

BASHEER @ N.P. BASHEET

v.

STATE OF KERALA

APRIL 20, 2004

[K.G. BALAKRISHNAN AND B.N. SRIKRISHNA, JJ.]

*Narcotic Drugs and Psychotropic Substances Act, 1985:*

*Ss. 21 and 27(2)—Narcotic Drugs—Stated to be for personal consumption—Onus to prove—Accused found selling brown sugar—On search small packets containing brown sugar recovered from his pocket—Conviction—Contention that small quantity of 1.2 gram of brown sugar recovered from accused be presumed to be used for personal consumption and he be awarded a lesser sentence u/s 27—Held, in view of sub-section (2) of section 27 the burden is on the accused to prove that brown sugar recovered from him was for personal consumption—The brown sugar was kept in the shirt pocket of the appellant and he completely denied having been in possession of the narcotic drug—When questioned under s.313 Cr.P.C. he did not have a specific case that drug was for his personal use—There were no material to show that the accused was keeping in his possession the narcotic drug for his personal consumption, whereas the evidence shows that narcotic substance was kept in six small packets and he was found in a street which obviously showed that he was waiting for his customers—In that background, it cannot be said that accused was entitled to the benefit of s.27—High Court has correctly held that the investigation officer strictly followed the provisions of ss. 42 and 50.*

*Alpesh Kumar v. State of Rajasthan, JT (2002) 10 SC 219 and Gauter Edwin, Kircher v. State of Goa, Secretariat Panaji, JT (1993) 2 SC 285, distinguished.*

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1334 of 2002.

From the Judgment and Order dated 11.9.2001 of the Kerala High Court in CrI. A. No. 269/2001C.

**A** T.N. Singh, Shiam Narain Singh, Ms. Asha Gopalan Nair, Mrs.B. Sunita Rao and Shakil Ahmed Syed for the Appellant.

K.R. Sasiprabhu, Ramesh Babu, Ms. Sushma Suri, Subramonium Prasad and Ms. Vibha Datta Makhija for the Respondent.

**B** The following Order of the Court was delivered :

The appellant has been found guilty for the offence punishable under section 21 of the NDPS Act. The Special Judge sentenced him to undergo imprisonment for a period of 10 years and to pay a fine of Rs. 1 Lac with a default sentence for 6 months. The conviction and sentence was challenged by the appellant before the High Court. The High Court confirmed the conviction and sentence.

The prosecution case against the appellant was that on 23.2.2000 at about 4.15 p.m. the appellant was found in selling brown sugar. The PW-2 Sub-Inspector of Police of Nadakkavu Police Station got information that somebody was selling brown sugar and he recorded this information, copy of the same sent to immediate superior and along with the police party went to the place and he found the appellant there. On seeing PW-2 and others, the appellant tried to escape from the place and PW-2 prevented him from going and told him that it was suspected that the appellant was having brown sugar with him and his body is to be searched. PW-2 also apprised the appellant of his right under section 50 of the NDPS Act and the appellant declined to have the privilege of his body being searched in the presence of Magistrate/Gazetted Officer and therefore a search was conducted and from the pocket of the appellant small packets were recovered wherein brown sugar was found. PW-2 prepared a Mazhar and recovered the same. On the side of the prosecution Pws. 1 to 3 were examined. The appellant alleged that he was falsely implicated in the case and in order to prove that DW-1 and DW-2 were examined. Ext. P-1 and P-2 documents were also marked. Ext. P1/Chemical Analyst shows that the article recovered from the appellant was brown sugar.

**G** The appellant alleged that there was violation of section 50 of the NDPS Act and he also contended that he was falsely implicated. Both these pleas were rejected by the Special Judge as well as High Court.

**H** We heard the learned counsel for the appellant. The counsel for the appellant contended that the quantity of brown sugar recovered from the

appellant was only 1.2 gram and this being a small quantity and the Court shall presume that he intended it to be used for personal consumption, and therefore he should have been awarded only lesser sentence, as envisaged under section 27 of the NDPS Act, 1985. In the instant case, there is no evidence to show that the brown sugar recovered from the appellant was for personal consumption. Sub-section (2) of section 27 of the NDPS Act specifically says that the burden is on the accused to prove that it was for personal consumption. The proviso reads to the following effect:

“Where a person is shown to have been in possession of small quantity of a narcotic drug or psychotropic substance, the burden of proving that it was intended for the personal consumption of such person and not for sale or distribution, shall lie on such person.”

Here the brown sugar was kept in the shirt pocket of the appellant and the appellant completely denied having been in possession of the narcotic drug. When questioned under section 313 Cr.P.C. he did not have a specific case that drug was for his personal use. The counsel for the appellant drew our attention in the decision of *Alpesh Kumar v. State of Rajasthan*, JT (2002) 10 SC 219 wherein this Court held that even in the absence of a specific plea if the circumstances show that the narcotic drug was for personal use, the Court would be at liberty to draw an inference and hold that the drug was for personal use. In that case, the narcotic drug was recovered from the accused in the form of two cigarettes and the Court drew presumption that the drug in this possession may have been for his personal consumption. The Court also relied on an earlier decision of this Court in *Gaunter Edwin Kircher v. State of Goa, Secretariat Panaji*, JT (1993) 2 SC 285. In that case the accused was having the narcotic substance in a pouch along with a chillum (smoking pipe) and smoking material and the averments extracted from the accused in the application by the Trial Court showed that it was meant for his personal consumption.

In the present case, there were no materials to show that the accused was keeping in his possession the narcotic drug for his personal consumption, whereas the evidence shows that narcotic substance was kept in six small packets and he was found in a street which obviously showed that he was waiting for his customers. In that background, we are not inclined to accept the contention that the appellant was entitled to the benefit of section 27 of the NDPS Act. The High Court has correctly held that the investigation officer strictly followed the provisions of sections 42 and 50 of the NDPS Act.

**A** We find no merit in the appeal and the appeal is accordingly dismissed.

The appellant is on bail. His bail bonds shall stand cancelled and he is directed to surrender his bail bonds within 3 weeks failing which the Special Judge will take appropriate steps to arrest him to undergo the remaining period of sentence.

**B**

R.P.

Appeal dismissed.