



2023/KER/69015

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE N.NAGARESH

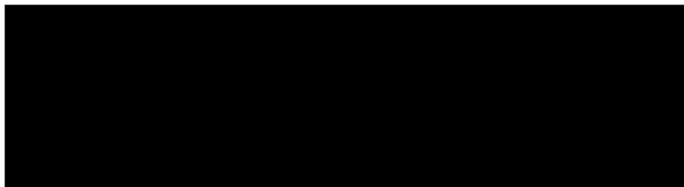
THURSDAY, THE 9TH DAY OF NOVEMBER 2023/18TH KARTHIKA, 1945

CRL.A NO. 1200 OF 2023

AGAINST THE JUDGMENT IN SC.959/2017 OF ADDITIONAL
SESSIONS COURT-VIII, ERNAKULAM
(CRIME NO.1480/2006 OF ERNAKULAM CENTRAL POLICE STATION)

APPELLANT:

RAVEENDRANATH



BY ADV MANU ROY

RESPONDENT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION
ON 09.11.2023, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:



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N. NAGARESH, J.

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Criminal Appeal No.1200 of 2023
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Dated this the 9th day of November, 2023

J U D G M E N T

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The appellant is the sole accused, who is convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of ₹1 lakh for the offence punishable under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and in default of fine, a rigorous imprisonment for a period of three months.

2. Crime No.1480/2006 was initially registered by Ernakulam Central Police against the appellant. The case of the prosecution was that on 09.11.2006 at 3.20 pm, PW2 while doing patrolling duty, got information that a person



wearing black pants and rose shirt having narcotic drugs in a bag, is standing at Forshore Road, Ernakulam. The police went to the Foreshore Road and in front of the CIFNET office, the appellant was found carrying a small handbag. PW2 introduced his identity to the appellant and issued a notice stating that he is going to conduct body search of the appellant and asking whether the appellant needs it to be done in the presence of a Gazetted Officer or a Magistrate.

3. The appellant issued a letter in writing in English stating that PW2 himself may conduct the body search. On conducting body search, five ampules of Phenergan, five ampules of Lupigesic, four ampules of Diazepam IP, two ampules of Buprenorphine IP and one ampule of Diazepam Biofort were found in the handbag of the appellant. Possession of those drugs is in contravention of the provisions of the NDPS Act. Thus, the appellant committed offence punishable under Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act, for short).



4. Before the Additional Sessions Court-VIII, Ernakulam, three official witnesses were examined as PWs 1 to 3. Exts.P1 to P12 and MO1 to MO3 were marked. After appreciation of evidence, the Additional Sessions Judge found that the appellant was found in possession of commercial quantity of psychotropic substance and that the offence under Section 22(c) of the NDPS Act is proved against the appellant. The Additional Sessions Judge consequently sentenced the appellant to undergo rigorous imprisonment for a period of ten years and to pay fine of ₹1 lakh. In default of payment of fine, the appellant was directed to undergo rigorous imprisonment for a period of three months. The appellant challenges the said judgment dated 25.07.2023 of the Additional Sessions Judge-VIII, Ernakulam in Sessions Case No.959/2017.

5. The appellant contended that the search was conducted in violation of Section 50 of the NDPS Act and the search is illegal. PW2 is alleged to have taken a letter in English from the appellant. The non-production of the letter



in the court creates suspicion in the case put forth by the prosecution. The appellant urged that the prosecution ought to have procured the presence of independent persons to witness the formalities claimed to have been complied with at the time of search and seizure.

6. The appellant further urged that the finding of the court below that Section 50 need not be complied with as seizure was made from the handbag of the appellant and not from his body, is wrong and faulty. Even partial compliance of Section 50 will not meet the requirement. The appellant further argued that the evidence of the policemen are not reliable since they are interested witnesses. The court below ought to have given the benefit of doubt to the appellant.

7. The counsel for the appellant relied on the judgment of the Hon'ble Apex Court in ***Sk. Raju @ Abdul Haque @ Jagga v. State of West Bengal [(2018) 9 SCC 708]*** and argued that as soon as search of a person takes place, requirement of mandatory compliance with Section 50 is attracted, irrespective of whether contraband is recovered



from the person of the detainee or not.

8. The counsel for the appellant placed reliance on the judgment of the Apex Court in ***Baldev Singh v. State of Haryana [(2015) 17 SCC 554]*** and argued that if the court on an appraisal of the entire evidence does not entertain doubt of a reasonable degree that he had real knowledge of the nature of the substance concealed in the bag, then the appellant is not entitled to acquittal. However, if the court entertains strong doubt regarding the awareness of the accused about the nature of substance in the bag, it would be a miscarriage of criminal justice to convict one for the offence, keeping such strong doubt undisputed.

9. The counsel for the appellant further argued that it is the obligation of the searching officer to have the search in the presence of either a Gazetted Officer or a Magistrate. In the case of the appellant, the appellant had no knowledge of English language and it is alleged that the appellant gave a reply in English language. In the judgment of the Apex Court in ***Ranjan Kumar Chadha v. State of Himachal Pradesh***



[2023 KHC Online 6891], the Apex Court has held that if the suspect says that he would not like to be searched before a Gazetted Officer or a Magistrate and he would be fine if his search is undertaken by the empowered officer, the matter should not rest with just an oral statement of the suspect. The suspect should be asked to give it in writing duly signed by him in presence of empowered officer as well as other officials of the squad.

10. The counsel for the appellant further argued that if a detecting officer informs right of accused to have presence of Gazetted Officer and not informing of the entitlement of accused to request for the presence of either Gazetted Officer or Magistrate, it would only amounts to partial compliance of the provision and would not satisfactorily meet the requirements of Section 50. The Additional Sessions Judge therefore ought to have found the appellant not guilty, contended the counsel for the appellant.

11. The Public Prosecutor resisted the appeal. The Public Prosecutor argued that when PW2 obtained



information on 09.11.2006 at about 3 pm about the presence of the appellant with narcotic drugs, he recorded the information and a report under Section 42(2) of the NDPS Act was sent to the Circle Inspector of Police, Ernakulam Central Police Station. The appellant was appraised of his right to have the presence of a Gazetted Officer or a Magistrate for a search of his body. The appellant stated that he does not require the presence of a Magistrate or a Gazetted Officer. The consent was given in writing in English. On search, the appellant was found in possession of 23 ampules of narcotic drugs and 14 injection needles and five syringes.

12. The Public Prosecutor pointed out that the Head Constable who accompanied PW2 was examined as PW1. PW1 supported the prosecution and gave evidence in tune with PW2. The prosecution has adduced cogent evidence to prove the charge against the appellant beyond reasonable doubt. PW1 and PW2 have deposed about the seizure of the contraband from the appellant, his arrest and registration



of the case. PW3 has also given evidence regarding investigation of the case. All the mandatory provisions of the Act are complied with and there is no reason to disbelieve the evidence of prosecution witnesses. The Additional Sessions Judge therefore rightly convicted the appellant, contended the Public Prosecutor.

13. As regards the issue of body search, the Public Prosecutor relied on the judgment of this Court in **Susheel Sarkar v. State of Kerala [2022 KHC 5415]** wherein this Court held that when a person chooses not to exercise the right and permitted police officer to have his body searched by him, then the procedure contemplated under Section 50 of the NDPS Act is not at all necessary. In the cases of seizure of narcotic drugs, merely for the reason that independent witnesses were not examined on search and seizure, the evidence of official witnesses cannot be discarded. If the evidence of the official witness does not contain any discrepancy which makes them untrustworthy, it can be relied upon even in the absence of any independent



evidence.

14. The offence alleged against the appellant is amply proved by the evidence of PW1 to PW3. PW1 to PW3 had no pre-acquaintance with the appellant. Therefore, there is no question of bias in the investigation. The appellant has committed a gross crime against the society. In the circumstances, the appeal preferred by the appellant is liable to be dismissed, contended the Public Prosecutor.

15. I have heard the learned counsel for the appellant and the learned Public Prosecutor representing the respondent.

16. The appellant stands convicted for offence punishable under Section 22(c) of the NDPS Act. The facts constituting the offence alleged against the appellant are that on 09.11.2006 at 3.20 pm, the appellant was found in possession of narcotic drugs / psychotropic substances in contravention of the provisions of the NDPS Act. It is alleged that on 09.11.2006 while PW2-Sub Inspector of Police was conducting law and order patrolling, he got information that a



person with a handbag is standing near the CIFNET near the Foreshore Road with narcotic drugs for sale. PW2 recorded the information and a copy was sent to the immediate official superior. Ext.P3 is the Section 42 report.

17. When PW2 reached the spot with the police party, the appellant was standing there with a bag. It is alleged that PW2 informed the appellant about his right to have the presence of a Gazetted Officer or a Magistrate for a search of his body. The appellant informed PW2 that he does not require presence of a Magistrate or Gazetted Officer and that he has no objection in PW2 conducting the search. The consent of the appellant is alleged to have been given in writing, in English language.

18. PW2 conducted a search of the body of the appellant. In the handbag found on the body of the appellant, PW2 is stated to have recovered 23 ampules of narcotic drugs, 14 injection needles and five syringes. The ampules were packed and sealed and marked as "S1". The appellant was arrested and a case was registered against



him.

19. PW1 Head Constable who accompanied PW2 at the time of search and seizure and PW3 Circle Inspector who conducted the investigation supported the prosecution case and gave evidence in tune with the evidence of PW2.

20. The appellant denied the prosecution case and stated that he hails from Tamil Nadu and came to Ernakulam in search of a job. The police has taken the appellant illegally into custody from a public road near St. Alberts College and a false case is registered against him.

21. From the evidence, it is seen that the incident took place on a public road near CIFNET, which is a busy area in the city. However, the prosecution could not produce any independent witness to prove the incident. The road from which the appellant was arrested is a busy area with a number of Government / Semi-Government Offices in the vicinity. Still, none from those offices were cited as witnesses. True, the incident can be proved even without examining any independent witnesses and can be proved on



the basis of evidence given by the official witnesses. But, in this case, there are a number of suspicious circumstances which would question the credibility of the prosecution case.

22. The prosecution claimed that the appellant was informed in writing of his right to have the presence of a Gazetted Officer or Magistrate. It is alleged that the appellant has given his consent in writing to conduct search without the presence of a Gazetted Officer or Magistrate. However, the intimation given to or the consent given by the appellant are not produced. The appellant is stated to have knowledge only of Tamil language. The information given to the appellant under Section 50 was in English. It is alleged that the appellant gave reply also in English. However, neither the communication stated to have been given by PW2 under Section 50 of the NDPS Act nor the reply alleged to have been given by the appellant have been produced before the court.

23. The Public Prosecutor relied on the judgment of the Apex Court in ***Kallu Khan v. State of Rajasthan*** [AIR



2022 SC 50] and contended that when no recovery of contraband was made from the person of the accused, compliance of Section 50 cannot be attracted. But, the case dealt with by the Apex Court was one where the contraband article was seized from a motorcycle at public place. In this case, contraband article was received from a bag on the person of the appellant. Therefore, the judgment in **Kallu Khan** (supra) will not be of any help to the prosecution. For the same reason, the judgment in **State of Punjab v. Baljinder Singh and another** [(2019) 10 SCC 473] cannot be relied on to support the prosecution case.

24. Section 50 of the NDPS Act, 1985 is as follows:

50. Conditions under which search of persons shall be conducted — (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he



sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973.

(6) After a search is conducted under subsection (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.

25. A Constitution Bench of the Hon'ble Apex Court in the judgment in ***State of Punjab v. Baldev Singh*** [1999 KHC 707] considered the scope of Section 50 of the NDPS Act and held that when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Section 50(1) of being taken to the nearest gazetted Officer or the nearest



Magistrate for making the search. The failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to the accused. The Hon'ble Apex Court held that failure to conduct search before a Gazetted Officer or Magistrate, may not vitiate the trial, but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

26. The Public Prosecutor relied on the judgment of a learned Single Judge of this Court in **Susheel Sarkar** (supra) to urge that where the appellant had chosen not to exercise the right under Section 50, procedure contemplated under Section 50 was not necessary. In the case of the appellant herein, there is nothing on record to prove beyond reasonable doubt that the appellant chose not to exercise his right under Section 50. In **Ranjan Kumar Chadha** (supra),



the Hon'ble Apex Court has held that when the suspect dispenses with the option to search before a Gazetted Officer / Magistrate, the suspect should be asked to give it in writing and that the matter shall not rest with just an oral statement of the suspect.

27. Indeed, there is need to protect society from criminals peddling in narcotic drugs. The societal interest and safety will suffer if persons who commit crime are let off because the evidence against them is to be treated as if it does not exist. The Apex Court dealing with prosecution of NDPS cases has held that in every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations. The Apex Court has held that an accused is entitled to a fair trial and a conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in



breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

28. In the present case, the sole allegation against the appellant is that he was found in possession of illicit narcotic drugs / psychotropic substances. An illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband by the accused though any other material recovered during that search may be relied upon by the prosecution in other proceedings against the accused.

29. The Public Prosecutor would submit that the chain of events that led to the search and seizure of narcotic drugs from the appellant have been well established by the evidence adduced by PWs 1 to 3. The credibility of witnesses is unquestionable. The facts deposed by them before the court are beyond doubt or dispute. The defence has not been successful in discrediting the evidence adduced by PWs 1 to 3. Therefore, it would be a travesty of



justice if the appellant is let off for the omission of the prosecution in producing the communication mandated under Section 50 of the Act, especially when the Act does not require a written communication to be given to the accused.

30. I find that in this case, it is not a question of communication of the right of the appellant to be searched in presence of a Gazetted Officer or a Magistrate. The question is whether the evidence adduced by the prosecution in this regard can be relied on, to convict the appellant and take from him his personal liberty by imposing a jail sentence of ten years. When the consequence of the prosecution is serious, then the prosecution should stick to the letter of the law. It is the version of the prosecution that a written communication regarding the information given to the appellant under Section 50 of the NDPS Act, was made. The prosecution further stated that the appellant had given his consent to dispense with the presence of gazetted Officer / Magistrate during search, that also in writing. If such



communications in writing existed, the prosecution ought to have produced the same before the court. The non-production of the documents gives rise to serious doubt as regards compliance of law, to an extent that the search and seizure get nullified. In the absence of a search and seizure in compliance with the provisions of Section 50, the entire prosecution story against the appellant would crumble.

31. In the afore facts of the case, I find that failure of the prosecution to produce Section 50 communication / information before the court has seriously prejudiced the appellant and conviction of the appellant cannot be justified under the circumstances.

Therefore, the Criminal Appeal is allowed and the conviction and sentence passed against the appellant in Sessions Case No.959/2017 of the Sessions Court, Ernakulam are set aside.

Sd/-

N. NAGARESH, JUDGE

aks/07.11.2023