

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

MONDAY, THE 03RD DAY OF AUGUST 2020 / 12TH SRAVANA, 1942

CRL.A.No.353 OF 2015(A)

AGAINST THE JUDGMENT IN SC 92/2012 DATED 23-01-2015 OF SPECIAL
COURT (NDPS ACT CASES), VADAKARA

CRIME NO.872/2011 OF S.Battery Police Station , Wayanad

APPELLANT/ACCUSED:

FAIJAS, S/O.KAREEM, C.NO.52/15, CENTRAL PRISON,
KANNUR

BY ADV. SRI.M.T.BALAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA - REPRESENTED BY THE
SUB INSPECTOR OF POLICE,
SULTHAN BATHERY POLICE STATION (CR.872/2011)

SRI SANTHOSH PETER-SR PP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
08-07-2020, THE COURT ON 03-08-2020 DELIVERED THE FOLLOWING:

R.NARAYANA PISHARADI, J

Crl.A.No.353 of 2015

Dated this the 3rd day of August, 2020

J U D G M E N T

The appellant is the accused in the case S.C.No.92/2012 on the file of the Court of the Special Judge (NDPS Act Cases), Vatakara.

2. The appellant stands convicted and sentenced for committing the offences punishable under Sections 22(b) and 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act').

3. The prosecution case is that, on 15.11.2011, at about 12.45 hours, inside the compound of the Government Hospital at Sulthan Bathery, the Sub Inspector (PW3) of Sulthan Bathery police station found the appellant/accused in possession of 17 ampoules of Buprenorphine and 12 ampoules of Diazepam injection along with some syringes and needles. PW3 seized the

contraband substances as per Ext.P1 mahazar.

4. The case against the accused was registered as Crime No. 872/2011 of Sulthan Bathery police station. The initial investigation of the case was conducted by PW6 Circle Inspector. After completing the investigation of the case, PW7 Circle Inspector filed final report against the accused for the offence punishable under Section 22(b) of the Act.

5. The trial court framed charge against the accused for the offences punishable under Sections 22(b) and 22(c) of the Act. The accused pleaded not guilty to the offences.

6. The prosecution examined PW1 to PW7 and marked Exts.P1 to P12 documents and MO1 to MO7 material objects. No evidence was adduced by the accused.

7. The trial court found the accused guilty of the offences punishable under Sections 22(b) and 22(c) of the Act and convicted him thereunder. The trial court sentenced him to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.30,000/- and in default of payment of fine, to

undergo rigorous imprisonment for a period of three months for the offence under Section 22(b) of the Act and to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a period of one year for the offence under Section 22(c) of the Act and directed that the substantive sentences of imprisonment shall run concurrently. This appeal is filed by the accused challenging the conviction and sentence entered against him by the trial court.

8. The appeal was preferred by the accused from jail and an advocate was appointed by the Court as State Brief for him. Subsequently, Advocate. Sri.M.T.Balan has filed vakalath for the appellant. Heard learned counsel for the appellant and also the learned Public Prosecutor and perused the records.

9. The prosecution examined seven witnesses. PW1 is the independent witness examined by the prosecution to prove the occurrence. PW2 is only an attestor to Ext.P2 scene mahazar. PW3 is the Sub Inspector who detected the offence. PW4 was the Senior Civil Police Officer who was in the police party led by PW3.

PW5 is the Village Officer who prepared and issued Ext.P10 site plan. PW6 is the Circle Inspector who initially conducted the investigation of the case. PW7 is the Circle Inspector who completed the investigation of the case and filed final report against the accused.

10. The summary of the evidence of PW3 Sub Inspector, regarding the search and seizure, is as follows: On 15.11.2011, at 12.30 hours, while he was in the police station, he received information over phone that a person was standing inside the compound of the Taluk Hospital, Sulthan Bathery with a yellow colour cover containing narcotic drugs. PW3 prepared Ext.P3 report under Section 42 of the Act and sent it to the Circle Inspector. He entered the information in the general diary and proceeded with police party and reached the compound of the Taluk Hospital at 12.45 hours. He saw a person (identified by PW3 as the accused standing in the dock) carrying a plastic cover trying to run away from there. PW3 obstructed him and ascertained his name. PW3 told the accused, in the presence of witnesses, that he was going to search the accused and also the

plastic cover held by him and that the accused had the legal right to demand the presence of the Magistrate or a Gazetted Officer at that time. The accused told him that it was not necessary and that PW3 himself could search him. The accused gave him Ext.P4 consent letter in that regard. PW3 then searched the body of the accused and the plastic cover held by him. The plastic cover contained 17 ampoules, two millilitres each, of the psychotropic substance by name Buprenorphine and 12 ampoules, two millilitres each, of the psychotropic substance by name Diazepam and also two syringes and 15 injection needles and three bottles of sterile water. PW3 arrested the accused and prepared Ext.P5 arrest and inspection memo. He took two samples from each item and wrapped them with brown paper and sealed the packets containing the samples and numbered them as S1 and S2. He wrapped the remaining items also with brown paper and sealed the packets and numbered them as P1 and P2. PW3 seized all the articles as per Ext.P1 mahazar.

11. PW4 Senior Civil Police Officer has also given evidence regarding the seizure of the substances from the possession of

the accused. His evidence corroborates the testimony of PW3 regarding the material particulars of the occurrence.

12. PW1, the independent witness examined by the prosecution, has also supported the prosecution case. He is an employee of the hospital. He has given evidence that he saw the police party seizing ampoules from the possession of the accused. He identified his signature in Ext.P1 seizure mahazar.

13. Ext.P12 is the certificate of chemical examination received in respect of the samples sent from the court to the laboratory. It shows that, Buprenorphine was detected in the sample numbered as S1 and that Diazepam was detected in the samples which were numbered as S2(1) and S2(2).

13. The appellant denied the seizure of the contraband substances from him but he did not raise any specific plea during the trial of the case.

14. Learned counsel for the appellant has raised the following contentions to challenge the conviction entered against the appellant by the trial court. (1) The requirement under

Section 42 of the Act was not properly complied with by PW3. (2) There was no proper compliance with the requirement of the provision contained under Section 50(1) of the Act. (3) There was delay in producing the seized substances before the court and the delay has not been explained by the prosecution and therefore, tampering with the samples and other substances, before producing them in the court, cannot be ruled out.

15. Section 42(1) of the Act provides for entry, search, seizure and arrest without warrant or authorisation. According to this provision, where an empowered officer, who has reason to believe from personal knowledge or information given by any person and who has taken down in writing that any narcotic drug or psychotropic substance in respect of which an offence punishable under the Act has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building or conveyance or enclosed place, may, between sunrise and sunset, enter into and search any such building, conveyance or place. Section 42(2) of the Act provides that where an officer takes down any

information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

16. PW3 was a police officer in the rank of Sub Inspector. He is an empowered officer by virtue of the notification issued by the Government of Kerala as G.O.(MS) No.146/90/TD dated 22.10.1990 under Section 41(2) of the Act by which all police officers in the police department of and above the rank of Sub Inspector of Police and all officers of the Excise Department of and above the rank of Excise Inspectors have been empowered to act under Section 42 of the Act (See **Sasi v. State of Kerala : 2001 (3) KLT 396**).

17. Section 42 of the Act comprises of two components. One relates to the basis of information, that is, (i) from personal knowledge (ii) information given by person and taken down in writing. The second is that the information must relate to commission of offence punishable under Chapter IV of the Act and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish

evidence of commission of such offence. Unless both the components exist Section 42 of the Act has no application (See **Rajendra v. State of M.P : AIR 2004 SC 1103** and **Krishna Kanwar v. State of Rajasthan : AIR 2004 SC 2735**).

18. In the instant case, Ext.P3 is the report prepared by PW3 on getting the information. He had sent it to the Circle Inspector (PW6), his immediate superior officer, even before proceeding to the spot. PW6 has given evidence that he had received Ext.P3 report at 12.40 hours on 15.11.2011.

19. Moreover, there is yet another aspect which requires consideration. Section 43 of the Act states that any officer of any of the departments mentioned in Section 42 may (a) seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under the Act has been committed and (b) detain and search any person whom he has reason to believe to have committed an offence punishable under the Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such

possession appears to him to be unlawful, arrest him and any other person in his company. The explanation to Section 43 of the Act provides that for the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

20. The material difference between the provisions of Section 43 and Section 42 of the Act is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc and arrest of a person who is found to be in possession of any narcotic drug or psychotropic substance in a public place where such possession appears to him to be unlawful (See **State of Punjab v. Baldev Singh : AIR 1999 SC 2378**).

21. In the instant case, when the search and seizure were effected, the appellant was standing inside the compound of the government hospital. It was a public place. If a search is made in a public place, the officer taking the search is not required to comply with the requirements under Section 42 of the Act. When search and seizure are effected at a public place, Section 43 of the Act comes into play and the question of non-compliance of Section 42 of the Act does not arise (See **Mohan Lal v. State of Rajasthan : AIR 2015 SC 2098**).

22. There is also no merit in the contention of the appellant that there was violation of the provisions contained in Section 50(1) of the Act in conducting the search.

23. Section 50(1) of the Act mandates that an empowered officer should necessarily inform the suspect about his legal right to be searched in the presence of a gazetted officer or a Magistrate.

24. The Constitution Bench in **Vijaysinh Chandubha Jadeja v. State of Gujarat : AIR 2011 SC 77** has held as

follows:

"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".

25. In the instant case, the evidence of PW3 is that he told the accused that he had the legal right to demand the presence of a Magistrate or a gazetted officer while conducting the search. PW3 has deposed that the accused told him that there was no

need to do so and that PW3 could conduct the search. PW3 has stated that the accused gave him Ext.P4 consent letter in this regard.

26. In **Sekhar Suman Verma v. Superintendent of N.C.B : AIR 2016 SC 3193**, the Apex Court has observed as follows:

"Lastly, so far as compliance of the requirement of Section 50 is concerned, it was found and indeed rightly that the offer to search the appellant was given to him in writing and on his giving consent, he was accordingly searched. The High Court was, therefore, right in upholding the procedure followed by the raiding party for ensuring compliance of Section 50 and rightly held against the appellant on this issue".

27. The decision referred to above would show that, on the basis of the consent letter given by the accused, PW3 could have conducted search of the body of the accused without ensuring the presence of another gazetted officer or a Magistrate.

28. What is required under Section 50 of the Act is to make the suspect or the accused aware of his right to be searched in

the presence of a gazetted officer or a Magistrate. In the present case, the evidence of PW3 would show that the accused was made aware of his right and it was not merely an option given to the accused. The evidence of PW3 in this regard is corroborated by the recital contained in Ext.P1 mahazar, the contemporaneous document prepared by him. The suspect person may or may not choose to exercise the right provided to him under Section 50 of the Act.

29. Moreover, Section 50(1) of the Act applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag, or premises. In case, the recovery of the contraband substance is made from a container being carried by the individual, the provisions of Section 50 of the Act would not be attracted. A bag, briefcase or any such article or container, under no circumstances, can be treated as body of a human being. It is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the Act. The provisions of Section 50 of the Act will come into play only in the case of personal search of the accused and not of

some baggage like a bag, article or container, etc. which the accused may be carrying (See **Rajendra v. State of M.P : AIR 2004 SC 1103, State of Himachal Pradesh v. Pawan Kumar : AIR 2005 SC 2265, State of Rajasthan v. Daulat Ram : AIR 2005 SC 3816, Jarnail Singh v. State of Punjab: AIR 2011 SC 964, Ram Swaroop v. State : AIR 2013 SC 2068** and **Kulwinder Singh v. State of Punjab : AIR 2015 SC 2488**).

30. In the instant case, the contraband substances were seized on conducting search of the plastic cover held by the accused. No contraband article was seized on conducting search of the person or body of the accused.

31. In **State of Punjab v. Baljinder Singh : AIR 2019 SC 5298**, the Apex Court has held as follows:

"In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of

contraband pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act as far as "personal search" was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Since in the present matter, seven bags of poppy husk each weighing 34 kgs were found from the vehicle which was being driven by accused- Baljinder Singh with the other accused accompanying him, their presence and possession of the contraband material stood completely established".

32. Thus, if a person is found to be in possession of a vehicle, bag, container etc and search of the body of the person as well as the vehicle or the bag or the container is made and if the contraband substance is recovered not on conducting search of the body of the person but from the vehicle or the container or the bag, then non-compliance with the requirements under Section 50 of the Act would be of no consequence and the accused will not be entitled to be acquitted on that ground. The dictum laid down in **Baljinder Singh** (supra) squarely applies to the facts of the present case.

33. Of course, in **Sk.Raju alias Abdul Haque alias Jagga v. State of West Bengal: AIR 2018 SC 4255**, it has been held that as soon as the search of a person takes place, the requirement of mandatory compliance with Section 50 of the Act would be attracted, irrespective of whether contraband is recovered from the person of the detainee or not. **Baljinder Singh** (supra) does not refer to the earlier decision in **Raju alias Abdul Haque** (supra). But, very recently, in **Than Kunwar v. State of Haryana: 2020 (1) KLD 476 (SC) : 2020 (2) KLT OnLine 1135 (SC)**, the Apex Court has taken note of the divergent views in **Baljinder Singh** (supra) and **Raju alias Abdul Haque** (supra). After making a reference to the decision of the Constitution Bench in **State of Punjab v. Baldev Singh : (1999) 6 SCC 172**, in **Than Kunwar** (supra) it has been held as follows:

"As already noticed, we are not oblivious of the observation which has been made in the other three Judge Bench judgment of this Court in Sk. Raju (supra), which it appears, was not brought to the notice to the Bench which decided the case later in Baljinder Singh (supra). We notice however that the

later decision draws inspiration from the Constitution Bench decision in Baldev Singh (supra). We also notice that this is not a case where anything was recovered on the alleged personal search. The recovery was effected from the bag for which it is settled law that compliance with Section 50 of the Act is not required”.

34. In the instant case also no contraband substance was recovered on conducting search of the body of the accused and therefore, this Court is inclined to follow the decisions in **Baljinder Singh** (supra) and **Than Kunwar** (supra) and hold that the provision contained in Section 50(1) of the Act does not apply to the facts of the case.

35. The next aspect to be considered is whether the appellant is entitled to succeed in the appeal on the ground that there was unexplained delay in producing the contraband substance in the court after the seizure.

36. PW3 has given evidence that he had forwarded the seized materials to the court as per Ext.P8 property list. He has stated on cross examination that he had produced the properties in the court on 16.11.2011. At the same time, he has admitted

that the Magistrate concerned has put his initials on the property list with the date 18.11.2011. Then, he would state that the properties might have been kept in the police station during the period between 16.11.2011 to 18.11.2011 and they would have been in the custody of the Station Writer.

37. PW6 Circle Inspector, who conducted the investigation of the case only on the date of occurrence, has stated that the properties were in the custody of PW3 Sub Inspector till they were produced in the court. He would say that he had received the properties but he entrusted them with the Sub Inspector himself for producing them before the court.

38. The office seal of the Magistrate's Court on Ext.P8 property list shows that it was on 19.11.2011 that the seized substances were produced in the court. The description, of the cover containing the sample S1 and the cover (P1) containing the remaining substance alleged to be Buprenorphine, given in Ext.P8 property list shows that there was no seal on them. At the same time, the description of the cover containing the sample S2 and the cover (P2) containing the remaining substance alleged to

be Diazepam given in Ext.P8 property list shows that there was seal on them.

39. The alleged occurrence was on 15.11.2011. Ext.P8 property list shows that the seized substances were produced in the court only on 19.11.2011. The prosecution has not explained the reason for the delay in producing the seized substances, including the samples, before the court. It is not explained what prevented the detecting officer or the investigating officer to produce the seized articles in the court immediately after the seizure. In view of the unexplained delay in producing the seized articles before the court, tampering with such articles at the police station cannot be ruled out.

40. There is also no reliable evidence as to who was having the custody of the seized articles till they were produced in the court and in what condition they were kept in the police station. PW3 has given evidence that the properties might have been kept in the police station during the period between 16.11.2011 to 18.11.2011 and they would have been in the custody of the Station Writer. But, the evidence of PW6 Circle Inspector, who

conducted the investigation of the case on the date of occurrence, is that the properties were in the custody of PW3 Sub Inspector till they were produced in the court. He has stated that he had received the properties but he entrusted them with the Sub Inspector himself for producing them before the court.

41. When the prosecution alleges that the contraband substance was kept in the police station, there shall be necessary evidence to prove as to how and in what conditions it was preserved at the police station (See **State of U.P v. Hansraj @ Hansu: (2018) 18 SCC 355**).

42. There are umpteen decisions of the Apex Court which hold that the delay in sending the sample for chemical analysis is not fatal to the prosecution case when the certificate of analysis shows that the seal on the sample received in the laboratory was intact and it tallied with the specimen of the seal provided (See **Hardip Singh v. State of Punjab: AIR 2009 SC 432, Mohan Lal v. State of Rajasthan : AIR 2015 SC 2098** and **State of Punjab v. Lakhwinder Singh : AIR 2010 SC 1557**). But, in all those cases the delay was in sending the samples for analysis

and the delay occurred was not in the production of the samples before the court.

43. It is stated in Ext.P12 chemical analysis report that the seal on the sample packets were intact and that it tallied with the sample seals provided by the court. A seal is seen provided in Ext.P11 forwarding note prepared for sending the samples for analysis but that seal is not legible. Even assuming that the seal provided in the forwarding note was not that of the court but provided by the investigating officer, there is no evidence to find that the detecting officer had sealed the sample packets at the spot of the occurrence with the same kind of seal. As noticed earlier, as per the description given in the property list prepared by PW3 for producing the seized articles before the court, the cover containing the sample S1 had no seal on it. The nature of the seal used by PW3 for sealing the sample packets is not mentioned in Ext.P1 seizure mahazar. The specimen of that seal is not seen affixed also on the seizure mahazar. PW3 has not given any evidence also with regard to the nature of the seal used by him to seal the sample packets. In the absence of such

evidence, there is no assurance that the samples allegedly taken at the spot of the occurrence had reached the laboratory for analysis.

44. The purpose of putting the specimen seal impression in the seizure mahazar is to give an opportunity to the court to verify the same and satisfy that the seized substances reached the court without any tampering. A specific space is provided in the forwarding note for affixing the specimen of the seal affixed on the sample. The specimen of the seal is provided in the forwarding note to enable the chemical examiner to compare it with the seal on the sample and come to the conclusion that it reached the laboratory without any tampering. The recital in the chemical analysis report that the seal on the sample packet was intact and it tallied with sample seal provided alone is not sufficient to come to the conclusion that the very same sample taken by the detecting officer at the spot of the occurrence had reached the laboratory for analysis. It is usual that seal of the court would be affixed while sending the sample for analysis to the chemical examiner. Therefore, the sample seal mentioned in

the chemical analysis certificate can also be the seal of the court. A comparison of the seal affixed on the sample packet with the specimen seal of the court will not give any assurance that the sample taken from the possession of the accused had reached the chemical examiner for analysis. Such an assurance would be possible only when the specimen of the seal affixed on the sample packet is provided to the chemical examiner for comparison. Such link evidence is missing in this case.

45. To put it in a nutshell, the unexplained delay in producing the seized substances before the court and absence of evidence as to how and in what condition the seized substances, including the samples, were kept in the police station till the date of their production in the court alongwith the circumstance that there is absence of evidence regarding the nature of the seal used by the detecting officer for sealing the sample packets, create doubt as to whether seizure of the substances was effected from the accused in the manner alleged by the prosecution. The benefit of that doubt shall be given to the accused.

46. In the light of the discussion above, the appellant is entitled to be acquitted solely on the ground mentioned in the preceding paragraph.

47. Consequently, the appeal is allowed. The order of conviction and sentence passed against the appellant/accused by the trial court under Sections 22(b) and 22(c) of the Narcotic Drugs and Psychotropic Substances Act is set aside. The appellant/accused is found not guilty of the aforesaid offences and he is acquitted. He shall be released forthwith, if his detention in jail is not required in connection with any other case.

48. The Registry shall forthwith send a copy of this judgment, for necessary action, to the Superintendent of the prison in which the appellant is detained.

(sd/-)

R.NARAYANA PISHARADI, JUDGE

jsr

True Copy

PS to Judge