"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

TUESDAY, THE 28TH DAY OF JUNE 2022 / 7TH ASHADHA, 1944

CRL.A NO. 317 OF 2008

AGAINST THE JUDGMENT DATED 30.01.2008 IN S.C.NO.5/2007 OF SPECIAL COURT (NDPS ACT CASES), VADAKARA

APPELLANT/ACCUSED

K.B.RASHEED
S/O BAPPU, KOLANGARA HOUSE, VEERAJPETTA,
PERUMBADI CHECK POST, KUDAK.

BY ADV SRI.SUNNY MATHEW

RESPONDENT/COMPLAINANT:

STATE OF KERALA
CIRCLE INSPECTOR OF POLICE, KASABA POLICE STATION, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

SMT MAYA M.N- P.P

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 16.06.2022, THE COURT ON 28.06.2022 DELIVERED THE FOLLOWING:

JUDGMENT **"C.R."**

The appellant is the accused in S.C.No.5 of 2007 on the file of the Special Court (NDPS Act Cases), Vadakara. He was convicted and sentenced for an offence punishable under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act"). The sentence imposed was rigorous imprisonment for a period of three years and a fine of Rs.10,000/- with a default sentence of six months. The said judgment of conviction and the order of sentence are under challenge in this appeal filed under Section 374(2) of the Code of Civil Procedure, 1973.

2. The allegations against the appellant are that at about 4.35 p.m. on 01.01.2006, he was found in possession of 1.250 kg. of Ganja near the Palayam bus stand at Kozhikode, in violation of the provisions of the NDPS Act. PW1, the Sub Inspector of Police, Kasaba Police Station, on receipt of reliable information, reached the spot and caught the appellant red-handed. On a search, 1.250 kg of Ganja was found in his possession. After necessary formalities of

preparation of seizure mahazar, sampling and sealing of both samples and the contraband, PW1 arrested the appellant.

3. During the trial, PWs.1 to 6 were examined and Exts.P1 to P12 were marked on the side of the prosecution. Mos.1 to 3 were identified. In the examination of the appellant under Section 313 (1)(b) of the Code, he took the stand that he was innocent and the case was foisted against him. No defence evidence was let in. The learned Special Judge did not accept the contentions raised by the appellant that he was innocent and evidence was insufficient to find him guilty. Accordingly, the appellant was convicted and sentenced.

4. On 15.02.2008, this appeal was admitted and the sentence imposed on the appellant was suspended. He was therefore directed to be released on bail on the conditions stipulated in that order.

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

6. PW1 is the detecting officer. PW2 is a police constable accompanied PW1 and witnessed the search of the

person of the appellant and the seizure. PW1 while working as the Sub Inspector of Police, Kasaba Police Station, got the information that a person was selling Ganja near the bus stand at Palayam, Kozhikode. After entering the information in the General Diary and sending a report as stipulated in Section 42(2) of the NDPS Act, went to the spot. The appellant was found near the Milma booth in the premises of the bus stand at Palayam. He was informed about his right to have his person searched in the presence of a Gazetted Officer or a Magistrate. But he waived that right and endorsed so in Ext.P2 report. Accordingly, PW1 himself searched the body of the appellant, whereupon PW1 found Ganja in a plastic cover he was carrying. PW1 prepared two samples of 50 grams each from the said Ganja. The samples as well as the remaining Ganja in the possession of the appellant were packed, labeled and sealed before seizure as per Ext.P5 seizure mahazar. Recording the arrest of the appellant, PW1 has prepared Ext.P3 arrest memo and Ext.P4 inspection memo. In Ext.P3 as well as Ext.P5, signatures of witnesses were taken.

7. PW2 was the police constable who accompanied PW1. PW2 also deposed regarding the details of the search and seizure of the contraband and arrest of the accused. He is also a signatory to Ext.P5 seizure mahazar. Besides PW2, PW4 was examined by the prosecution to prove the search, seizure and arrest. He admitted that he had signed Ext.P5 at the precincts of the Palayam bus stand where he was selling newspaper. His signature in Ext.P3 as well as Ext.P5 is admitted to be that of him. He, however, denied having seen the arrest of the accused and the seizure of any object from him. Although in regard to the arrest of the accused and seizure of contraband, he did not support the case of the prosecution, his evidence would support the evidence of PWs.1 and 2 regarding the preparation of Exts.P3 and P5 at the place of occurrence.

8. Coming back to the police station, PW1 registered a crime as per Ext.P6, first information report. Without any delay, the appellant was produced before the court. The contraband and the samples were also produced before the

court without any delay. Ext.P8 is the property list, as per which the contraband and the samples were produced before the court.

9. It is true that there is no independent evidence in order to prove the arrest of the appellant and seizure of contraband from his possession. But no inconsistency or contradiction has been brought out in evidence of PWs.1 and 2 with reference to the said aspects. The documents referred to above well corroborate the oral testimony of PWs.1 and 2. In the said circumstances, there is no reason to disbelieve the oral testimony of PWs.1 and 2 in court.

10. The Apex Court in **Karamjit Singh v. State (Delhi Administration) [AIR 2003 SC 1311]** held that,-

> "The testimony of police personnel should be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies as much in favour of police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good grounds. It will all depend upon the facts and circumstances of each

case and no principle of general application can be laid down."

11. In the light of the said principle laid down by the Apex Court, there is no impediment for relying on the evidence tendered by PWs.1 and 2 in court. I found that they are credible witnesses. Therefore, even in the absence of any independent evidence, they can be believed. It follows that the prosecution has succeeded in proving that 1.250 kg. of contraband was seized from the possession of the appellant, as alleged by the prosecution.

12. The learned counsel appearing for the appellant would contend that there has been a slew of procedural irregularities, resulting in miscarriage of justice, and therefore, the conviction of the appellant is unsustainable in law. It is contended that the appellant is a person knowing only Kannada; whereas, in none of the stages of the investigation or trial, he was made to know about the proceedings by telling him in his own language. It is true that in Ext.P2 his signature was taken, but without his knowing its contents. During the proceedings in the court also, he was not apprised of the contents of various

proceedings by interpreting in his own language as provided in Sections 279 and 281 of the Code. The learned counsel for the appellant would point out that the appellant did not know any language other than Kannada is a fact stated by PW1, and as such the said lapses resulted in failure of justice, thereby causing grave prejudice to the appellant.

13. The objective of Section 279 of the Code is to safeguard the interest of an accused, who does not understand the language in which the proceedings of the court are being conducted. Section 273 of the Code insists that unless otherwise expressly provided, all evidence taken in the course of the trial of a case shall be recorded in the presence of the accused. It is an invariable rule of the fair trial guaranteed under Article 21 of the Constitution of India. Section 278 of the Code further binds all the courts conducting criminal trials to read over evidence recorded from every witness to such witnesses in the presence of the accused, unless he appears only through his pleader. A conjoint reading of these provisions would show that the intention of the

Legislature is that the process of recording evidence during a criminal trial shall be done in the informed presence of the accused. His mere presence, without understanding the contents of the proceedings being taken place during the course of the trial, does not satisfy the requirements of Section 273 of the Code or the principles of a fair trial as envisioned under Article 21 of the Constitution of India.

14. Section 279 of the Code reads as follows:

> "279. Interpretation of evidence to accused or his pleader.- (1) Whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him.
>
> (2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.
>
> (3) When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary."

15. This Section envisages that when the accused is present in Court in person and evidence is given in any language not understood by him, it shall be interpreted to him

in open Court in a language understood by him. In the case of oral evidence that is a mandatory requirement, but in the case of documentary evidence, it is only discretionary. It is clear from its reading that sub-sections (1) and (2) of Section 279 are mutually exclusive and even in a case the accused is represented by a counsel it is mandatory that the evidence shall be interpreted to the accused in a language known to him if he does not know the language in which the evidence is recorded.

16. Section 281(1) of the Code insists that whenever the accused is examined by a magistrate or a court, he shall make a memorandum of the substance of such examination in the language of the Court. Section 281(4) mandates that such record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands.

17. I have gone through the records of the case. It is not certified in the statement of the appellant while recording his plea to the charge framed against him or in the record of

the examination of him under Section 313(1)(b) of the Code that the matter was translated in Kannada to the appellant. In none of the records of deposition of the witnesses also there is no certification that the contents were interpreted to the appellant in the language known to him or that he knew Malayalam. It shows that at no stage of the trial an interpreter was engaged and the evidence or other statements were translated in the language of the appellant.

18. Now, what is the effect of such failure? The Apex Court in **Shivanarayan Kabra v. The State of Madras [AIR 1967 SC 986]** considered a similar question. Sub-section (1) of Section 361 of the Code, 1898, was the provision then in existence. That provision is in *pari materia* to sub-section (1) of Section 279 of the Code, 1973. The Apex Court has held as follows:

> "10. xxx xxx It was said that the evidence of the prosecution witnesses was given either in Tamil or in the English language and the appellant did not know either of the languages and so he was not able to take part in the trial. Mr. Naunit Lal contended that there was a breach of the requirement of Section 361(1) of the Criminal Procedure

Code and the trial was vitiated. We do not think there is any substance in this argument. Even if it is assumed that the appellant did not know English or Tamil the violation of any of Section 361(1) of the Criminal Procedure Code was merely an irregularity and it is not shown in this case that there is any prejudice caused to the appellant on this account. It is pointed out by the Sessions Judge that the appellant did not make any objection at the time the evidence was given and it appears that he was represented by two eminent advocates – Sri.V.T. Rangaswami Iyenger and Sri R.Krishnamoorthy Iyer - in the trial court who knew both these languages and who would not have allowed the interest of the appellant to be jeopardized even to the smallest extent. In our opinion, the irregularity has not resulted in any injustice and the provisions of Section 537 of the Criminal Procedure Code are applicable to cure the defect."

19. In the light of the principle laid down by the Apex Court in the aforesaid decision in a case where the accused is defended by a counsel, non-compliance with Section 279(1) or 281(4) of the Code by itself would not render the prosecution illegal. The non-compliance with Sections 279(1) or 281(4) of the Code is an irregularity. Unless prejudice is caused to the accused, that irregularity will not vitiate the trial altogether.

20. It is seen that at no stage of the trial, the counsel

appearing for the appellant has pointed out before the Special Court that the appellant did not know Malayalam in which language the proceedings were recorded. When PW1 categorically deposed in court that the appellant knew Kannada only, it cannot be inferred that he could understand what was stated to him in Malayalam.

21. The appellant was represented by a lawyer through out the proceedings in court. It is seen that he or his lawyer never complained before the court about the requirement of translation in Kannada. It is not pointed out by the learned counsel for the appellant any instance of prejudice caused to the appellant during the process of trial. As such, it may say that there occurred no prejudice to him in the process of trial and for such reason the prosecution need not fail. I, however, hasten to state in the above context that non-observance of Section 279(1), 279(2) or 281(4) of the Code may be an irregularity only, but that is not a permission to violate it. I may reiterate the view of the this Court in **Chalam Sheikh v. State of Kerala [2020 (4) KLT 164]** as to what shall be the

procedure to be followed by courts in a similar situation, which is as follows:

> "It is ideal and proper and always desirable to prepare the questions to be put to the accused in a language in which the accused is well versed. However, as in the present case, when the accused is a person who hails from another part of the country, it may not be possible to prepare the questions in the language which he knows. In such cases, the questions have to be prepared in Malayalam or English and an interpreter or translator has to be appointed by the Court to interpret or translate the questions put to the accused and the answers given by him. What is essential is that the accused shall clearly understand the questions put to him so that he could give proper answers. It is also necessary that the record shall clearly indicate the procedure adopted by the Court. The Magistrate or the Judge shall certify at the bottom of the record of examination that the questions were translated or interpreted and explained to the accused in the language of the accused. It would also be ideal and desirable that the interpreter or translator shall, instead of simply putting his signature in the record of examination of the accused, make an endorsement that he has truly and correctly interpreted or translated the questions and the answers."

22. The same procedure shall invariably be followed while recording plea of the accused to the charge. Similarly, evidence of each witness examined in the case shall be interpreted in the language understood by the accused and a certification to that effect added in the record of deposition. Whenever an accused who does not know the language in which the aforesaid proceedings take place, the magistrate or court is expected to follow the procedure mentioned above.

23. In this case, apart from such flaws during the course of the trial, there occurred a glaring glitch while recording the statement of the appellant in Ext.P2, the statement of waiver under Section 50 of the NDPS Act. Section 50 of the NDPS Act is a mandatory provision. Unless the accused waived his right to be searched before a Gazetted Officer or a Magistrate, it is the obligation of the searching officer to have the search in the presence of either a Gazetted Officer or a Magistrate. In **Vijaysinh Chandubha Jadeja v. State of Gujarat [(2011) 1 SCC 609]**, a Constitution Bench of the Apex Court interpreted Section 50 thus:

"The mandate of Section 50 is precise and clear, viz. if the person intended to be searched expresses to the authorised officer his desire to be taken to the nearest gazetted officer or the Magistrate, he cannot be searched till the gazetted officer or the Magistrate, as the case may be, directs the authorised officer to do so. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under Sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search."

24. PW1 deposed that the appellant was apprised of his right and as he stated that the presence of Gazetted Officer or

a Magistrate was unnecessary, he himself conducted the search. At the same time, PW1 stated that the appellant knew Kannada only. The appellant wrote in Ext.P2 also in Kannada. In the absence of certification in Ext.P2 or a statement of PW1 in court that the appellant was communicated in Kannada about his right under Section 50 of the NDPS Act, it can only be said that there occurred non-compliance with the provisions of Section 50. In the circumstances, conviction of the appellant for the offence under Section 20(b)(ii)(B) of the NDPS Act cannot be sustained. Hence, this appeal is allowed and the judgment dated 30.01.2008 in S.C.No.5 of 2007 of the Special Court (NDPS Act Cases), Vadakara, convicting and sentencing the appellant is set aside. The appellant is acquitted and set at liberty.

Sd/-

P.G. AJITHKUMAR, JUDGE

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