

(2010) 02 KL CK 0045
In the High Court Of Kerala
Case No : Criminal M.C. No. 436 of 2010

Abdul Gafoor

APPELLANT

Vs

The Sub Inspector of Police and Another

RESPONDENT

Date of Decision : 17-02-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 — Section 2(xxiiia), 21(a), 21(b), 21(c), 21(o)

Citation : (2010) 2 ILR (Ker) 449 : (2010) 1 KLJ 432 : (2010) 1 KLT 956 : (2011) 6 RCR(Criminal) 2162

Hon'ble Judges : M. Sasidharan Nambiar, J

Bench : Single Bench

Advocate : T.G Rajendran, for the Appellant; S.U. Nazar (P.P.), for the Respondent

Judgement

M. Sasidharan Nambiar, J.—Petitioner along with two other accused were on 30/8/2004 and 70 gms, of brown sugar was seized from the petitioner. He was released on bail. While on bail, he had left India. Later Annexure-IV final report was filed before Special court, Vatakara alleging that accused committed offence u/s 21 (b) of N.D.P.S. Act (hereinafter referred to as the Act). While so, first accused committed suicide. Third accused was convicted for the offence u/s 21 (b) of the Act. The conviction is challenged before this court and CrI. A. 1589/2006 is pending before this court. Petitioner on returning to India finding that non bailable warrant is pending, as the case as against him was removed to long pending register as L.P.9/2006 in S.C.6/2006, filed CrI. M.C. 141/2009 for a direction to special court to withdraw the non bailable warrant. It was disposed by Annexure-I order. Petitioner then surrendered before the learned Special Judge and sought bail. By Annexure-II order learned Special Judge dismissed the petition. Though petitioner filed an application for bail before this court, it is submitted by the learned counsel appearing for the petitioner that the petition was withdrawn. This petition is filed u/s 482 of Code of Criminal Procedure. The

prayer in the petition is to transfer Annexure-IV final report to appropriate court for trial and to release him on bail. Case of the petitioner is that an offence u/s 21 (b) is attracted only if the petitioner was having in his possession a narcotic drug greater than the small quantity and lesser than the commercial quantity and if he has been in possession of only small quantity of the narcotic drug it is punishable only u/s 21 (a) of the Act providing a maximum sentence which may extend to six months or fine which may extend to ten thousand rupees. It is contended that if it is a small quantity, as provided u/s 36 (A)(a) of the Act, Special court has no jurisdiction to try the petitioner and he is to be tried by Judicial First Class Magistrate and when Annexure-V certificate of chemical analysis does not show the actual narcotic content, it could only be treated as a small quantity and therefore, learned Special Judge is to be directed to transfer the case to Judicial First Class Magistrate court.

2. Learned counsel appearing for the petitioner and learned Public Prosecutor were heard.

3. Argument of the learned counsel is that as seen from Annexure-V certificate of chemical analysis, no quantitative analysis was conducted and the report only shows that samples "contain Diacety/Morphine (heroin). Impure heroin is called Brown Sugar" and from the report it cannot be found that petitioner has been in possession of a quantity above the small quantity fixed under the notification. Argument is that though under item 56 of the table provided under the notification specifying small quantity and commercial quantity, small quantity of heroin is 5 gms, and commercial quantity is 250 gms, as declared by the Apex court in E. Micheal Raj Vs. Intelligence Officer, Narcotic Control Bureau, question whether it is a small quantity or a commercial quantity can only be determined on fixing the actual narcotic content and in the absence of any material to show that narcotic content exceeded 5 gms, it can only be taken as a small quantity and therefore, as provided u/s 36 (A)(a) of the Act the case cannot be tried by the Special court and hence it is to be tried by the Judicial First Class Magistrate court and if so, petitioner is to be released on bail.

4. Learned Public Prosecutor pointed out that third accused is already convicted for the offence u/s 21 (b) of the Act and appeal is pending before this court and even if, the actual narcotic content cannot be fixed based on Annexure-V report, the Special drug, seized from the petitioner examined and get a report based on the quantitative analysis and thereafter decide whether special court could try the case or not. Learned Public Prosecutor pointed out that as the quantity of narcotic drug seized from the petitioner is 70 gms, which far exceeds the small quantity provided under notification and when Annexure-V report does not show that the narcotic drug was mixed with any neutral content, it cannot be held that it is a small quantity and therefore, the case cannot be transferred to the Magistrate court as canvassed by the petitioner.

5. Small quantity is defined u/s 2 (xxiia) of N.D.P.S Act as in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity

specified by the Central Government by notification S.O.1055 (E) dated 19th October, 2001 and published in the Gazette of India dated 19th October, 2001, small quantity and commercial quantity is specified. The relevant entry (item 56) of the table reads.

If narcotic drug seized from the petitioner is not a small quantity, as provided u/s 36(A)(a) of the Act the accused is to be tried by the Special court. On the other hand, if it is a small quantity, accused could be tried only by Judicial First Class Magistrate, Section 36A(1)(a) reads.

All offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special court constituted for the area in which the offence has been committed or where there are more Special courts than one for such area, by such one of them as may be specified in this behalf by the Government.

If the contravention involves only a small quantity an accused could be convicted only u/s 21 (a) and the maximum sentence provided is imprisonment for six months and fine or rupees ten thousand. Hence if the narcotic drug seized from the petitioner is a small quantity he cannot be tried for the offence u/s 21 (b) of the act. If he is liable for conviction only for the offence u/s 21 (a), he could be sentenced only upto six months apart from fine. If that be so, as provided u/s 36 (A)(1)(a) of the Act he cannot be tried by the Special court.

6. Though narcotic drug seized from the petitioner is 70 gms. Annexure-V certificate of chemical analysis prepared by the Assistant Chemical examiner, Government of Kerala does not show the actual narcotic content of the drug. Admittedly, no quantitative analysis was conducted. Therefore, based on Annexure-V report it cannot be found what is the actual narcotic content of the drug seized from the petitioner.

7. Question whether which is the actual content by weight of the narcotic drug or the quantity of the narcotic drug seized without deciding its narcotic content seized from the accused which is relevant for determining whether it is a small quantity or commercial quantity was settled by the Apex court in Micheal Raj's case (supra). It was held that it is not the actual quantity of the drug seized but the actual content of the narcotic drug which is relevant to decide whether it is a commercial quantity or small quantity. Their Lordship held.

Thus we find it difficult to accept the argument advanced on behalf of the respondent that the rate of purity is irrelevant since any preparation which is more than the commercial quantity of 250 gms, and contains 0.2% of heroin or more would be punishable under S. 21(o) of the NDPS Act, because the intention of the legislature as it appears to us is to levy punishment based on the content of the offending drug in the mixture as such. This may be tested on the following Rationale. Supposing 4 gms, of heroin is recovered from an accused, it would amount to a small quantity, but when the same 4 gms, is mixed with 50 kgs. Of the powdered sugar, it would be quantified as a commercial quantity. In the

mixture of a narcotic drug or a psychotropic substance with one or more neutral substance/s, the quantity of the neutral substance/s is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug which is relevant for the purposes of determining whether it would constitute small quantity or commercial quantity. The intention of the legislature for introduction of the amendment as it appear to us is to punish the people who commit less serious offences with less severe punishment and those who commit grave crime, such as trafficking in significant quantities with more severe punishment,

Therefore, whether an accused is to be convicted for an offence u/s 21 (a) or 21 (b) or 21 (c) of the Act can only be decided based on the actual narcotic drug seized from him.

8. Though as per notification S.O. 2941 (E) dated 18/11/2009 published in the Gazette of India dated 18th October, 2009 notification dated 19th October 2001 (S.O. 1055E) was amended incorporating clause 4 in the table which reads.

(4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.

It has no retrospective effect and hence cannot be applied to offences committed prior to 18/11/2009.

9. When Annexure-V report does not show the actual content by weight of the narcotic drug, which is relevant for deciding the question, whether it is a small quantity or commercial quantity and the question could be determined only on a quantitative analysis of the drug the Special Judge is to be directed to send the sample of the narcotic drug produced before the court, to the Central Forensic Science Laboratory where quantitative analysis could be conducted and to decide the question after receiving the report of quantitative analysis. If on such analysis it is found that the drug seized from the petitioner is not a small quantity, Special Judge is competent to try the case. If it is only a small quantity, he has no jurisdiction to try the petitioner and the case is necessarily to be transferred to proper court, as provided u/s 36(A)(1)(a) of the Act. Till then learned Special Judge shall not proceed with the trial. Then the question is whether petitioner is to be detained till the report of quantitative analysis is received. As long as Annexure-V report now available with the court, does not show that it is not a small quantity, Special Judge is to treat it as a small quantity for the purpose of considering the application for bail. Petitioner is permitted to file an application for bail before the Special Judge and Special Judge is directed to consider the application as one moved by an accused who was alleged to be in possession of small quantity of drug and pass appropriate order in accordance

with Jaw.

Petition is disposed accordingly.