

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K. BABU

THURSDAY, THE 1ST DAY OF FEBRUARY 2024 / 12TH MAGHA, 1945

CRL.A NO. 993 OF 2023

CRIME NO.1/2016 OF KALPETTA EXCISE CIRCLE OFFICE, WAYANAD
AGAINST THE JUDGMENT IN SC 291/2020 OF THE COURT OF ADDITIONAL
SESSIONS JUDGE - II, KALPETTA, WAYANAD

APPELLANT/ACCUSED:

MANOJ, 


BY ADV. SUNNY MATHEW

RESPONDENTS/COMPLAINANT:

- 1 STATE OF KERALA REPRESENTED THROUGH THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM - 682031
- 2 EXCISE CIRCLE INSPECTOR
EXCISE CIRCLE OFFICE, SULTHAN BATHERY, WAYANAD
DISTRICT-673592.

BY P.P. SRI.G SUDHEER

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
01.02.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

“C.R.”

K.BABU, J.

Criminal Appeal No.993 of 2023

Dated this the 1st day of February, 2024

JUDGMENT

The appellant is the accused in S.C No.291/2020 on the file of the Additional Sessions Court-II, Kalpetta. He has been convicted under Section 20(b)(ii)(B) of the NDPS Act as per the impugned judgment.

2. The prosecution case is that on 21.04.2016 at 10.45 a.m, the accused was found in possession of 1.3 kg of dried Ganja, a narcotic drug, on the concrete road junction leading to Mailampadi Paniya colony. The accused was arrested from the place of occurrence along with the contraband substance.

3. The Investigating Officer submitted the final report. The accused appeared in response to the summons. He pleaded not guilty, and therefore, he came to be tried by the Trial Court. The prosecution examined PWs 1 to 7 and proved Exts.P1 to P17 and MOs

1 and 2. The Trial Court found the accused guilty of the offence alleged and passed the impugned judgment of conviction and sentence.

4. Heard Sri.Sunny Mathew, the learned counsel appearing for the appellant/accused and Sri. G.Sudheer, the learned Public Prosecutor appearing for the respondents.

5. The learned counsel for the appellant challenged the judgment of conviction and sentence on the following grounds:-

- (i) The samples of the seized contraband were not drawn in the presence of the Magistrate, and the inventory of the seized contraband was not duly certified by the Magistrate.
- (ii) The detecting officer ought not to have drawn the sample from the bulk quantity of the contraband substance seized at the scene of occurrence, and he should have drawn the sample in the presence of the Magistrate as provided in Section 52A of the NDPS Act.
- (iii) The prosecution failed to explain what happened to the rest of the contraband after taking the sample allegedly seized from the possession of the accused.

6. The Excise Inspector, Sulthan Bathery detected the crime.

On 21.04.2016, after getting information from the Commissioner's Squad, the Excise Inspector (PW2) proceeded to the place of occurrence. He reached the Appad Mailampadi colony. He found the accused holding a plastic cover. PW2 took the plastic cover from the possession of the accused and found that it contained 1300 grams of Ganja wrapped with a newspaper. After complying with the statutory formalities, PW2 seized the contraband substance from the possession of the accused. He drew 25 grams of Ganja from the contraband seized to be used as sample. PW2 prepared Ext.P5 seizure mahazar. He wrapped the sample with a plastic cover and sealed and labelled it.

7. The learned counsel for the accused submitted that there is non-compliance with Section 52A of the NDPS Act, which vitiates the entire proceedings. The learned counsel submitted that as per sub-section (2) of Section 52-A of the NDPS Act, the detecting officer should have forwarded the contraband substance to the officer empowered under Section 53 of the NDPS Act, who shall prepare an inventory of the same. The learned counsel further contended that the sample ought to have been taken in the

presence of the jurisdictional Magistrate.

8. The learned counsel for the appellant relied on **Union of India v. Mohanlal and Another [(2016) 3 SCC 379]**, **Simarnjit Singh v. State of Punjab [2023 SCC OnLine SC 906]**, **Mangilal v. State of Madhya Pradesh (2023 SCC OnLine SC 862)** and **Yusuf @ Asif v. State (2023 SCC OnLine SC 1328)** in support of his contentions.

9. In the instant case, admittedly, the detecting officer had drawn the sample at the scene of occurrence, and he did not forward the contraband substance as provided under Section 52A of the NDPS Act. Section 52A reads thus:

“Section 52A - Disposal of seized narcotic drugs and psychotropic substances

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, 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 drugs, psychotropic substances, controlled substances or conveyances 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, psychotropic substances, controlled substances or conveyances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs, psychotropic substances, controlled substance or conveyances 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, controlled substance or conveyances 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, substances or conveyances 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, psychotropic substances, controlled substances or conveyances and any list of samples drawn under subsection (2) and certified by the Magistrate, as primary evidence in respect of such offence."

10. As per sub-section (2) of Section 52A, upon seizure of the contraband substance, he should forward the contraband to the officer-in-charge of the nearest Police Station or the officer empowered under Section 53, as the case may be, who shall

prepare an inventory as stipulated therein and make an application to the Magistrate to certify the correctness of the inventory, certify the truthfulness of the photographs of such drugs or substances, draw representative samples in the presence of the jurisdictional Magistrate and certify the correctness of the list of samples so drawn. As per sub-section (3) of Section 52A, when such an application is filed, the Magistrate shall allow the same.

11. The intention of the legislature by incorporating Section 52A in the NDPS Act is to see that the process of drawing the sample has to be in the presence and under the supervision of the Magistrate, and the entire exercise has to be certified by him to be correct. Sub-section (4) of Section 52A says that every court trying an offence under the NDPS Act shall treat the inventory, the photographs of the contraband substance and the list of samples drawn under sub-section (2) and certified by the Magistrate as primary evidence in respect of such offence.

12. In **Mohanlal** (supra), the Apex Court had occasion to consider the scope of Section 52-A of the Act. In **Mohanlal** the Supreme held thus:-

“15. It is manifest from S.52A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in - charge of the nearest police station or to the officer empowered under S.53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of S.52A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to S.52A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of S.52 - A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would,

therefore, do well, to re - examine the matter and take suitable steps in the above direction.”

(emphasis supplied)

13. In **Mohanlal** (supra), the Apex Court observed that it is manifest that upon seizure of the contraband, it has to be forwarded either to the officer-in-charge of the nearest Police Station or to the officer empowered under Section 53 as the case may be, who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate to get its correctness certified.

14. In **Bothilal v. Intelligence Officer, Narcotics Control Bureau (2023 SCC OnLine SC 498)** while considering a case where the detecting officer had drawn samples from the contraband at the place of seizure without following provisions of Section 52A of the Act, following **Mohanlal** (supra) the Supreme Court held that the act of drawing sample at the time of seizure not in conformity with the law declared in **Mohanlal** creates serious doubt about the prosecution case that the substance recovered was contraband.

15. Following **Mohanlal**, in **Simarnjit Singh** (supra), the Supreme Court held that the drawing of sample by the detecting officer at the time of seizure and not following the

statutory provision under Section 52A creates serious doubt about the prosecution case that the substance seized was a contraband.

16. In **Yusuf @ Asif** (supra), the Supreme Court reiterated that once there is no primary evidence obtained as provided under Section 52A of the NDPS Act, the trial as a whole stands vitiated.

17. The further contention of the learned counsel for the accused is that the non-explanation of the prosecution as to what happened to the remaining quantity of Ganja after drawing the sample also creates doubt on the prosecution case that any contraband, as pleaded was seized from the possession of the accused.

18. The learned Public Prosecutor submitted that there are materials to show that the remaining Ganja, after taking the sample, was duly produced before the Court by the empowered officer. The Trial Court has dealt with the contention of the accused in paragraph 25 of the impugned judgment in the following way:

“25. The next defence of the accused is that the remaining ganja after drawing the samples has not been produced before court; therefore the accused is entitled to acquittal. The above defence of the accused is not correct. On perusal of Ext.P12 property list, it is found that the remaining ganja weighing 1.250 kg has been

sealed, labelled and produced before the Magistrate on 21.04.2016 and the Magistrate forwarded the same to the NDPS Court, Vatakara. The Hon'ble sessions court, Kalpetta had received the contraband on 18.11.2020.”

19. It is pertinent to note that the remaining quantity of the contraband was not exhibited to the witnesses at the time of adducing evidence. No material shows that the remaining quantity was available in the Court. The lack of satisfactory explanation on the availability of the Ganja during the trial is evident from the observation of the learned Sessions Judge in paragraph 25 of the judgment. It is also important to note that the prosecution has no case that the remaining quantity of Ganja seized from the possession of the accused was forwarded to the competent officer as provided under Section 52A of the NDPS Act and destructed thereafter. In **Mangilal** (supra), the procedure under Section 52A for drawing sample was not followed. The bulk quantity of the contraband substance allegedly recovered from the accused was also not produced in the Court at the time of trial. In that factual matrix, the Supreme Court observed thus:-

“12.The record would also indicate that an order was passed by the trial Judge permitting the prosecution to keep the seized materials within the police station, to be produced at a later point of time. This itself is a sufficient indication that the

mandate of Section 52A has not been followed. There is no explanation either for non-production of the seized materials or the manner in which they are disposed of. No order passed by the Magistrate allowing the application, if any, filed under Section 52A of the NDPS Act....

13. There is a serious doubt with respect to the seizure.....”

Therefore, in the present case, non-explanation regarding the non-production of the remaining quantity of the Ganja after drawing the sample creates doubt on the prosecution case regarding the alleged recovery of the contraband.

20. The resultant conclusion is that the prosecution failed to establish the link connecting the accused with the contraband seized. The conviction and sentence passed by the learned Sessions Judge overlooking these vital aspects of the matter cannot be sustained. Therefore, the accused is found not guilty of the offence alleged. He is acquitted of the offence alleged. He is set at liberty.

The Criminal Appeal is allowed as above.

**Sd/-
K.BABU,
JUDGE**