2025:KER:27613

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

WEDNESDAY, THE 2ND DAY OF APRIL 2025 / 12TH CHAITHRA, 1947

CRL.A NO. 123 OF 2021

CRIME NO.20/2020 OF EXCISE RANGE OFFICE, PALAKKAD

AGAINST THE JUDGMENT DATED 15/01/2021 IN SC NO.390 OF 2020 ON THE FILE OF THE COURT OF SESSION, PALAKKAD.

APPELLANT/ACCUSED:

ABDUL RASHEED,
AGED 30 YEARS
S/O.MUHAMMED,
ELAYODATHU VEEDU,
PALAPOTHA DESOM,
PANNIPPARA POST, MALAPPURAM.

BY ADVS.
V.JOHN SEBASTIAN RALPH
SRI.L.RAJESH NARAYAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY EXCISE INSPECTOR,
EXCISE RANGE OFFICE,
PALAKKAD, THROUGH THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM

BY ADV.VIPIN NARAYAN, SENIOR PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25.03.2025, THE COURT ON 02.04.2025 DELIVERED THE FOLLOWING:

2025:KER:27613

C.S.SUDHA, J.

Criminal Appeal No.123 of 2021

Dated this the 02nd day of April 2025

J U D G M E N T

In this appeal filed under Section 374(2) Cr.P.C., the appellant, the sole accused, in S.C.No.390 of 2020 on the file of the Court of Session, Palakkad, challenges the conviction entered and sentence passed against him for the offence punishable under Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act).

2. The prosecution case is as follows: on 15/02/2020 at about 03:50 p.m. PW1, Excise Inspector, Excise Range Office, Palakkad and his party were on routine patrolling duty. When they reached the place of occurrence, that is, the national highway junction from where a new road leads to the railway station at Olavakkode, Palakkad, they saw the accused coming from the railway station with a trolley bag and another bag. When the accused

saw the Excise party he became perplexed and started looking around. Suspicions arose and hence the accused was intercepted and the bags in his possession were inspected. On examination it was found that the trolley bag contained 6 packets and the other bag contained packets wrapped with brown paper and sealed with cello tape. On examining the contents of the packets, it was found to be ganja. The contraband was found to have a weight of 21 kilograms. Hence, the contraband was seized and the accused arrested. Thus, as per the complaint filed, the accused is alleged to have committed the offence punishable under Section 20(b)(ii)(c) of the Act.

3. Crime no.20/2020, Excise Range Office, Palakkad, that is, Ext.P6 crime and occurrence report was registered by PW1, the detecting officer. PW5, the Excise Circle Inspector, Palakkad conducted the investigation and on completion of the investigation submitted the final report alleging the commission of the offence punishable under the aforementioned Section by the accused.

4. On appearance of the accused, the trial court after complying with all the necessary formalities contemplated under

Section 207 Cr.P.C. and after hearing both sides under Section 227 Cr.P.C., framed a charge under Section 20(b)(ii)(c) of the Act, which was read over and explained to the accused to which he pleaded not guilty.

5. On behalf of the prosecution, PW1 to PW5 were examined and Exts.P1 to P22 and MO.1 to MO.4 were marked in support of the case. After the close of the prosecution evidence, the accused was questioned under Section 313(1)(b) Cr.P.C. regarding the incriminating circumstances appearing against him in the evidence of the prosecution. The accused denied all those circumstances and maintained his innocence. He also filed a statement under Section 313(5) Cr.P.C. contending that he had gone to Coimbatore in search of a job. However, he was unable to secure any employment and hence returned. As he did not have any money to take a ticket, he travelled from Coimbatore to Palakkad without a ticket. He was taken into custody by the railway police. While he was in the custody of the railway police, the Excise team arrived there and made enquiries. The accused confessed that he was an

accused in an earlier NDPS case for being in possession of 100 grams of ganja, for which he had been fined. Hearing this, the Excise party took him into custody and registered the false case against him stating that 21 kgs of ganja has been seized from his possession. He had not given any statement to PW1 the detecting officer waiving his right to be searched in the presence of a magistrate or a gazetted officer. The statement alleged to have been given by him was obtained by the Excise party by threatening and manhandling him.

6. As the trial court did not find it a fit case to acquit the accused under Section 232 Cr.P.C., he was asked to enter on his defence and adduce evidence in support thereof. No oral or documentary evidence was adduced on behalf of the accused.

7. On consideration of the oral and documentary evidence and after hearing both sides, the trial court by the impugned judgment found the accused guilty of the offence punishable under Section 20(b)(ii)(c) of the Act and hence sentenced him to rigorous imprisonment for ten years and to a fine of ₹1,00,000/- and in default to rigorous imprisonment for one year. Set off for the period from

15/02/2020 till the date of judgment, that is, on 15/01/2021 was granted under Section 428 Cr.P.C. Aggrieved, the accused has come up in appeal.

8. The only point that arises for consideration in this appeal is whether the conviction entered and sentence passed against the appellant/accused by the trial court are sustainable or not.

9. Heard both sides.

10. It was submitted by the learned counsel for the appellant/accused that the main challenge raised is non compliance of Section 52A of the Act. In support of the same he relied on the following dictums:- **Vijay Pandey v. State of Uttar Pradesh, 2019 KHC 6727: 2019 (18) SCC 215** ; **Faijas v. State of Kerala, 2020 KHC 5259**, and **Mangilal v. State of Madhya Pradesh, 2023 SCC OnLine SC 862**. It was also pointed out that Ext.P5 seizure mahazar alleged to have been prepared at the scene of occurrence does not contain the specimen impression of the seal alleged to have been affixed on the contraband articles. These aspects are sufficient to raise doubts regarding the prosecution case entitling the

appellant/accused to get an order of acquittal, argued the learned counsel.

10.1. *Per contra*, it was submitted by the learned Public Prosecutor that the materials on record are sufficient to establish the prosecution case and that there is no infirmity in the findings of the trial court calling for an interference by this Court.

11. Section 52A of the Act reads thus:-

> ***"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 substances 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, psychotropic substances, controlled substances 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

(5) 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 sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

12. As held in **Mangilal** *(Supra),* sub-section (1) of Section 52A of the Act facilitates the Central Government a mode to be prescribed to dispose of the seized narcotic substance. The idea is to create a clear mechanism for such disposal both for the purpose of dealing with the particular case and to safeguard the contraband being used for any illegal purpose thereafter. Sub-section (2) of Section 52A of the Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes. The objective behind this provision is to have an element of supervision by the magistrate over the disposal of seized contraband. Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute primary evidence. Therefore, when there is non-compliance of Section 52A

of the Act, where a certification of a magistrate is lacking, any inventory, photograph or list of samples would not constitute primary evidence. The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from the list of samples drawn.

13. In this context it would be apposite to refer to the dictum in **Bharat Aambale v. State of Chhattisgarh, 2025 SCC Online SC 110** in which case the Apex Court after referring to several precedents on the point including **Union of India v. Mohanlal, 2016 ICO 558** held that mere non-compliance of the procedure under Section 52A of the Act or the standing order(s)/rules thereunder will not be fatal to the trial unless there are discrepancies in the physical evidence rendering the prosecution case doubtful, which may not have been there, had such compliance been done. Courts must take a holistic and cumulative view of the

discrepancies that may exist in the evidence adduced by the prosecution and appreciate the same more carefully keeping mind the procedural lapses. If the remaining materials on record adduced by the prosecution, oral or documentary inspire confidence and satisfy the court as regards the recovery as well as conscious possession of the contraband from the accused persons, then even in such cases, the courts can without hesitation proceed to hold the accused guilty notwithstanding any procedural defect in terms of Section 52A of the Act. Non-compliance or delayed compliance of the said provision or rules thereunder may lead the court to draw an adverse inference against the prosecution. However, no hard and fast rule can be laid down as to when such inference may be drawn, and it would all depend on the peculiar facts and circumstances of each case. Where there has been lapse on the part of the police in either following the procedure laid down in Section 52A of the Act or the prosecution in proving the same, it will not be appropriate for the court to resort to the statutory presumption of commission of an offence from the possession of illicit material under Section 54 of

the Act, unless the court is otherwise satisfied as regards the seizure or recovery of such material from the accused persons from the other material on record. Therefore, I will consider whether the materials on record in the case on hand are sufficient to find the appellant/accused guilty of the offence alleged against him.

14. The incident is alleged to have taken place on 15/02/2020. Ext.P9 property list shows that the contraband was produced before the Magistrate on the same day itself. The Magistrate is seen to have directed the officer concerned to produce the contraband before the Court. Thereafter, the contraband is seen produced before the Court only on 17/02/2020. Ext.P10 dated 15/02/2020 is the application submitted by the Excise Inspector, Excise Range Office, Palakkad before the JFCM Court-II, Palakkad which reads thus:

> *"Before the Honorable Judicial First Class Magistrate Court-II, Palakkad.*
>
> *NDPS CR No:20/2020, Excise Range Office, Palakkad*
>
> *Accused: Abdul Rasheed S/o Muhammad Elayedath House, Palapotta desom, Edavanna Village, Eranad Taluk, Malapuram Dist.*
>
> *The above mentioned crime detected by Excise Inspector, Excise Range Office, Palakkad while Combined checking with Palakkad special squad*

party on 15.02.2020/04.00 PM Infront of main gate of Palakkad Junction Railway station Olavakkode desom Palakkad I Village Palakkad for illegally possession of 21 Kg Dry Ganja in the presence of independent witness from the place of occurrence and the same is submitted with this application.

I am herewith submitting an inventory describing the details of the seized drug.

I request that necessary action may be taken to:

1. Certify the correctness of the inventory

2. Take photographs of the drugs and substances produced along with and to certify the photograph as true.

3. Allow to draw representative samples of the drug in the presence of the Honorable Magistrate and to certify the correctness of the list of samples so drawn.

Dated this the 15th day of February 2020" (Emphasis supplied)

15. Though Ext.P10 states that the inventory describing the details of the seized drug has been submitted along with Ext.P10 application, the same is not seen produced or marked in evidence. When the inventory itself has not been produced, there cannot be any question of certifying the same. Therefore, there has been non-compliance of Section 52A(2)(a).

16. Ext.P16 series are the photographs of the contraband stated to have taken in the presence of the Magistrate concerned. In Ext.P19, the Magistrate says that the photos were taken in his presence and that the photographs were certified to be

true and correct. Section 52A(2)(b) says that photographs shall be taken in the presence of the Magistrate who shall certify such photographs as true. On going through Ext.P16 series photographs, I do not find any certification as contemplated under the aforesaid provision. Therefore, there is yet another non-compliance of the statutory provision.

17. Another anomaly seen is List II in Ext.P9 property list dated 17/02/2020. List II contains the details of the samples taken from the contraband seized from the appellant/accused. Item no.1, 3 and 5 are the samples that are alleged to have been taken from item no.1, 2 and 3 in List I of Ext.P9. However, Ext.P19 proceedings of the Magistrate is dated 18/02/2020. A reading of List II in Ext.P9 gives the impression that the samples were already taken on 17/02/2020. If that be so, there is non-compliance of Section 52A (2)(c).

18. Another disturbing aspect that is pointed out is the delay in the sample reaching the laboratory. The incident is alleged to have taken place on 15/02/2020. The contraband was produced

before the Court after two days, that is, on 17/02/2020. Ext.P11 forwarding note shows that an officer of the Excise Range Office, Palakkad had received the sample from the court on 18/03/2020. However, the receipt of the Regional Chemical Examiner's Laboratory, Ernakulam produced along with Ext.P11 forwarding note and the covering letter of the trial judge concerned shows that the sample packet was received in the laboratory only on 03/06/2020. This inordinate delay in the sample reaching the laboratory has not been explained by the prosecution. It is not clear in whose custody the sample was from the date on which it was received from the court, that is, on 18/03/2020 till it reached the laboratory on 03/06/2020. Neither the property Section Clerk of the Court concerned nor the officer who received the sample packet from the Court and produced before the laboratory has been examined. This is yet another aspect which raises doubts regarding the prosecution case.

19. It is true that mere non-compliance of Section 52A of the Act is no ground to reject the prosecution case provided there

are other sufficient materials to prove the case. The remaining materials on record are also insufficient because in the case of non-compliance of Section 52A, then the residue contraband after drawal of the sample has to be produced before the Court, brought in evidence and marked. However, that has also not been done. The Act provides for stiff sentences. Therefore, stiffer the sentence stiffer is the proof required. That being the position, I find that the appellant/accused is entitled to the benefit of doubt.

In the result, the appeal is allowed and the conviction and sentence imposed against the appellant/accused by the trial court for the offence punishable under Section 20(b)(ii)(c) is set aside. The accused is acquitted under Section 235(1) Cr.P.C. He is set at liberty and his bail bond shall stand cancelled.

Interlocutory applications, if any pending, shall stand closed.

Sd/-
C.S.SUDHA
JUDGE

ak

2025:KER:27613

APPENDIX OF CRL.A 123/2021

APPELLANT'S ANNEXURES:-

ANNEXURE 1	**TRUE COPY OF THE INVITATION CARD OF THE MARRIAGE OF THE BROTHER OF THE APPLICANT, TO BE HELD ON 10.02.2024.**