



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE JOHNSON JOHN

FRIDAY, THE 26TH DAY OF SEPTEMBER 2025 / 4TH ASWINA, 1947

CRL.A NO. 628 OF 2012

JUDGMENT DATED 21.04.2012 IN SC NO.573 OF 2011 OF ADDITIONAL
SESSIONS JUDGE (ADHOC-I), ERNAKULAM

APPELLANT/ACCUSED:

BENNY SEBASTIAN @ BENNY, AGED 40 YEARS, S/O.BABY, VAZHAPPILLY
HOUSE, CHUNANGAMVELI, CHOORNIKKARA KARA, ALUVA WEST.

BY ADV SHRI.V.N.SUNIL KUMAR

RESPONDENT/COMPLAINANT:

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

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 24.09.2025, THE
COURT ON 26.09.2025 DELIVERED THE FOLLOWING:

**'C.R'****JOHNSON JOHN, J.**-----
Crl. Appeal No. 628 of 2012
-----Dated this the 26th day of September, 2025**J U D G M E N T**

The appellant is the accused in S.C. No. 573 of 2011 on the file of the Additional Sessions Judge (Adhoc-I), Ernakulam and he is challenging the conviction and sentence imposed on him for the offence under Section 22(b) of the Narcotic Drugs and Psychotropic Substances, Act, 1985 ('NDPS Act' for short) as per the impugned judgment dated 21.04.2012.

2. As per the prosecution case, the accused was found in possession of 3 ampules of diazepam of 2 ml. each and 9 other ampules without any labels on search of his person by PW1, the then Sub Inspector of Police, Harbour Police Station, Kochi on 14.09.2011 at 11.30 a.m. It is stated that while PW1 and party were patrolling in the area, they saw the accused in a suspicious circumstance. The accused was arrested at the spot and after effecting recovery, crime was registered by PW1 and thereafter PW6, the then Circle Inspector, conducted the investigation and filed the final report.



3. When the accused pleaded not guilty to the charge, PWs 1 to 6 were examined and Exhibits P1 to P10 and MOs 1 to 4 were marked from the side of the prosecution. No evidence adduced from the side of the accused.

4. After hearing both sides and analysing the evidence, the trial court found the accused guilty of the offence under Section 22(b) of the NDPS Act and sentenced him to undergo rigorous imprisonment for 4 years and to pay a fine of Rs.30,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of two years.

5. Heard Smt. Soorya S. Shenoy, the learned counsel representing the learned counsel for the appellant and Smt. Hasnamol N.S., the learned Public Prosecutor.

6. The learned counsel for the appellant argued that PW1, Sub Inspector who detected the case, failed to comply the requirements of Section 50 of the NDPS Act and that there is no satisfactory evidence in this case as to who was in custody of the contraband items and sample from 14.09.2011 till 10.10.2011. It is argued that the prosecution has not explained the inordinate delay in forwarding the sample for analysis



and therefore, the accused is entitled for the benefit of reasonable doubt.

7. But, the learned Public Prosecutor argued that the evidence of PW1 would show that when PW1 informed the accused about his right under Section 50 of the NDPS Act, the accused declined to exercise the said right and therefore, there is no violation of the mandate of Section 50 of the NDPS Act and there is no reason to disbelieve the evidence of PW1 regarding the search and recovery of contraband items from the accused.

8. The evidence of PW1 shows that on 14.09.2011, at about 11.30 a.m., while he was conducting patrol duty along with police party, they saw the accused sitting on a motorcycle and attempting to start the motorcycle to move away on seeing the police party and accordingly, they stopped the accused and on questioning him, it is revealed that the pocket of his jeans contained psychotropic substance and thereupon, PW1 informed the accused about his right to have his search conducted in the presence of a gazetted officer or magistrate and when the accused waived the said right and informed PW1 that PW1 can conduct the body



search, a written consent of the accused in this regard is obtained by PW1 and thereafter, he conducted the body search and recovered the contraband items. PWs 3 and 4 are the Civil Police Officers who accompanied PW1 for the patrol duty.

9. PW2 is the Village Officer who prepared Exhibit P8 scene plan. PW5 is the independent witness examined by the prosecution to prove the occurrence; but, he turned hostile to the prosecution and his evidence shows that he has not witnessed the alleged occurrence. PW1 deposed in chief examination that on the body search of the accused, a white plastic kit is recovered from the right side pocket of the jeans and the said plastic kit contained 3 ampules of diazepam of 2 ml. and 9 other ampules without any labels and currency notes amounting to Rs.3,110/-.

10. Even though, the alleged occurrence was on 14.09.2011, Exhibit P5 property list is dated 10.10.2011. Exhibit P7, copy of the forwarding note, is also dated 10.10.2011. In chief examination, PW1 only stated that Exhibit P5 is the property list and Exhibit P7 is the copy of the forwarding note. It is pertinent to note that PW1 has no case that he prepared Exhibit P5, property list or Exhibit P7, forwarding note, or



he produced the properties before the court as per Exhibit P5 property list on 10.10.2011. The learned counsel for the appellant pointed out that there is no evidence in this case as to who was in the custody of the contraband items and sample from 14.09.2011 to 10.10.2011.

11. The evidence of PW1 and Exhibit P1, seizure mahazar, shows that the accused used a plastic kit for keeping the contraband items and money in his pocket; but, the said plastic kit is not among the items listed in Exhibit P5, property list. PW6, Circle Inspector who conducted the investigation, has not given any explanation for not producing the plastic kit before the court. PW6 also admitted in cross examination that he has not seized the registration certificate and other documents of the motorcycle. Even though, PW1 has a case that he obtained a written consent from the accused for conducting his body search, the same is not seen produced before the court.

12. In ***Ranjan Kumar Chadha v. State of Himachal Pradesh*** [AIR 2023 SC 5164], the Honourable Supreme Court considered the requirements of Section 50 of the NDPS Act and held thus:

64. From the aforesaid discussion, the requirements envisaged by Section 50 can be summarised as follows:-

(i) Section 50 provides both a right as well as an obligation. The person about to be searched has the right to have his search



conducted in the presence of a Gazetted Officer or Magistrate if he so desires, and it is the obligation of the police officer to inform such person of this right before proceeding to search the person of the suspect.

(ii) Where, the person to be searched declines to exercise this right, the police officer shall be free to proceed with the search. However, if the suspect declines to exercise his right of being searched before a Gazetted Officer or Magistrate, the empowered officer should take it in writing from the suspect that he would not like to exercise his right of being searched before a Gazetted Officer or Magistrate and he may be searched by the empowered officer.

(iii) Before conducting a search, it must be communicated in clear terms though it need not be in writing and is permissible to convey orally, that the suspect has a right of being searched by a Gazetted Officer or Magistrate.

(iv) While informing the right, only two options of either being searched in presence of a Gazetted Officer or Magistrate must be given, who also must be independent and in no way connected to the raiding party.

(v) In case of multiple persons to be searched, each of them has to be individually communicated of their right, and each must exercise or waive the same in their own capacity. Any joint or common communication of this right would be in violation of Section 50.

(vi) Where the right under Section 50 has been exercised, it is the choice of the police officer to decide whether to take the suspect before a Gazetted Officer or Magistrate but an endeavour should be made to take him before the nearest Magistrate.

(vii) Section 50 is applicable only in case of search of person of the suspect under the provisions of the NDPS Act, and would



have no application where a search was conducted under any other statute in respect of any offence.

(viii) Where during a search under any statute other than the NDPS Act, a contraband under the NDPS Act also happens to be recovered, the provisions relating to the NDPS Act shall forthwith start applying, although in such a situation Section 50 may not be required to be complied for the reason that search had already been conducted.

(ix) The burden is on the prosecution to establish that the obligation imposed by Section 50 was duly complied with before the search was conducted.

(x) Any incriminating contraband, possession of which is punishable under the NDPS Act and recovered in violation of Section 50 would be inadmissible and cannot be relied upon in the trial by the prosecution, however, it will not vitiate the trial in respect of the same. Any other article that has been recovered may be relied upon in any other independent proceedings.”

13. It is well settled that the burden is on the prosecution to establish that the requirements of Section 50 of the NDPS Act was duly complied with when search was conducted. In this case, even though PW1 has deposed that he obtained a written consent from the accused for searching his person by waiving the right under Section 50 of the NDPS Act, no such written consent is produced or marked in evidence.

14. It is the obligation of the police officer to inform the accused of his right before proceeding to search the person of the accused and in



a situation where the suspect declines to exercise his right of being searched before a gazetted officer or magistrate, the police officer or empowered officer is bound to take it in writing from the suspect that he would not like to exercise his right of being searched before a gazetted officer or magistrate and he may be searched by the empowered officer. Therefore, in the absence of any such writing from the side of the accused, it cannot be held that the prosecution has complied the requirements envisaged under Section 50 of the NDPS Act.

15. The learned counsel for the appellant fairly conceded that the judgment of the Honourable Supreme Court in ***Mohan Lal v. State of Punjab [(2018) 17 SCC 627]*** is not applicable, in as much as the occurrence in this case was prior to the NDPS Amendment Act, 2014 and that the Honourable Supreme Court in ***Varinder Kumar v. State of H.P. [(2020) 3 SCC 321]***, clarified the position that all pending criminal prosecution, trials and appeals prior to the law laid down in *Mohan Lal's* case (supra) shall continue to be governed by the individual facts of the case.

16. But, the learned counsel for the appellant cited the decision of the Honourable Supreme Court in ***Dilip v. State of M.P. [(2007) 1 SCC 450]*** and ***Valsala v. State of Kerala [1993 Supp (3) SCC 665]*** to point out that the offence under the NDPS Act is of grave nature and



therefore, the procedural safeguards provided under Sections 41, 42 and 50 should be complied with.

17. In ***Parminder Singh v. State of Haryana*** [2006 SCC onLine P & H 1042], the Punjab and Haryana High Court found that there was no explanation for the delay of 25 days in sending the sample for analysis and held thus:

“13. No explanation has come forward from the side of the prosecution as to why the samples were sent after a gap of 25 days for analysis. S.K. Nagpal, Retired Senior Scientific Officer, FSL, Madhuban PW-2 has stated that on 7.8.2001 five sealed parcels were received in the Laboratory, but the same were returned back due to the reason that the FIR in that case was registered on 12.7.2001, with the objection regarding the delayed deposit of sample parcels. As per this witness, according to the Narcotic Control Bureau Instructions, the sealed parcels should be deposited within 72 hours with the Chemical Examiner. He has further stated that two samples were to be taken of the seized contraband as per instructions. The explanation given by DSP Chander Singh PW-6 to this witness was that samples could not be sent earlier due to VVIP duties. Ram Kumar MHC PW-3 brought Rapat Roznamcha from 12.7.2001 to 16.7.2001. During this period, it has been shown that the Police Force was not sent for VVIP duty at any time. The cross-examination of Ram Kumar MHC PW-3 was deferred by the trial Court to enable the witness to produce the Roznamcha from 16.7.2001 to 13.8.2001. This witness was not brought into the witness-box by the prosecution thereafter for further cross-examination. We can safely infer that Ram Kumar PW-3 was not brought again into the witness-box, as the period from 16.7.2001 to 13.8.2001 did not show any VVIP duty. It is clear that the



Investigating Officer Chander Singh DSP PW-6 has only made an excuse, which is not convincing, that the samples could not be sent because of VVIP duty.”

18. The learned counsel for the appellant invited my attention to Circular:39/2020 No.U6-111285/PHQ, wherein it is directed that the sample packets for chemical/FSL analysis should be sent to the lab on a forwarding note (duly filled) through the concerned court within 72 hours of the registration of the case in order to make the investigation impartial and fair under the NDPS Act.

19. As noticed earlier, in this case, PW1 does not say that the contraband items and samples were in his custody till the same was produced before the court as per Exhibit P5 property list on 10.10.2011. The evidence of PW1, Sub Inspector who seized the contraband article, is absolutely silent as to what he did with the seized article till it was produced in the court. The evidence of PW6, Investigating Officer, and Exhibit P5, property list, shows that the plastic kit said to be recovered from the accused is not produced before the court and further PW6 has also not conducted any investigation regarding the registration particulars of the motorcycle bearing registration No.KL-9/B-5300 said to



be used by the accused at the time of occurrence. PWs 1 or 6 has not taken any steps to seize the said motorcycle. Therefore, I find that the investigation in this case, has been perfunctory and on important aspects, the evidence of the concerned officers is highly discrepant and unconvincing and in that circumstance, the accused/appellant is entitled to the benefit of reasonable doubt.

20. For the aforementioned reasons, the impugned judgment is set aside and the accused/appellant is acquitted of the offence under Section 22(b) of the NDPS Act. The bail bond executed by the appellant/accused shall stand cancelled and he is set at liberty forthwith.

This appeal is allowed as above.

sd/-
JOHNSON JOHN,
JUDGE.

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