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Court : Kerala

Decided On : May-21-1998

Reported in : 1998CriLJ4427

Judge : K.A. Mohamed Shafi, J.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - Sections 21, 25, 41, 42, 42(1), 42(2), 52, 52A, 52A(1), 52A(2), 52A(4), 53, 57 and 67; Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1989; Customs Act - Sections 108; [Evidence Act, 1872](#); [Code of Criminal Procedure \(CrPC\) , 1973](#); [Constitution of India](#) - Article 20(2)

Appeal No. : Crl. Appeal No. 752/1995

Appellant : G. Jayakumar

Respondent : Superintendent, Central Excise, Customs Preventive and Intelligence Unit and anr.

Advocate for Def. : C.C. Thomas, A.C.G.S.C for No. 1 and; P.P.V.K. Mohanan, Adv. for No. 2

Advocate for Pet/Ap. : P.K. Ashokan, Adv.

Judgement :

K.A. Mohamed Shafi, J.

1. Four accused persons stood trial before the Sessions Court, Thiruvananthapuram for the offences punishable under Sections 21 and 25 of the N.D.P.S. Act on the basis of the complaint filed by the Superintendent, Central Excise, Customs Preventive and Intelligence Unit. Divisional Office, Thiruvananthapuram in O.R. 3/N.D.P.S./93.

2. The prosecution case is that on 27-12-1993 at about 5 p.m. accused Nos. 1 to 3 were found in Kunnukattil Veedu, Pamamkode, Pappunamcode in the possession of the 1st accused and they were in possession of 506 gms. of brown sugar which is a narcotic drug having estimated value of Rs. 1.5 lakhs for the purpose of illegal sale in contravention of the provisions of the N.D.P.S Act and accused Nos. 2 to 4 purchased, possessed and transported the brown sugar to the aforesaid house of the 1st accused immediately before the case was detected by PW1, the Superintendent of Central Excise and Customs.

3. The lower Court framed charge against the 1st accused for the offences punishable under Sections 21 and 25 of the N.D.P.S. Act and against accused Nos. 2 to 4 for the offence punishable under Section 21 of the N.D.P.S. Act. After trial the lower Court found that the 1st accused is guilty of the offences punishable under Sections 21 and 25 of the N.D.P.S. Act and accused Nos. 2 to 4 are guilty of the offence punishable under Section 21 of the N.D.P.S. Act by judgment dated 7-10-1995 and convicted and sentenced the 1st accused to undergo rigorous imprisonment for 20 years and to pay a fine of Rs. 2 lakhs in default of payment of fine to undergo simple imprisonment for 5 years for the offence punishable under Section 25 of the N.D.P.S. Act and to undergo rigorous imprisonment for 20 years and to pay a fine of Rs. 2 lakhs in default of payment of fine to undergo simple imprisonment for 5 years for the offence punishable under Section 21 of the N.D.P.S. Act and directed the substantive sentences to run concurrently. The lower Court found accused 2 to 4 guilty of the offence punishable under Section 21 of the N.D.P.S. Act and convicted and sentenced them to undergo rigorous imprisonment for 20 years each and to pay a fine of Rs. 2 lakhs each in default of payment of fine to undergo simple imprisonment for 5 years each.

4. The 2nd accused preferred Cri. Appeal No. 887/95, the 4th accused preferred Cri. Appeal No. 752/95, the 3rd accused preferred Cri. Appeal No. 59/96 and the 1st accused preferred Cri. Appeal No. 68/96 challenging the finding of guilt, conviction and sentence entered by the lower Court.

5. In this case the prosecution has examined PWs. 1 to 9 and marked Exts. P1 to P21 and M.O.1 and M.O.2. PW1 is the Superintendent of Central Excise who detected the offence, conducted the search, seized the contraband articles, registered the case, conducted necessary enquiry and investigation. PW7 is the Superintendent of the Central Excise who laid the complaint before the lower Court. PWs 4 and 9 are excise officials who were the members of the raiding party and they have corroborated the evidence of PW1. PW2 is the Chemical Examiner attached to the Customs Office, Kochi and PW3 is the Scientific Assistant in the Forensic Science Laboratory, Trivandrum who examined the samples of contraband articles and issued certificates Exts. P6 and P8 respectively. PW5 is the Village Officer who issued Ext. P16 certificate regarding the occupation of the house by the 1st accused. PW6 is the Assistant Taluk Supply Officer who issued Ext. P17 report regarding the ration card in respect of the house in question. PW7 is the Superintendent of Central Excise who filed the complaint before the Court and PW8 is the Superintendent of Central Excise who produced Exts. P18 to P21 before the Court.

6. PW 1 has deposed that he has seized 506 gms, of brown sugar in polythene covers wrapped in a newspaper found kept on a teapoy in the verandah of the house of the 1st accused surrounded by accused Nos. 1 to 3 on 27-12-1993 in between 5 p.m. and 8 p.m. as per Ext. P1 mahazar prepared by him from the scene of occurrence. According to him, he satisfied himself that it was heroin (brown sugar) by examining the article with the aid of the narcotic kit with him and after taking three samples of 5 gms each from the seized contraband article, he packed and sealed the brown sugar, polythene covers, newspaper and sample taken separately. PW1 has also deposed that he produced the contraband articles before the Court on 29-12-1993 as per Ext. P9 report sent the samples for analysis. He has also deposed that he received Ext. P6 report from PW2 the Chemical Examiner attached to the Customs Office, Kochi and Ext. P8 report from

the Forensic Science Laboratory, Trivandrum. PWs. 2 and 3 have deposed that on proper chemical analysis the samples analysed were found to be heroin (brown sugar) as stated by them in the respective reports. Therefore, the fact that the contraband article alleged to have been seized in this case by PW1 is proved to be heroin (brown sugar).

7. The appellants have raised various contentions against the finding of guilt, conviction and sentence entered by the lower Court. They have contended that there is absolutely no evidence of possession of the contraband article by accused 1 to 4 and the alleged confession statements Exts. P2 to P4 made by accused 1 to 3 are inadmissible in evidence. They have also contended that the mandatory provisions of Sections 41, 42, 52A and 53 of the N.D.P.S. Act are violated in this case. Therefore, according to them, the finding of guilt, conviction and sentence entered by the lower Court against any of the accused are not sustainable.

8. It is the case of prosecution that PW1 along with PW4, PW9 and others detected the offence in this case on the basis of the information received by PW9 to the effect that the appellants are engaged in sale of brown sugar in the house of the first accused who is the appellant in CrI. Appeal No. 68 of 1996. The appellants have contended that the mandatory provisions of Section 42(1) and (2) of the N.D.P.S. Act have not been complied with by PW1, since the information alleged to have received by PW9 is not recorded and a copy of the so recorded information is not sent to his immediate superior officer. PW1, the Superintendent of the Central Excise who detected the offence has deposed that when he received the information about the transaction in brown sugar from the house of the first accused from PW9, he directed PW9 to record the same and send it in a sealed cover to the Superior Officer. He has also deposed that the gist of the information was recorded in the prescribed form DR-1. He has also deposed that he discussed the matter with the Assistant Collector personally and thereafter he directed to conduct the raid and detected the offence. PW9 has deposed that he got information that there will be a transaction of brown sugar in the house of the first accused and he recorded the information as directed by PW 1 and sent it in a sealed cover to the official superior. Though the information alleged to have been sent to the Assistant Collector of Customs in sealed cover is not perused, the

prosecution has produced Exts. P18 to P21 through PW8 who is the Superintendent of the Customs Preventive and Intelligence Unit, Thiruvananthapuram and custodian of those documents. PW8 has deposed that the information received with regard to the contraband article is entered in the information register and Ext. P18 is that register and a copy of the relevant entry in the register pertaining to this case is marked as Ext. P18(a). PW8 has also deposed that Ext. P19 is the DRI form wherein the gist of information received is recorded. The first page of Ext. P19 is marked as Ext. P20. The information is recorded in the name of PW9. Ext. P21 is the DRA II form pertaining to the case. Exts. P18 to P21 and the evidence of PWs. 1, 8 and 9 clearly established that the information received by PW9 with regard to the offence involved in this case has been recorded and a copy of the same has been forwarded to the Superior Officer as provided under Section 42(1) and (2) of the N.D.P.S. Act and, therefore the contention of the appellants that the mandatory provisions of Section 42 are violated in this case is absolutely unsustainable and the lower Court has rightly held so.

9. The contention of the appellants that there is no proper sampling in this case is also not sustainable and rightly rejected by the lower Court. The evidence of PWs. 1, 4 and 9 clearly established that the contraband article weighing 506 grams was seized and out of that three samples weighing 5 grams each were taken by' PW1 and all the packets were sealed and separately packed and the signature of accused Nos. 1 to 3 as well as PWs. 1 and 2 and other independent witnesses were obtained in all those packets. Ext. P1 is the mahazar prepared by PW1 for seizure of the contraband articles from the scene of offence. PW 1 sent two of the samples for analysis to PW2 Chemical Examiner attached to the Customs Office, Cochin and to the Forensic Science Laboratory, Trivandrum. He produced the remaining brown sugar before the Court. Though it is contended by the appellants at the stage of arguments that the sampling was improper, when PW1 was in the witness box, the sampling was not challenged. Exts. P6 and P8 certificates issued by PWs. 2 and 3 who examined the samples have stated in the report that the samples were intact when they received in their office for chemical analysis. Therefore, the contention against the sampling raised by the appellants is of no substance.

10. The appellants have contended that the mandatory provisions of Section 52A of the N.D.P.S. Act are not complied with by PW1 in this case and therefore the appellants are entitled to acquittal on that ground alone. It is contended by the prosecution that detailed description with regard to the seizure and the seized article were given in Ext. P1 mahazar and, therefore there was no necessity to follow the procedure laid down in Section 52A of the N.D.P.S. Act.

11. Counsel for the appellants vehemently argued that Section 52A is inserted into the N.D.P.S. Act by amending Act 2 of 1989 with effect from 29-5-1989 by notification dated 29-5-1989 being the statutory guarantee available to the accused in such very grave offences of this nature. According to them violation of this particular procedural law in this case is in contravention of Article 20(2) of the Constitution. Therefore, according to them the provisions of Section 52A of the N.D.P.S. Act is mandatory and violation of the same-vitiates the entire prosecution. In the decision reported in State of Punjab v. Balbir Singh AIR 1994 SC 1872 : (1994 Cri LJ 3702) the Apex Court has held that the non-compliance or failure to strictly comply the provisions of Sections 52 and 57 of the N.D.P.S. Act which deal with the steps to be taken after arrest and seizure under the Act are not mandatory and if there is non-compliance of those provisions the same has to be examined to see whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case. In that decision the Supreme Court has not directly considered the compliance or non-compliance of the provisions of Section 52A of the N.D.P.S. Act, but it has been held by the Supreme Court that the provisions of Section 52 onwards of the N.D.P.S. Act which deal with the steps to be taken after the seizure of the contraband article or arrest of the accused are not mandatory and non-compliance of those provisions will not ipso facto vitiate the prosecution.

12. Section 52A incorporated into N.D.P.S. Act by way of amending Act 2 of 1989 is with a definite purpose with regard to the disposal of seized narcotic drugs and psychotropic substances which reads as follows :

Disposal of seized narcotic drugs and psychotropic substances -

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in Sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other; identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in Sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true, or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn;

(3) Where an application is made under Sub-section (2), the Magistrate shall, as soon as may be, allow the application;

(4) Notwithstanding anything contained in the Indian [Evidence Act, 1872](#)(1 of 1872) or the Code of Criminal Procedure 1973.(2 of 1974), every Court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs

or psychotropic substances and any list of samples drawn under Sub-section (2) and certified by the Magistrate as primary evidence in respect of such offence.

It is clear from the provisions of Section 52A that for the expeditious disposal of the seized narcotic drugs or psychotropic substances, after the seizure the procedure prescribed under Section 52A(2) has to be followed such as preparation of inventory, certificate by Magistrate regarding correctness of the inventory, taking in the presence of such Magistrate, photographs of the narcotic drugs or psychotropic substances and certifying such photographs as true; drawing representative samples of such drugs or substances in the presence of such Magistrate and certifying the correctness of any list of samples so drawn etc. It is also clear from the provisions of Section 52A that since the contraband articles seized will be destroyed before the case is tried, those preventive steps are necessary to ensure that the contraband articles were seized from the accused as alleged by the prosecution. This fact is clear from Sub-section (4) of Section 52A which lays down that notwithstanding anything contained in the Indian Evidence Act, or the Code of Criminal Procedure, every Court trying an offence under this Act shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under Sub-section (2) and certified by the Magistrate as primary evidence under the provisions of N.D.P.S. Act in respect of such offence. Therefore, in this case the compliance of Section 52A of the N.D.P.S. Act has no relevance, since the entire contraband article seized, except those portions expended by the Analysts for the purpose of Chemical Analysis, were before the Court at the time of the trial and the same was evidenced by the seizure mahazar, Ext. PI.

13. The lower Court has found that Ext. Pi and the evidence of PWs. 1,4 and 9 is believable with regard to the seizure of the contraband articles and, therefore, the non-examination of the two independent witnesses signed Ext. PI is of no significance. The prosecution has contended that as independent witnesses signed Ext. PI were not available, they could not be examined at the time of trial of this case. On a casual perusal of the evidence of PWs. 1, 4 and 9 and Ext. PI seizure mahazar, I find they are believable and the lower Court was justified in accepting the same without examination of the independent witnesses who

attested Ext. PI. Therefore, the contention of the appellants that Section 52A of the N.D.P.S. Act are mandatory and non-compliance of the provisions of that section vitiates the entire prosecution in this case is not sustainable.

14. It is contended by the appellants that the search and seizure in this case is bad in law since the search was after sunset and in contravention of Section 42(1) of the N.D.P.S. Act. But the definite case of prosecution is that PVV1 along with the party went to the house of the first accused at about 5 P.M. and the contraband article was seized at that time itself and the entire official formalities for the seizure and detention of accused 1 to 3 were completed only by 8 P.M. Therefore, since the search in this case was conducted before sunset, though it took long time to complete the formalities of search, seizure etc. and was completed by 8 P.M., it cannot be contended that the search was after sunset in contravention of Section 42(1) of the N.D.P.S. Act. Hence, this contention is also not sustainable and rightly negated by the lower Court.

15. It is the case of prosecution that accused 1 to 3 were in possession of brown sugar in the house of the first accused. According to the prosecution, when PW1 and party reached the house of the first accused, he found the contraband article kept on a teapoy on the verandah of the house and accused 1 to 3 were sitting in the verandah on expectation of the intending purchaser of the brown sugar. The evidence on record in support of the prosecution case is that of the excise officials, PW1, PW4 and PW9 and the mahazar, Ext PI prepared by PW1. As already noted, PW1 is the detecting officer and PWs. 4 and 9 are his subordinates. The prosecution also relied upon Exts. P2 to Ext. P4 confession statements made by accused 1 to 3 respectively under Section 67 of the N.D.P.S., Act in order to establish that all the accused are guilty of the offences alleged against them.

16. According to the prosecution, after PW1 seized the contraband article from the residence of the first accused and took accused 1 to 3 into custody at about 8 P.M. on 27-12-1993, PW1 took accused 1 to 3 to his office and recorded their statements after questioning them. PW1 has deposed that accused 1 to 3 have given the statements, Exts. P2 to P4 respectively without any inducement, threat or compulsion and they have given the statements voluntarily. According to him,

after satisfying himself that accused 1 to 3 are involved in this case, after questioning and recording their statements, Exts. P2 to P4, he arrested them in the morning of 28-12-1993 and produced them before the Sessions Court in that evening. Though the first accused contended that he was taken into custody on 28-12-1993 and his signatures were taken in blank papers by threat, there is nothing on record to support that contention. Likewise, though the second accused has stated that he was compelled to write a statement as dictated by the Customs Officers and when he refused to write the statement he was manhandled and when he was produced before the Sessions Court he had injuries on his right hand inflicted by the Customs officials, that allegation is not supported by any evidence. On the other hand, when he was produced before the Sessions Judge on 28-12-1993 he has not stated that he was either threatened or manhandled or inflicted injuries by the customs officials to extract Ext. P3 confession. The third accused has also stated that he was called to the customs office in the morning of 28-12-1993 and forced to write the statement as dictated by the customs officials by threatening and beating him and due to fear of life he signed the statement as dictated by them. There is nothing on record to support the allegation. The third accused also has not stated about any threat or compulsion or manhandling by the customs officials when he was produced before the Sessions Judge in the evening of 28-12-1993. Therefore, the contention of the appellants that Exts. P2 to P4 statements given by them were obtained by threat or force or manhandling them is not sustainable.

17. Counsel for the appellants vehemently argued that the confession evidenced by Exts. P2 to P4 cannot be considered by the Court. According to them, Exts. P2 to P4 are not proved in this case and, therefore, no reliance can be placed upon Exts. P2 to P4 in this case. It has to be noted that PW 1 has deposed that Exts. P2 to P4 are written by accused 1 to 3 in their respective handwriting in his presence and signed by them and he has also signed those documents. The contention of the appellants and those statements were recorded by compulsion, threat and force is already negated by me. The lower Court has believed the evidence of PW1 with regard to the execution of Exts. P2 to P4. Apart from the allegation that accused 1 to 3 were taken to the customs office and were forced to give those confession statements, Exts. P2 to P4, absolutely no illwill or animosity or any

reason as against PW1 or other customs officials to extract such confession from accused 1 to 3 and to implicate the accused in a very grave offence of this nature is alleged by them. Therefore, the evidence of PW1 to the effect that accused 1 to 3 have given those statements voluntarily has to be accepted and the lower Court is justified in accepting the contention of the prosecution that Exts. P2 to P4 are the voluntary statements given by accused 1 to 3. Hence, the contention of the appellants that Exts. P2 to P4 confession statements are not proved and, therefore, they cannot be looked into for any purpose in this case is not sustainable.

18. Counsel for the appellants argued that the lower Court found the appellants guilty of the offence alleged against them only on the basis of Exts. P2 to P4 confession statements. According to them, confession of a co-accused cannot be the foundation for conviction and if there is acceptable evidence adduced by prosecution confession can be considered in aid of and to strengthen or as an assurance for conviction. They also argued that in order to fortify the conviction of the accused on other evidence available on record, the confession statement of an accused can be relied upon. In support of this argument counsel for the appellants relied upon the decisions reported in *Kashmira Singh v. State of Madhya Pradesh* AIR 1952 SC 159 : (1952 Cri LJ 839); *Nathu v. State of U. P.* AIR 1956 SC 56 : (1956 Cri LJ 152), *Haricharan Kurmi v. State of Bihar* AIR 1964 SC 1184: (1964 (2) Cri LJ 344). Though the principles laid down in the above rulings cannot be disputed, those decisions are of no help to the accused in this case. There is acceptable evidence of seizure of brown sugar from accused 1 to 3 tendered by PW1, PW4 and PW9 and Ext. PI in this case and the confession statements, Exts. P2 to P4 made by accused 1 to 3 only corroborate the other evidence adduced by prosecution in this case.,

19. The 4th accused was not present in the house of the first accused at the time of detection of the offence by PW1. It is on the basis of the confession statements, Exts. P2 to P4 given by accused 1 to 3, the 4th accused has been implicated in this case. The 4th accused was not arrested or questioned by PW1. He surrendered before the Court subsequently. According to him, the confession statements, Exts. P2 to P4 are given by accused 1 to 3 as they are on inimical terms with him.

Therefore, he contended that since there is no acceptable evidence against him except the confession statement made by accused 1 to 3, he cannot be found guilty in this case. PW1 has deposed that except Exts. P2 to P4 confession statements given by accused 1 to 3 to the effect that the brown sugar in question was supplied by the 4th accused, no other evidence is available on record against him. Therefore, counsel for the 4th accused vehemently argued that the confession by co-accused cannot be the basis of conviction and, therefore, there is absolutely nothing on record to incriminate the 4th accused in this case. Over and above the above decisions relied upon by counsel for the other accused, counsel for the 4th accused relies upon the decision reported in Mohammed v. State of Kerala 1990 (1) KLTSN Case No. 26, wherein a single Judge of this Court has held that the confession made by one accused implicating himself and another can be used against the other only as corroborating material and confession of co-accused is not a substantive evidence, though the same can be used to corroborate the substantive evidence. In the decision reported in Bhan Khalpa Bhai Patel v. Assistant Collector of Customs (1998) 1 SCC 222 : (AIR 1998 SC 1487) it is observed as follows (at page 1488 (of AIR)) :

We are unable to accept the arguments that the entire case rests on the sole uncorroborated testimony of PW 27 who was a co-accused. If it had been factually correct the contention would have been well founded. Our attention has been drawn to the judgment in Haricharan Kurmi v. State of Bihar AIR 1964 SC 1184: (1964 (2) Cri LJ 344) in which it is held that though the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity for 1998 Cri. L.J./278 XII an assurance in support of its conclusion deducible from the said evidence. The Court observed that the stage to consider such confessional statements arrived only after the other evidence is considered and found to be satisfactory.

6. In the present case several statements have been recorded under the Customs Act and marked as Ext. 23 to Ext. 32. They were all recorded on 2-2-1970. In the statement of Accused 1 he stated that PW27 was driving the car of the appellant and he met him on the relevant date and requested him to bring gold from the

vessel which was in the sea. He was also assured that he would be paid for the work by the appellant. He was instructed to bring gold near Jampore School. His statement implicates the appellant amply. His second statement was recorded on 3-2-1970 and third on 11-7-1970. In the third statement he had stated that the machine for his boat was fitted with the help of the appellant and it was agreed between him and the appellant that the amounts payable for the work which he would do for the appellant could be adjusted towards the cost of the machine. According to him, the appellant told him that if he had any work he would send a message through PW 27. The fourth statement of Accused 1 was recorded on 25-2-1972. The statements of Accused 2 to 7, 10 and 11 were also recorded on 2-2-1970. Accused 3 made a specific reference to the appellant. The statements recorded under the Customs Act have been duly proved by the officials concerned. The Courts below were satisfied that there was no threat or inducement and that the relevant provisions of law were explained to the persons who gave the statements. The statements were found to be voluntary and not vitiated in any manner. Hence, all those statements are admissible in evidence and it is clear therefrom that the appellant was guilty of the offences for which he was prosecuted.

Though the above decision is rendered by the Supreme Court while considering the statement recorded under Section 108 of the Customs Act, the principles laid therein are squarely applicable to the facts of this case.

20. Statements, Exts. P2 to P4, of accused 1 to 3 are recorded under Section 67 of the N.D.P.S. Act. Those statements have been duly proved by PW 1, the official concerned. The lower Court as well as this Court has found that there was no threat or inducement and the relevant provisions of law were explained to accused Nos. 1 to 3 who gave the statements and those statements were found to be voluntarily and not vitiated in any manner. Therefore, those statements are admissible in evidence. Therefore, applying the principles laid down by the Apex Court in the above decision, Exts. P2 to P4 statements given by Accused 1 to 3 can be relied upon against Accused Nos. 1 to 3 in this case. Hence, the contentions raised by the appellants against the acceptance of Exts. P2 to P4 confession statements given by Accused 1 to 3 against them are not tenable.

21. As already noted it is well settled that the confession of a co-accused cannot be the foundation for conviction of the accused. From the evidence on record it is clear that apart from the confession statements made by Accused Nos. 1 to 3 in Exts. P2 to P4 to the effect that the brown sugar in question was purchased from the 4th accused, there is absolutely no evidence on record to connect the 4th Accused with the crime alleged in this case. PW1 the Detecting Officer has deposed that apart from Exts. P2 to P4 confession statements of Accused 1 to 3, there is absolutely no evidence on record to connect the 4th Accused with the crime alleged against him in this case. According to the prosecution the 4th accused was absconding and he was not available for questioning by PW1 or any other Excise officials and he subsequently surrendered before the Lower Court. Merely because of the fact that the 4th accused was absconding and he subsequently surrendered before the Court, it cannot be presumed that he is guilty in this case in the absence of any other evidence to prove his guilt. Therefore, on the basis of the statements given by Accused Nos. 2 and 3 in Exts. P3 and P4 to the effect that the brown sugar in question was transported by the 4th accused and accused 1 to 3 obtained the same from the 4th accused cannot be accepted. Therefore, the lower Court is not at all justified in finding that the 4th accused is guilty in this case relying upon Exts. P2 to P4 confession statements made by Accused 1 to 3. Hence, the finding of guilt, conviction and sentence entered by the lower Court against the 4th accused cannot be sustained.

22. The appellants vehemently contended that there is absolutely no evidence on record to prove that any contraband articles were seized from the possession of the appellants. The case of the prosecution is that the brown sugar in question is seized from the residence of the first accused. Along with the complaint filed before the Court on 30-8-1994, the prosecution has filed Ext. P13, a statement given by Ambika, wife of the 1st accused. In Ext. P13 statement it is stated that the building belongs to Sreedharan, uncle of Ambika. PW1 has deposed that Sreedharan is also residing in the same house. But Sreedharan is not made an accused in this case, even though under Section 25 of the N.D.P.S. Act he could have been made accused in this case. Counsel for the appellants argued that there are other persons also residing in the house and, therefore it cannot be held that the contraband articles were seized from the possession of the accused, in

this case.

23. The prosecution has produced Ext. P16 certificate issued by the Village Officer to the effect that the first accused is residing in the house in question and that the owner of the house is Sreedharan aforesaid. The Village Officer is examined as PW5. The prosecution has also produced Ext. P17 letter sent by the Assistant Taluk Survey Officer, Trivandrum giving the details of declaration given by Sreedharan aforesaid for the purpose of ration card which shows the first accused is also residing in the house. Therefore, the residence of the first accused in the house is established and it is not disputed.

24. Counsel for the appellants argued that possession to constitute an offence under the N.D.P.S. Act should be conscious possession and actual control and there must be mens rea before the person can be convicted, in such grave offence of possession of Narcotic drugs. They also argued that possession should be real and not constructive in order to attract the offence punishable under the N.D.P.S. Act. In support of these arguments they relied upon various decisions including the decisions reported in Sahendra Singh v. Emperor AIR 1948 Patna 222 : (49 Cri LJ 445), Abdul Ali v. The State AIR 1950 Assam 152: (51 Cri LJ 973), Sulaiman Sait Mohammed Usuff Sait v. State 1967 KLT 993, Gunwantlal v. State of M. P. (1972) 2 SCC 194 : (1972 Cri LJ 1187) and the Superintendent of Remembrancer of Legal Affairs, W. B. v. Anil Kumar Bhunja 1979 (4) SCC 274 :(1979 Cri LJ 1390). Though the principles laid down in the above decisions are beyond challenge, they are of no help to the appellants. In this case there is acceptable evidence on record to establish that PW1 along with the raiding party including PW4 and 9 seized the contraband article kept on the teapoy on the verandah of the house in which the first accused is residing and at that time accused 1 to 3 were sitting on the verandah. It is contended by counsel for the appellants that even if the case of prosecution that the contraband articles contained in the packet was kept on the teapoy on the verandah of the house is accepted, it cannot be contended that the appellants were in conscious possession with definite degree of control over the article. That contention cannot be accepted in this case. The evidence adduced by the prosecution that accused 1 to 3 were sitting on the verandah of the house of the first accused keeping the contraband articles on the teapoy has been accepted

by the lower Court. Ext. P2 to P4 statements given by Accused 1 to 3 under Section 67 of the N.D.P.S. Act also corroborate the prosecution case. Therefore, the contention of the accused that they were not in conscious possession of the contraband articles in this case is not sustainable.

25. From my foregoing discussions it is clear that the prosecution has adduced evidence to prove the guilt of Accused 1 to 3 beyond reasonable doubt and the prosecution has not succeeded in adducing satisfactory evidence to prove the guilt of the 4th accused. Hence, the finding of the lower Court that the first accused is guilty of the offence punishable under Sections 25 and 21 of the N.D.P.S. Act and Accused 2 and 3 are guilty of the offence punishable under Section 21 of the N.D.P.S. Act has to be confirmed and the finding of the lower Court that the 4th accused is guilty of the offence punishable under Section 21 of the Act is liable to be set aside.

26. The lower Court has awarded a sentence of rigorous imprisonment for 20 years and a fine of Rs. 2 lakhs. In default of payment of fine to undergo simple imprisonment for five years for the offence punishable under Section 25 of the N.D.P.S. Act and rigorous imprisonment for 20 years and a fine of Rs. 2 lakhs. In default of payment of fine to undergo simple imprisonment for five years for the offence punishable under Section 21 of the N.D.P.S. Act to the first accused directing the substantive sentences to run concurrently. The Lower Court has also awarded rigorous imprisonment for 20 years each and imposed a fine of Rs. 2 lakhs each in default of payment of fine to undergo simple imprisonment for 5 years each against Accused Nos. 2 to 4. In view of my finding that the 4th accused is not guilty of the offence alleged against him, the conviction and sentence awarded by the lower Court against the 4th accused is not sustainable.

27. Considering the menace of drug trafficking and deleterious effect of the use of narcotic drug in the society, drug trafficking has to be dealt with very heavy hand in order to eradicate drug trafficking and drug menace from the society. Viewed from that angle the sentence awarded by the lower Court against Accused No. 1 to 3 is only appropriate and commensurate with the offence proved against them. Therefore, I find absolutely no ground to interfere with the sentence awarded by

the lower Court against Accused Nos. 1 to 3.

In the result the finding of guilt, conviction and sentence entered by the lower Court against Accused 1 to 3 are confirmed and Crl. Appeal Nos. 68 of 1996, 887 of 1995 and 59 of 1996 respectively preferred by them are dismissed. Crl. Appeal No. 752 of 1995 preferred by the 4th accused is allowed and the finding of guilt, conviction and sentence entered by the Lower Court against the 4th accused are set aside: The 4th accused is found not guilty and is acquitted and set at liberty. The 4th accused will be released from the jail forthwith if his custody is not required in any other case.

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