2025:KER:29437

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

MONDAY, THE 7TH DAY OF APRIL 2025 / 17TH CHAITHRA, 1947

CRL.A NO. 1280 OF 2006

AGAINST THE JUDGMENT DATED 12.06.2006 IN SC NO.19 OF 2005 ON THE FILE OF THE COURT OF THE SPECIAL JUDGE (NDPS ACT CASES), VADAKARA.

APPELLANT/1st ACCUSED:

BALULAL DAROGA,
SON OF NARAYAN, DAROGA, KHERABAD TALUK,
MAMEERGURF, BILWARA DIST., RAJASTHAN.

BY ADV.AMAL BABY, AMICUS CURIAE

RESPONDENT/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SHEEBA THOMAS, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 01.04.2025, THE COURT ON 07.04.2025 DELIVERED THE FOLLOWING:

2025:KER:29437

C.S.SUDHA, J.

Crl.Appeal No.1280 of 2006

Dated this the 7th 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, who is the first accused in S.C.No.19/2005 on the file of the Court of the Special Judge (NDPS Act Cases), Vadakara, challenges the conviction entered and sentence passed against him for the offence punishable under Section 18(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the Act).

2. The prosecution case is that accused 3 to 5 (A3 to A5) entered into a conspiracy to transport opium from Rajasthan to Ponnani in Kerala. As part of the conspiracy, the fourth accused (A4) loaded 10 bags of opium and concealed it in a secret chamber of his lorry bearing registration no.RJ-06 G-2199. A3 and A5 told A4 that they would wait at Ponnani to receive the contraband. Accordingly, A4 instructed accused 1 and 2 (A1 and A2) to take the

lorry from Rajasthan to Ponnani in Kerala. Pursuant to the same A1 and A2 knowing that 10 bags of opium had been concealed in the secret chamber of the lorry, transported the same to Ponnani to be handed over to A3 and A5.

3. Crime no.1/2005, Excise Range Office, Sulthan Bathery, that is, Ext.P7 crime and occurrence report was initially registered by PW2, Excise Inspector, Excise Circle Office, Sulthan Bathery against A1 to A3 alleging the commission of the offence punishable under Section 18 of the Act. The investigation was conducted by PW7, Excise Circle Inspector, Kalpetta, who on completion of investigation submitted the final report against 5 accused persons. A4 is alleged to be registered owner of the lorry in which the contraband was transported to Kerala. During the investigation the investigating officer filed a report stating the complicity of A4 and A5 in the crime and also incorporating Section 29 in addition to Section 8 read with Section 18 of the Act. Hence, as per the final report the accused persons are alleged to have committed the offences punishable under Section 18 and 29 of the

Act. A1 and A2 were arrested at the time of seizure and produced before the Court. A3 to A5 never appeared before the Court in spite of repeated non-bailable warrants being issued against them. As per the final report, A3 to A5 were reported to be absconding and hence the case against A3 to A5 was split up and refiled as S.C.No.2/2006 and the case was proceeded against A1 and A2. The trial court after complying with all the necessary formalities contemplated under Section 207 Cr.P.C., framed a charge against A1 and A2 for the offence punishable under Section 18(b) of the Act, which was read over and explained to the accused persons to which they pleaded not guilty.

4. On behalf of the prosecution PW1 to PW7 were examined and Exts.P1 to P23 and MO.1 & MO.2 series were marked in support of the case. After the close of the prosecution evidence, A1 and A2 were questioned under Section 313(1)(b) Cr.P.C. regarding the incriminating circumstances appearing against them in the evidence of the prosecution. The accused persons denied all those circumstances and maintained their innocence. Both the

accused also submitted detailed statements in writing.

5. As the trial court did not find it a fit case to acquit the accused persons under Section 232 Cr.P.C., they were asked to enter on their defence and adduce evidence in support thereof. No oral or documentary evidence was adduced by the accused persons.

6. On consideration of the oral and documentary evidence and after hearing both sides, the trial court by the impugned judgment found no evidence to find A2 guilty of the offence punishable under Section 18(b) of the Act and hence acquitted him under Section 235(1) Cr.P.C. However, A1 has been found guilty of the offence punishable under Section 18(b) of the Act and hence he has been sentenced to rigorous imprisonment for a period of ten years and to fine of ₹1,00,000/- and in default to rigorous imprisonment for two years. Set off under Section 428 Cr.P.C. has been allowed. Aggrieved, A1 has come up in appeal.

7. The only point that arises for consideration in this appeal is whether the conviction entered and sentence passed against the appellant/A1 by the trial court are sustainable or not.



8. Initially the appellant/A1 was represented by a lawyer of his choice. Thereafter, the lawyer relinquished his vakalath. Hence, as per order dated 15/10/2024, advocate Amal Baby was appointed as amicus curiae for the appellant/A1. Heard both sides.

9. The main argument advanced by the learned counsel for the appellant/A1 is that the prosecution has failed to prove conscious possession of contraband by A1 by referring to the testimony of PW7, the investigating officer. It was also pointed out that A1 was totally unaware of the presence of the contraband in the lorry and hence the reason why, he along with A2 remained in the lorry without even making an attempt to flee till PW2 arrived at the scene by about 08:00 a.m., though they were intercepted and stopped by PW3 on 22/01/2005 at 03:30 a.m. This would show the innocence of A1. A2, also a driver who drove the lorry from Rajasthan to Madhya Pradesh has been acquitted finding no evidence to connect him with the crime. Hence, A1 is also entitled to be acquitted, goes the argument.



9.1. *Per contra*, it was submitted by the learned Public Prosecutor that the materials on record are sufficient to find that A1 was in conscious possession of the contraband. There is no infirmity in the findings of the trial court calling for an interference by this Court.

9.2. I briefly refer to the evidence relied on by the prosecution in support of the case. PW3, Preventive Officer, Excise Range Office, Mananthavadi, who was on duty at the Excise check post, Muthanga, deposed that on 22/01/2005 at about 03:30 a.m. the mini lorry bearing registration no.RJ-06/G-2199 reached at the check post without any load on the way from Bangalore to Kozhikode. When he inspected the vehicle which was being driven by A1, he saw a secret chamber on the platform just behind the driver's cabin. On suspicion that some contraband article was being carried in the said vehicle, he gave intimation to PW2, the Excise Inspector. On the basis of the intimation given PW2, Excise Inspector along with the Assistant Excise Inspector and others reached the check post and inspected that vehicle thoroughly. On

inspection, PW2 found a secret chamber made of iron plate on the platform of the lorry just behind the driver's cabin. PW2 opened and examined the secret chamber in which 10 cloth bags containing some waxy substance was found concealed. When PW2 opened and examined the bags, each of them was found to contain opium in plastic covers. All the 10 bags of opium were seized by PW2 as per Ext.P1 seizure mahazar and A1 and A2 were arrested at the spot. A2 was also found inside the driver's cabin as an assistant of A1, the driver. The vehicle was in the control and custody of A1. The contraband when weighed was found to have a weight of 50.950 kg. PW2 took 50 grams of opium from each of the bags as sample and all the sample packets as well as the bags containing the residue opium were sealed and labels affixed which contained the signature of the accused and witnesses. PW3 identified the 10 bags containing the residue opium and the packets containing the samples, which have been marked as MO. 1 and MO.2 series respectively. PW3 also deposed that in addition to the contraband, PW2 had also seized the documents found in the vehicle, that is, the driving license of A1

and A2 as well as an amount of ₹7676/- seen in the possession of A1.

9.3. PW2 the Excise Inspector deposed that on 22/01/2005 at about 06:45 a.m. he received Ext.P17 intimation from PW3 that a lorry had been detained at Muthanga Excise check post on suspicion. He immediately recorded the information received in writing along with his grounds of belief for proceeding to search the vehicle at the check post. The information recorded was sent to the Assistant Excise Commissioner. Ext.P22 is the original report under Section 42 of the Act sent by PW2 to his superior officer and Ext.P10 is the xerox copy of Ext.P22. After sending Ext.P22 report, PW2 proceeded to the excise check post with his party consisting of PW5, the Assistant Excise Inspector and a Preventive Officer. At about 08:00 a.m. he reached the check post, where he saw mini lorry bearing registration no.RJ-06/G-2199 which had been detained by PW3. A1 was the driver of the lorry and A2 was seen sitting inside the cabin as A1's assistant. PW2 further deposed that when he inspected the vehicle thoroughly, he saw a secret

chamber made of iron plate on the platform of the lorry just behind the driver's cabin. He opened the same and on inspection found it to contain 10 cloth bags containing a waxy substance. When he opened the 10 bags and examined the contents, he was convinced that it was opium. The contraband was taken to the bakery of PW1 situated near the check post and weighed. The total quantity of opium was found to have a weight of 50.950 kg. He took 50 grams as sample from each of the bags and all the sample packets were sealed and labelled. The 10 cloth bags containing the residue were also sealed and labelled. Labels containing the signature of the accused and the witnesses were affixed on all the 10 sample packets as well as the 10 bags containing the residue contraband. PW2 identified MO.1 series and MO.2 series. PW2 deposed that he had arrested A1 and A2 at the spot and the contraband was seized as per Ext.P1 seizure mahazar.

9.4. PW5, Assistant Excise Inspector, Excise Range, Sulthan Bathery who was in the team along with PW2 supports the prosecution case.



9.5. PW4 an independent witness supported the prosecution case and admitted that he is an attestor to Ext.P1 seizure mahazar.

10. PW1 deposed that he is running a bakery in front of the Excise-Sale Tax check post at Muthanga. On 22/01/2005 at 08:00 a.m. the Excise party came to his shop with the accused persons. The Excise team had few packets in their possession. He does not know the contents of the packets which were brought to his shop for weighing. Samples were taken from all the packet brought for weighing. He understood that the article weighed was narcotic drug.

11. A1 when questioned under Section 313 Cr.P.C., gave a detailed statement in writing. In the statement it is contented that he belongs to the Bhilwara District of Rajasthan and he is a driver by profession. On 19/01/2005 he joined A2 for transporting ice cream to Bangalore in a vehicle bearing registration no. RJ-06/G-2199 from Mandsuar (in Madhya Pradesh). The owner of the vehicle Rajulal Daroga came along with A2 from Rajasthan and

introduced A2 to him and entrusted A1 an amount of ₹10,000/- towards the fuel expenses for the trip to Bangalore. At that time, he was never told that they were to go to Kerala. After entrusting the amount of ₹10,000/-, Rajulal Daroga returned to Rajasthan. He along with A2 took the lorry to Bangalore and after reaching Bangalore when they contacted Rajulal Daroga over telephone, he was asked to take the vehicle to Ponnani in Kerala and contact one Abdul Salam from whom some load was to be taken to Rajasthan. Believing the words of the owner, he proceeded from Bangalore to Ponnani through the national highway. On 20/01/2005 at about 03:30 p.m. when he reached Muthanga check post, an officer of the excise department conducted a search of the vehicle and found out the secret chamber on the back of the driver's cabin. He was taken by surprise to note the concealment of opium in the secret chamber in the platform of the lorry. The said secret chamber was untraceable on normal inspection. A1 further contended that he and A2 are totally innocent and were unaware about the secret chamber which was made by some skilled persons. The vehicle had passed

through several check posts and they had never taken any alternate routes which would also indicate lack of knowledge and innocence on the part of A1. The absence of any remuneration also fortifies the fact that A1 was unaware of the presence of the contraband in the lorry. According to A1, he had absolutely no knowledge about the secret chamber in the lorry, from where the contraband had been loaded, its exact weight etc.

12. On going through the testimony of the prosecution witnesses, I do not find any reasons to disbelieve the same. The testimony of PW6 proves that all the statutory formalities were complied with. Therefore, the only question that remains is whether A1 was in conscious possession of the contraband. PW7, the investigating officer deposed that A4 is the registered owner of the lorry. His investigation revealed that the lorry was entrusted to A2 on 18/01/2005 at a petrol pump at Bhilwara, Rajasthan. A4 had also accompanied A2 till Madhya Pradesh. At a place by name Mandsuar, Madhya Pradesh, A4 introduced A2 to A1 and entrusted the lorry to A1. A4 directed A1 and A2 to take 4 boxes of ice cream

to Bangalore and from there to proceed to Kerala. To meet the expenses, A1 was given ₹1,000/- and for the fuel expenses an amount of ₹10,000/-. A2 was given daily wage of ₹150/-. Though he had questioned A1 and A2, no information was received as to who had made the secret chamber in the cabin of the lorry and as to who had loaded the contraband in the vehicle. Referring to this testimony of PW7, it was argued by the learned counsel for A1 that the latter never knew what was inside the lorry. A1 took over the lorry from A2 in Madhya Pradesh only and not from Rajasthan from where the lorry had initially started its journey. Therefore, the argument is that A1 was never in conscious possession of the contraband.

13. The question whether A1 was in conscious possession of the contraband is seen discussed in paragraph no.22 of the impugned judgment. I do not find any infirmity in the conclusion arrived at because as rightly pointed out by the trial court, it was quite a substantial quantity of opium that was seized from the secret chamber situated just behind the driver's cabin. At the time when the excise party intercepted the vehicle, A1 the driver of the lorry was

2025:KER:29437

found in control/dominion of the vehicle. The prosecution case of seizure of the contraband has been proved by the testimony of the prosecution witnesses to which I have already referred to. These aspects coupled with the presumptions contained under Sections 35 and 54 of the Act, establish the prosecution case. Therefore, the trial court was right in finding A1 guilty of the offence punishable under Section 18(b) of the Act. No grounds are made out for interfering into the finding of guilt of A1. The sentence that has been imposed is also commensurate with the offecnce committed.

In the result, the appeal *sans merit* is dismissed.

Interlocutory applications, if any pending, shall stand closed.

SD/-

C.S.SUDHA
JUDGE

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