magistrate or a Gazetted Officer. Exts.P2 and P2(a), the notice and consent said to have been given by the appellant are unreliable and insufficient to make body search legal.

15. If the object searched is a part of the body of the

person, Section 50 of the NDPS Act necessarily has to be complied with. The law was explained by a Constitution Bench of the Apex court in *State of Punjab v. Baldev Singh* [(1999) 6 SCC 172]. The proposition was further explained in *State of H.P v. Pawan Kumar* [(2005) 4 SCC 350].

16. In *Dayalu Kashyap v. State of Chhattisgarh*

[(2022) 12 SCC 398] the Apex Court specifically held that if the recovery was from a polythene bag which was carried by the accused, the recovery was not from the person and therefore non compliance of the provisions of Section 50 does not defeat the prosecution. When the contraband was enclosed in a polythene bag, and it was found on the lap of the appellant, his possession of the same is not open for challenge. In view of the law laid down in the aforesaid decisions, there was no requirement of compliance of Section 50 of the NDPS Act for the search of the bag in the possession of the appellant.

17. The court below relied on Ext.P6 confession

statement of the appellant also to find him guilty. The learned counsel for the appellant would submit that Ext.P6 is hit by Section 25 of the Evidence Act, 1872 and therefore it cannot be used in evidence. In *Tofan Singh v. State of Tamilnadu*

[(2021) 4 SCC 1] the Apex Court in the majority judgment

held that the officers who are invested with powers of

investigation under Section 53 of the NDPS Act are 'police officers' within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act and cannot be taken into account in order to convict an accused under the NDPS Act. Hence, Ext.P6 cannot be used in evidence.

18. The further contention of the learned counsel for the

appellant is that Section 52A of the NDPS Act were not complied with in preparing the sample and production of contraband before the Magistrate and therefore the trial is vitiated. In this regard, the learned counsel placed reliance on the law laid down by the Apex Court in Union of India v. Mohanlal and another

[(2016) 3 SCC 379]. In the said decision, the Apex Court held

that the detecting officer shall follow the provisions of Section 52A of the Act by approaching the Magistrate for getting samples drawn and inventory certified. That principle was dilated further by the Apex Court in Mangilal v. State of Madhya Pradesh [2023 (2) KLJ 729 (SC)]. The Apex Court reiterated that before the property is disposed or destructed, provisions of Section 52A of the NDPS shall necessarily be followed. The Apex Court did not, however, hold that in a case where the contraband is physically produced before the court and the court is satisfied about its identity and proper custody, non-compliance of the provisions of Section 52A of the NDPS Act would vitiate the trial altogether. In this case, the packets of contraband, after drawing up samples, were duly wrapped, packed and sealed. The samples were also so packed and sealed. The labels on such packings bear the signatures of the

detecting officer, the accused and the witnesses. Those facts

prove that the contraband seized from the possession of the appellant was duly produced before the court. The samples drawn therefrom were duly sent to the chemical examiners laboratory from the court. The samples were found to be Ganja as per the report, Ext.P22 of the chemical analysis. In such circumstances, non-compliance of Section 52A of the NDPS Act shall not vitiate the trial.

19. As stated, the prosecution has proved arrest of the

appellant and seizure of 5.1 Kgs. of Ganja from his possession. The procedure followed by PW2 did not violate any of the mandatory provisions for the search and seizure. A report was as contemplated in Section 57 of the NDPS Act was soon prepared and sent to the superior officer. Exts.P12 and P13 prove receipt of the report by the superior officer. In the light of the above, I find no reason to interfere with the finding of guilt on the part of the appellant by the court below.

20. The appellant was awarded the maximum sentence

prescribed for the offence. The contraband possessed by the appellant is 5.1 kg. of Ganja. No previous conviction is proved against the appellant. He was aged 29 years at the time of conviction. Taking all such aspects into account, I am of the view that the sentence imposed on the appellant is disproportionate. Hence, the sentence is modified. The appellant is sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.20,000/-. If the fine is not paid, the appellant has to undergo imprisonment for a further period of six months. Set off is allowed. Sd/- P.G. AJITHKUMAR, JUDGE dkr

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