IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K.HARIPAL

FRIDAY, THE 10TH DAY OF JULY 2020 / 19TH ASHADHA, 1942

CRL.A.No.992 OF 2013

AGAINST THE JUDGMENT IN SC 49/2011 DATED 28-06-2013 OF SPECIAL COURT (NDPS ACT CASES), VADAKARA

APPELLANT/S:

MUSHTHAFA
S/O.MUHAMMED, NADUTHODI HOUSE, MANJERI AMSOM DESOM, CHANDAKUNNU, MALAPPURAM.

BY ADV. SRI.SUNNY MATHEW

RESPONDENT/S:

1 **THE SUB INSPECTOR OF POLICE**
NILAMBUR POLICE STATION, MALAPPURAM DISTRICT, PIN 678001.

2 **STATE OF KERALA**
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, PIN 682031.

BY PUBLIC PROSECUTOR SRI. D. CHANDRASENAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01-07-2020, THE COURT ON 10-07-2020 DELIVERED THE FOLLOWING:

C.R.

JUDGMENT

This is an appeal preferred under Section 374(2) of the Code of Criminal Procedure, hereinafter referred to as the Code, challenging the legality and correctness of the judgment of the learned Special Judge (NDPS Act Cases), Vatakara in S.C.No.49 of 2011. That case was taken on file on the final report laid by the Circle Inspector of Police, Nilambur Police Station in Crime No.28/11, alleging offence punishable under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter referred to as the Act. The prosecution case in brief is that on 17/01/2011 at about 2:45 p.m. the accused was found at Athikkapp on the western side of Karulayi bridge across the Karimpuzha river on the Karulayi-Palankara road, 39 metres north-west from the house of one Mannureth Mathew, bearing door No.K.P.III/155 carrying 1.500 kgs of ganja, a narcotic drug; he was intercepted by the Sub Inspector and party in the presence of

independent witnesses; the contraband was taken from his possession, which was seized by following the statutory formalities and thus Crime No.28/11 of that police station was registered. After investigation, the Circle Inspector, Nilambur laid the charge sheet before the Special Judge who took cognizance of the offence and summoned the accused. The accused was defended by a counsel of his choice. After completing the procedural formalities and hearing the counsel on both sides, when the charge was framed, read over and explained, he pleaded not guilty. He was on bail.

2. On the side of the prosecution, seven witnesses were examined as PWs.1 to 7. Prosecution evidence also consist of documents marked as Exts.P1 to P13 and material objects identified and marked as MOs.1 to 6. On examination under Section 313 of the Code, the accused denied all the incriminating materials highlighted against him. He reiterated that he is innocent. As the court found it not a fit case for acquitting under Section 232 of the Code, the accused was called upon to enter on his evidence in defence. However, no evidence

was adduced by him. After hearing counsel on both sides, the learned Judge rendered the impugned judgment on 28.6.2013. The accused was found guilty of the offence alleged against him. After hearing him on punishment, he was sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.75,000/-, in default to undergo rigorous imprisonment for six months, for the offence under Section 20(b)(ii)(B) of the Act. He was also given set off under Section 428 of the Code.

3. The appellant has challenged that conviction and sentence, in this appeal. By order dated 12.07.2013, this Court suspended the sentence and directed to release him on bail, on certain terms and conditions.

4. I heard Sri. Sunny Mathew, the learned counsel for the appellant and Sri.D.Chandrasenan, the learned Public Prosecutor.

5. Even though numerous grounds were urged in support of the appeal, the learned counsel for the appellant has fairly submitted

that he is not touching the merits of the finding. He has raised only two contentions before Court. Firstly, he said that the appellant has since been convicted by the same court in S.C.No.21/2016 for another offence under the Act and, therefore, he is entitled to get the sentence imposed by the judgment under challenge run concurrently. Secondly, he argued that the sentence imposed is disproportionate to the offence proved and thus prayed for showing leniency.

6. The learned Public Prosecutor said that the appellant is not entitled to get the benefit of Section 427 of the Code. According to him, the sentence imposed is commensurate with the gravity of the offence proved against him.

7. As mentioned earlier, the crime was registered by PW4 the Sub Inspector of Nilambur police station. According to him, on getting a tip off, he had proceeded to the place of occurrence after entering the information in the station GD and sending the Ext.P4, report under Section 42 of the Act, to the Circle Inspector; on reaching

the spot near the bridge, a person with the given specifications was found standing there carrying a packet with him; seeing the police party he tried to move away, but he was intercepted; on conducting body search, nothing incriminating could be found out. However, when the packet carried by him was examined in the presence of independent witnesses and other members of the police party, it contained 1.500 kgs of dried gunja which was seized under the Ext.P1 seizure mahazar, prepared at the place. PW1 and another independent witness had attested the mahazar. After arresting the accused, the party returned to the police station and registered the crime and later, the accused and the MOs were produced before the court. He also sent a report promptly under Section 57 of the Act to the Circle Inspector, which is marked as Ext.P10. The investigation was taken over by PW6, who was in charge of the Circle Inspector who conducted initial investigation by preparing the scene mahazar; he also prepared the Ext.P12 forwarding note for obtaining chemical examination report of the material object. The witness has acknowledged the receipt of both

reports sent by PW4 under Sections 42 and 57 of the Act, marked as Exts.P4 and P10 respectively. PW7 the Circle Inspector of Police, who took over the investigation from PW6, completed the investigation and laid the charge sheet. He also proved the Ext.P13 chemical examination report, which shows that the sealed packet in respect of Crime No.28/11 of Nilambur police station was received in-tact and on examination it was found and identified as gunja, i.e. c*annabis sativa*.

8. PW1, the independent witness, who had attested the seizure mahazar, turned hostile to the prosecution, though he identified his signature in Ext.P1. PW2 the Village Assistant proved the Ext.P2 scene plan. Similarly, PW3 attested the scene mahazar, marked as Ext.P3 mahazar, though he feigned ignorant about its content. PW4 is the detecting officer, the Sub Inspector of Police who proved Exts.P4 to P11 documents and also identified MOs.1 to 6. PW5 is the Civil Police Officer who accompanied the Sub Inspector who helped him in seizing the contraband from the appellant and preparing the documents.

9. That means, the oral testimony of PWs.4 and 5 police officials clearly indicate that the appellant was arrested from the said place while carrying 1.500 kgs of gunja. Oral testimony of these witnesses remain unshaken in cross-examination. There is not even a suggestion that they were fabricating a false case against the appellant.

10. Though the correctness of the finding of the learned Special Judge is not disputed, the oral testimony of witnesses and the materials clinchingly suggest that the appellant was found in illegal possession of 1.500 kgs of dried gunja, which is an offence punishable under Section 20(b)(ii)(B) of the Act. Thus the finding of the learned Special Judge is beyond reproach and is liable to be confirmed.

11. Now I shall consider the two contentions urged by the learned counsel for the appellant. Firstly, he pleaded for the benefit of Section 427 of the Code on the premise that the appellant stands convicted in another NDPS crime, SC 21/16 of that court whereby he has been sentenced to undergo rigorous imprisonment for 15 years. No other material is available before this Court with regard to the

proceedings undergone by the appellant in another crime under the Act or the punishments imposed. Section 427(1) of the Code reads thus:

> "427.Sentence on offender already sentenced for another offence:-
>
> (1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence.
>
> …….."

In order to attract the application of Section 427 of the Code, the following conditions have to be satisfied:

1. A person already undergoing sentence of imprisonment stands convicted;

2. While undergoing such sentence such a person is subsequently convicted and awarded the sentence of imprisonment including imprisonment for life;

3. Such imprisonment of rigorous imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced; and,

4. The court directs that subsequent sentence shall run concurrently with such previous sentence.

12. In other words, in order to attract Section 427(1) of the Code, when a person already undergoing the sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, then the second sentence shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the court directs that a subsequent sentence shall run concurrently with such previous sentence.

13. It is certain from a host of authorities that the sentencing court has the discretion to direct concurrency. The investiture of such discretion presupposes that it will be exercised on sound principles, regulated according to the known rules of law. Any casual direction made regarding concurrency often go against the express provisions of the statute.

14. It is also trite that the benefit under Section 427 of the Code can be conferred only by the court dealing with the subsequent case. It has also been held that the basic rule of thumb over the years has been the so-called single transaction rule for concurrent sentences. The Hon'ble Supreme Court in **Mohd. Akhtar Hussain *alias* Ibrahim Ahmed Bhatti v. Assistant Collector of Customs (Prevention) Ahmedabad & Ors. (AIR 1988 SC 2143)** held that Section 427 of the Code relates to administration of criminal justice and provides procedure for sentencing. The sentencing court is, therefore, required to consider and make an appropriate order as to how the sentence passed in subsequent case is to run. It is also apposite to quote the following passage from the judgment:

> "10. The basic rule of thumb over the years has been the so-called single transaction rule for concurrent sentences. If a given transaction constitutes two offences under enactments generally, it is wrong to have consecutive sentences. It is proper and legitimate to have concurrent sentences. But this rule has no application if the transaction relating to offences is not the same or the facts

constituting the two offences are quite different."

15. That means, whether the sentences shall run concurrently or consecutively can be decided only by the court deciding the latter case and not the former. Thus, for reasons more than one, the argument of the learned counsel for the appellant cannot be found favour with. The impugned judgment relates to an offence committed on 17/01/2011 following which a crime was registered and S.C.No.49/11 was originated before the trial court. Now the appellant has approached this Court challenging the correctness of that judgment rendered on 28/06/2013. Even in the absence of materials showing details of the subsequent conviction, from the words of the learned counsel, there are reasons to suggest that the appellant stands convicted for another crime committed later in point of time, in a case took cognizance by the Court in 2016. In other words, the cause of action and the conviction have taken place much later in point of time.

16. The learned counsel for the appellant has now canvassed a

position in which a sentence imposed on the appellant on an earlier point of time, to run concurrently with a sentence imposed on him long after imposing the first sentence. That is against the very purport of the statute. It should be the other way round. When the latter judgment was pronounced, the appellant should have brought the earlier conviction to the notice of the court and should have prayed for running the sentences concurrently, so that, if accepted, the appellant would have saved four years imprisonment. That power is vested with the court imposing the subsequent imprisonment or its appellate court. Now, it is settled by authoritative pronouncements that such a power is also available with this Court under Section 482 of the Code.

17. Secondly, as indicated earlier, the question whether two sentences should run concurrently or consecutively depends upon the exercise of discretion by the court. As held by this Court in **Grahari v. State [1988 (1) KLT 85]**, court must apply its mind to the facts and circumstances of the case and should not make it a meaningless

exercise, missing the nuances of the case. Such an exercise can be done only if all the materials are placed before the court. But, the argument of the learned counsel stands alone, without the appellant making available the materials to exercise the discretion by the court.

18. Moreover, as the very provision suggests, the rule is always that the sentences should run one after the other and the rule of concurrency is the exception. As held by the Apex Court, the benefit under Section 427 cannot be conferred for transactions which are unrelated. In such cases, the sentences should run consecutively.

19. The learned counsel for the appellant placed reliance on the decision reported in **Mani and Another v. State of Kerala (1983 Cri.LJ 1262)** and an unreported decision of the Madras High Court in Crl.O.P.(MD) No.14056 of 2019. I have no doubt that these decisions cannot support the argument of the counsel. In **Mani**'s case (*supra*), a Division Bench of this Court was considering the question whether the inherent powers of the Court under Section 482 of the Code can

be invoked to decide whether two sentences should run concurrently or consecutively. Overruling an earlier decision of a learned Single Judge of this Court in **Bhaskaran v. State (1978 KLT 6)** the Division Bench answered the question in the affirmative. The Madras High Court decision deals with simultaneous disposal of matters by the High Court in two prosecutions for offence under Section 138 of the Negotiable Instruments Act, after the disposal of appeals and revisions. Both the decisions were rendered in different contexts and cannot help the appellant.

20. To sum up, granting of prayer for concurrency depends on facts and circumstances of each case and the benefit under Section 427 of the Code can be claimed only before the Court trying the subsequent offences. Direction to run concurrently can be given only in appropriate cases by the Court imposing subsequent sentence of imprisonment; the appellate court dealing with subsequent conviction also can exercise the jurisdiction. In appropriate cases, such a benefit can be given by the High Court also, in exercise of its inherent

jurisdiction under Section 482 of the Code. To put it in other words, seeking such a relief from the court dealing with the first conviction is totally out of place.

21. That means, the argument of the learned counsel, that the appellant is entitled to get the sentences run concurrently with the sentence imposed on him on subsequent point of time, cannot be accepted.

22. This Court finds it difficult to approve the second argument also. In no stretch of imagination it could be held that, having regard to the nature and gravity of the offence, the imposition of a sentence of rigorous imprisonment for four years and fine is disproportionate. It is a fact that use of gunja and the like narcotic drugs has become rampant. It has got far reaching impact on the posterity. As held by the Apex Court in **Union of India v. Kuldeep Singh (AIR 2004 SC 827)**, an offence relating to narcotic drugs or psychotropic substance is more heinous than a culpable homicide

because the latter affects only an individual while the former affects and leaves its deleterious impact on the society, besides shattering the economy of the nation as well. If such offences are not dealt with an iron hand, it would grow as an offence against the posterity.

23. The subsequent conduct of the appellant also suggests that the conviction and sentence under challenge had little impact in his character. He has also proved himself unfit to claim any indulgence from the Court.

On these considerations, the appeal lacks merits. Confirming the conviction and sentence imposed by the trial court, the appeal is dismissed.

Sd/-
K. HARIPAL
JUDGE

okb/02/07/2020

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P.S. TO JUDGE