



Crl. Appeal No. 796/2007

2025:KER:58637

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE JOHNSON JOHN

WEDNESDAY, THE 6TH DAY OF AUGUST 2025 / 15TH SRAVANA, 1947

CRL.A NO. 796 OF 2007

AGAINST THE JUDGMENT DATED 05.05.2007 IN SC NO.15 OF 2006 OF
SPECIAL COURT for NDPS ACT CASES, THODUPUZZHA

APPELLANT/A1:

AVIRACHAN @ KUTTIACHAN, S/O. MATHAI,
KALLIYATHU HOUSE, MANJAKUZHAY BHAGAM, NJERIPALAM KARA,
RAJAKKAD.

BY ADVS.
SRI.JOHN K.GEORGE
SRI.P.K.VARGHESE
SRI.N.K.SHYJU

RESPONDENT/COMPLAINANT:

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

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04.08.2025, THE
COURT ON 06.08.2025 DELIVERED THE FOLLOWING:

**'C.R'****JOHNSON JOHN, J.**-----
Crl. Appeal No. 796 of 2007
-----Dated this the 6th day of August, 2025**J U D G M E N T**

The appellant is the first accused in S.C. No. 15 of 2006 on the file of the Special Court for NDPS Act Cases, Thodupuzha. As per the impugned judgment, the trial court acquitted the second accused finding her not guilty of the offence under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and the appellant/first accused was found guilty and he is convicted and sentenced to undergo rigorous imprisonment for 5 years and to pay a fine of Rs.25,000/- and in default of payment of fine, to undergo rigorous imprisonment for 3 months under Section 20(b)(ii)(B) of the NDPS Act and the same is under challenge in this appeal.

2. As per the prosecution case, the first accused is the husband of the second accused and on 30.07.2005, at 6.35 a.m., the accused were



found keeping 11 kgs. and 350 grams of dried ganja in their house bearing No.X/539 (I/221) of Rajakumari Panchayath.

3. When the accused persons pleaded not guilty to the charge, PWs 1 to 10 were examined and Exhibits P1 to P26 and MOs 1 to 11 series were marked from the side of the prosecution. From the side of the defence, DW1 examined.

4. After hearing both sides and analysing the evidence, the trial court recorded a finding that there is no reliable evidence to take a view that the second accused had kept the contraband items in the house in question and that it is explicit from the attending circumstances of the case that the first accused is liable for keeping the contraband in the house in question.

5. The learned counsel for the appellant argued that the finding of the trial court that it was the appellant who kept the contraband in the house in question is based on an inference drawn by the trial court relying on the evidence of PWs 1 and 6 that when they reached near the house in question, they saw the first accused running away from there.



6. It is pointed out that PWs 2, 3 and 4, the independent witnesses examined by the prosecution to prove the occurrence, turned hostile and that PW1, Deputy Superintendent of Police who detected the offence, did not identify the appellant/first accused in the dock. PW1 only stated that when he reached there, one accused ran away from there and he can identify the said accused. PW1 also stated that it was the first accused who ran away from there.

7. It is well settled that identification of an accused in court by the witness is the substantive evidence and even if the witness and the accused are persons known to each other, it is obligatory for the witness to identify the accused in court by pointing out that the person referred to by him in the evidence is the person who is standing in the dock and it is obligatory for the court to record in the deposition that the witness had identified the accused in the dock, as held by this Court in **Vayalali Girishan and Others v. State of Kerala** [2016 KHC 204] and **Shaji @ Babu @ Japan Shaji v. State of Kerala** [2021 (5) KHC SN 27]. In this case, the presiding Judge has omitted to do so, while recording the deposition of PW1 and there was no attempt on the part of the



prosecutor to put appropriate questions to PW1 for the said purpose. The trial court has not recorded in the deposition of PW1 that the said witness has identified the first accused, Avirachan @ Kuttiachan, in the dock.

8. It is true that PW6, ASI who accompanied PW1, Deputy Superintendent of Police, to the place of occurrence, deposed that when they reached the front courtyard of the house of accused Avirachan, the said Avirachan came out of the house and ran away on seeing the police party. According to PW6, even though they chased the first accused, they were not able to apprehend him. The trial court has specifically recorded in the deposition of PW6 that the witness identified the first accused in the dock.

9. The learned counsel for the appellant argued that the case set up by the prosecution against the appellant is entirely based on circumstantial evidence and none of the prosecution witnesses has a case that they saw the accused/appellant storing or handling the contraband item in the house at the time of occurrence. It is pointed out that PWs 1 and 6 have no case that they took notice of the Panchayath number of the house in question at the time of occurrence.



10. It is pertinent to note that the Panchayath number of the house is not stated in Exhibit P13, mahazar, or Exhibit P23, scene plan, prepared by the Village Officer. Even though, it is stated in Exhibit P13, mahazar, that the specimen signature and seal are separately taken to custody in a sealed cover, the same is not seen produced as per Exhibit P15, property list.

11. The prosecution is relying on the evidence of PW5 and Exhibits P20, P21 and P22 to prove that the house in question belongs to the appellant herein. As noticed earlier, PWs 1 and 6 have no case that they took notice of any Panchayat house number for the house in question at the time of occurrence.

12. In chief examination, PW5 deposed that he is now residing in Tamil Nadu and that he has given his house at Rajakkad to the accused persons. But, there was no attempt on the part of the prosecution to identify the accused persons in the dock through PW5.

13. In re-examination of PW5, a photostat copy of an agreement is marked as Exhibit P20. According to PW5, he produced a photostat



copy of the agreement before the Circle Inspector, but has nothing to say if the said fact is not mentioned in his statement to the police. The evidence of PW10, Circle Inspector who conducted the investigation, shows that PW5 has not given statement to him that he produced any agreement. PW10 further admitted in cross examination that he has not conducted any investigation to ascertain whether PW5 has sold the house to the first accused.

14. A perusal of the list of documents in the final report filed by PW10 would show that he has not produced Exhibit A20, photocopy of the agreement, along with the final report. It is not forthcoming as to how and when Exhibit P20, photocopy of the agreement, is produced before the trial court. It is true that the prosecution can be allowed to produce documents or material omitted to be produced along with the final report if the omission was inadvertent and no prejudice is caused to the accused; but in this case, no such application is moved by the prosecution for receiving Exhibit P20 in evidence.

15. The Secretary of Rajakumari Grama Panchayat is examined as PW7 and Exhibits P21 and P22 are the documents marked through PW7.



PW7 has not deposed regarding the contents of Exhibits P21 and P22. A perusal of Exhibit P21, ownership certificate, shows that one Jose Joseph is the owner of building No.I/221 (X/539). Exhibit P22 is a letter issued by PW7 to the Investigating Officer to the effect that house bearing number 'I/221' was renumbered for the purpose of Panchayath election during 2000 as 'XI/385' and subsequently during 2003-2004, the said house is numbered as X/539 and the said house is in the ownership of one Jose Joseph before and after the year 2002.

16. I find force in the argument of the learned counsel for the appellant that the evidence of PW7 and Exhibits P21 and P22 will not support the prosecution case that the house in question is in the possession of the appellant/first accused. In the absence of reliable evidence regarding the Panchayath number of the house from where the contraband item is alleged to be recovered, it is not safe to arrive at a conclusion from the vague evidence of PW5, Jose, and Exhibit, P20 photo copy of the agreement, that PW5 has handed over the possession of the house to the accused persons prior to the alleged occurrence.



17. Exhibit P22 is only a reply to the letter sent by the Investigating Officer to PW7, Panchayath Secretary, and therefore, the same is hit by Section 162 Cr.P.C. In ***Kali Ram v. State of H.P.*** [1973 KHC 634 = AIR 1973 SC 2773], a three Judges' Bench of the Honourable Supreme Court observed as follows:

“18. ...The prohibition contained in the section relates to all statements made during the course of an investigation. Letter PEEE which was addressed by Sahi Ram to Station House Officer was in the nature of narration of what, according to Sahi Ram, he had been told by the accused. Such a letter, in our opinion, would constitute statement for the purpose of S.162 of the Code of Criminal Procedure. The prohibition relating to the use of a statement made to a police officer during the course of an investigation cannot be set at naught by the police officer not himself recording the statement of a person but having it in the form of a communication addressed by the person concerned to the police officer. If a statement made by a person to a police officer in the course of an investigation is inadmissible, except for the purposes mentioned in S.162 the same would be true of a letter containing narration of facts addressed by a person to a police officer during the course of an investigation. It is not permissible to circumvent the prohibition contained in S.162 by the investigating officer obtaining a written statement of a person instead of the investigating officer himself recording that statement.”

18. The learned trial judge overlooked the fact that the prosecution has not filed any petition for receiving Exhibit P20, photostat copy of the agreement, and also wrongly admitted Exhibit, P22 reply letter issued by PW7 to the Investigating Officer, and in that



circumstance, it is not safe to record a finding based on the vague evidence of PW5 and Exhibit P20 that the appellant/first accused was residing in the house in question at the time of occurrence.

19. The learned counsel for the appellant argued that the prosecution has failed to prove the conscious possession of the contraband article by the appellant/first accused. In ***Om Prakash @ Baba v. State of Rajasthan*** [2009 KHC 5198], the Honourable Supreme Court held thus:

“7. A bare perusal of the evidence aforementioned would reveal that the ownership and possession of the house and the place of recovery is uncertain. As a matter of fact PW.3 has categorically stated that the house from where the recovery had been made belonged to one Durga Bhanji and not to the appellant. Even assuming for a moment that the house did belong to the appellant and was in his possession, the prosecution was further required to show the appellant had exclusive possession of the contraband as a very large number of persons including the appellant and five of his brothers, their children and their parents were living therein.”

20. In this case, even as per the prosecution case, only the second accused was arrested from the house at the time of occurrence. The only witness who properly identified the appellant/first accused in the dock is PW6, ASI and his evidence only shows that he saw the



appellant/first accused running away from the courtyard of the house in question. There is no satisfactory evidence regarding the number of persons residing in the house in question at the relevant time and there is also no evidence to show that the appellant/first accused was in exclusive possession of the house in question at the time of occurrence. The prosecution has not succeeded in establishing that the appellant/first accused was the owner in possession of the house in question by producing legally admissible documents.

21. It is also relevant to note that the independent witnesses, PWs 2, 3 and 4, did not support the prosecution version and therefore, they were treated as hostile. In the absence of satisfactory evidence to show that the first accused/appellant was in ownership or possession of the house in question at the time of the alleged recovery, the conviction and sentence entered by the trial court cannot be sustained.

In the result, the appeal is allowed. The conviction and sentence imposed by the trial court against the first accused/ appellant is set aside and he is acquitted of the offence under Section 20(b)(ii)(B) of the



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NDPS Act. The bail bond executed by the appellant/accused shall stand cancelled and he is set at liberty forthwith.

sd/-
JOHNSON JOHN,
JUDGE.

Rv