



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

THURSDAY, THE 8TH DAY OF AUGUST 2024 / 17TH SRAVANA, 1946

CRL.MC NO. 5852 OF 2024

CRIME NO.6/2023 OF Malampuzha Police Station, Palakkad

AGAINST THE ORDER DATED 15.11.2023 IN CC NO.43 OF 2023
OF JUDICIAL MAGISTRATE OF FIRST CLASS -III, PALAKKAD ARISING
OUT OF THE ORDER DATED 11.04.2024 IN CRRP NO.5 OF 2024 OF
DISTRICT COURT & SESSIONS COURT, PALAKKAD

PETITIONER/ ACCUSED :

IBNU SHIJIL
AGED 22 YEARS
S/O IBRAHIM, ISHAL HOUSE,
MANTHAKKAD SASTHA COLONY, MALAMPUZHA,
PALAKKAD, PIN - 678651

BY ADVS.
ADITH KIRAN R.S.
NANDAGOPAL S.KURUP

RESPONDENT/ RESPONDENT :

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031

BY SRI. C.N. PRABHAKARAN, PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
08.08.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:



BECHU KURIAN THOMAS, J.

Crl.M.C.No.5852 of 2024

Dated this the 8th day of August, 2024

ORDER

Can an investigating officer's olfaction be the sole basis for the prosecution of an accused alleging consumption of a narcotic drug? The aforesaid question arises for consideration in this petition to quash the criminal proceedings initiated against the petitioner.

2. Petitioner is the accused in C.C.No.43 of 2023, on the files of the Judicial First Class Magistrate's Court-III, Palakkad, alleging the commission of an offence under Section 27(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'NDPS Act').

3. Prosecution alleged that on 03.01.2023, the accused was found smoking a cigarette while seated on a rock, beside the Malampuzha Dam and when the complainant went towards him, he threw the cigarette into the dam. However, since the complainant smelt ganja from the breath of the accused, the crime was registered alleging offence under Section 27(b) of the NDPS Act. After investigation, the final report was filed alleging that the accused consumed ganja as the Investigating Officer identified its smell from breath and speech of the accused, thereby committing the offence alleged.

4. Sri. Adith Kiran, the learned counsel for the petitioner contended that the uncontroverted allegations in the final report cannot lead to



conviction, as consumption of the narcotic drug as alleged, is not supported by any proof. It was submitted that the sense of smell by the Investigating Officer is not proof and in the absence of any forensic examination about what was consumed, the petitioner cannot be ultimately convicted and hence the prosecution is liable to be quashed.

5. Sri. C.N Prabhakaran, the learned Public Prosecutor, on the other hand, submitted that evidence in a prosecution can be documentary or oral and that there is nothing that restricts the right of the prosecution from adducing oral evidence to prove that the accused had consumed a narcotic drug. It was also stated that medical evidence can also be adduced to justify the prosecution case and hence the jurisdiction under Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023 ought not to be exercised.

6. While considering the rival contentions, it has to be borne in mind that the consumption of a narcotic drug is made punishable under Section 27 of the NDPS Act. The two sub-clauses of Section 27 of the NDPS Act indicate two types of punishments for consuming different narcotic drugs. The type of drug specified in Section 27(a) is different from those covered under Section 27(b) of the NDPS Act. This distinction assumes significance in the instant case, since neither the alleged cigarette nor the narcotic drug were seized. In the absence of seizure of any narcotic drug, it fails all comprehension as to how the prosecution would be able to prove its case even relating to the specific limb of Section 27 of the NDPS Act, the alleged offence falls.



7. The foundational facts in a prosecution for a criminal offence and the specific offending clause that is attracted by the alleged conduct are to be alleged and proved by the prosecution. In the absence of the contraband or the article containing the contraband or atleast a medical test to justify the allegation of consumption of a narcotic drug, it is impossible for the prosecution to prove the nature of the contraband.

8. The olfactory abilities of a person can at the most trigger a suspicion. The odourant receptor genes of humans play a vital role in our sense of smell and as the ability of the said gene is subjective, reliance upon such an identification cannot be conclusive. Sensory perception of human beings is not standardised or a constant and therefore that ability cannot be a substitute for proof. To identify the nature of the contraband on the basis of smell, that too, from the breath of a person cannot be a piece of acceptable evidence to justify a criminal prosecution. As noted earlier, it could be the basis for suspicion, but certainly not the sole basis for prosecution. If a person is permitted to be prosecuted on the mere basis of smell from his breath, it can lead to anomalous situations where the Investigating Officers would be able to rope in any person as an accused in an NDPS offence.

9. In the decision in **Anurag Shaji v. State of Kerala** [2023 KHC 9406], this Court had considered a case where the alleged contraband collected was not subjected to a forensic examination. In the said case, it was observed that in the absence of any forensic examination or a report from the expert regarding the nature of the contraband, the prosecution



cannot be permitted to continue.

10. In the case on hand, the contraband article allegedly consumed was not recovered nor is there any medical evidence to justify the allegation. Hence, I am satisfied that the prosecution against the petitioner is an abuse of the court's process and must be interfered with.

11. Accordingly, the proceeding against the petitioner in C.C.No.43 of 2023 on the files of the Judicial First Class Magistrate's Court-III, Palakkad, arising out of Crime No.6 of 2023 of Malampuzha Police Station is hereby quashed.

The Crl.M.C. is allowed as above.

Sd/-
BECHU KURIAN THOMAS
JUDGE

RKM



APPENDIX OF CRL.MC 5852/2024

PETITIONER'S ANNEXURES :

- Annexure A1 TRUE COPY OF THE FIRST INFORMATION REPORT
DATED 03.01.2023 IN CRIME NO. 06/2023 OF
MALAMPUZHA POLICE STATION, PALAKKAD
- Annexure A2 TRUE COPY OF THE FINAL REPORT IN CC
NO.43/2023 ON THE FILES OF THE JUDICIAL
FIRST-CLASS MAGISTRATE COURT, PALAKKAD
- Annexure A3 CERTIFIED COPY OF THE ORDER DATED
15.11.2023 IN CMP NO. 4276 IN CC
NO.43/2023 PASSED BY THE JUDICIAL FIRST-
CLASS MAGISTRATE COURT III, PALAKKAD
- Annexure A4 CERTIFIED COPY OF THE ORDER DATED
11.04.2024 IN CRIMINAL R.P NO. 05 /2024
PASSED BY THE SESSIONS COURT, PALAKKAD