IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE JOHNSON JOHN

MONDAY, THE 8TH DAY OF SEPTEMBER 2025 / 17TH BHADRA, 1947

CRL.A NO. 447 OF 2014

CRIME NO.562 OF 2011 OF SULTHAN BATHERY POLICE STATION
JUDGMENT DATED 06.02.2014 IN SC NO.89 OF 2012 OF SPECIAL COURT (NDPS ACT CASES), VATAKARA

APPELLANT/ACCUSED:

ASKAF, AGED 33 YEARS,S/O. AZEEZ, PAYYAYIL HOUSE, KAYYAYAD, SULTHAN BATHERY.

BY ADV SRI.T.P.SANTHOSH KUMAR
SRI. ANAND MAHADEVAN, STATE BRIEF

RESPONDENT/COMPLAINANT:

1 SUB INSPECTOR OF POLICE, SULTHAN BATHERY
SULTHAN BATHERY - 670 114.

2 STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM - 682 031.

SRI. ALEX M. THOMBRA, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26.08.2025, THE COURT ON 08.09.2025 DELIVERED THE FOLLOWING:

'C.R'

JOHNSON JOHN, J.

Crl. Appeal No. 447 of 2014

Dated this the 8th day of September, 2025

J U D G M E N T

The appellant is the accused in S.C. No. 89 of 2012 on the file of the Special Judge (NDPS Act Cases), Vatakara and he is challenging the conviction and sentence imposed on him for the offences under Sections 22(b) and 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short).

2. The prosecution case is that the accused was found in conscious possession of 250 ampoules of Buprenorphone injection Lupigesic, 165 injection ampoules of Diazepam starlium and 60 injection ampoules of Diazep on 05.07.2011 at 16.40 hours at a place near MSMI Cristh Jyothi Convent building at Sulthan Bathery.

3. Before the trial court, when the accused pleaded not guilty to the charge, PWs 1 to 8 were examined and Exhibits P1 to P13 and MOs 1 to 12 were marked from the side of the prosecution. From the side of the defence, Exhibit D1 marked.

4. After considering the oral and documentary evidence on record, the learned Special Judge found the accused guilty and convicted him for the offences as aforesaid. When there was no representation for the appellant for several postings, this Court appointed Adv.Anand Mahadevan as State Brief to represent the appellant.

5. Heard Sri. Anand Mahadevan, the learned counsel representing the appellant as State Brief and Sri. Alex M. Thombra, the learned Public Prosecutor for the State and perused the records.

6. The learned State Brief, Adv.Anand Mahadevan, argued that the prosecution is vitiated as the sample was allegedly drawn by PW1 without taking recourse to sub-Section 2 of Section 52A of the NDPS Act and further, the trial court accepted the chief affidavit of PWs 1 and 4 as evidence against the accused in violation of Section 276 Cr.P.C.

7. But, the learned Public Prosecutor argued that the evidence of PWs 1 and 4 regarding the arrest and seizure of the contraband from the possession of the accused is reliable and there is no reason to interfere with the findings in the impugned judgment.

8. It is not in dispute that the trial court accepted the chief affidavit of PWs 1 and 4 as evidence against the accused in violation of

Section 276 Cr.P.C., which reads thus:

> "276. **Record in trial before Court of Session.**
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> (1) In all trials before a Court of Session, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the presiding Judge himself or by his dictation in open Court, or under his direction and superintendence, by an officer of the Court appointed by him in this behalf.
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> [(2) Such evidence shall ordinarily be taken down in the form of a narrative, but the presiding Judge may, in his discretion, take down, or cause to be taken down, any part of such evidence in the form of question and answer."
>
> (3) The evidence so taken down shall be signed by the presiding Judge and shall form part of the record."

9. Section 273 Cr.P.C provides that all evidence in a criminal trial is to be taken in the presence of the accused and Section 278 Cr.P.C shows that the evidence so recorded is required to be read over to the witness in the presence of the accused. Therefore, the presence of the accused or his Pleader is required at the time of recording the examination in chief of a material prosecution witness. The accused or his Pleader has a right to object to a leading or irrelevant question being asked to the witness during chief examination. Therefore, if the trial

court permits the prosecution to file chief affidavit of a material witness as evidence in a criminal case against the accused, the same will cause serious prejudice to the accused, in as much as the entire contents of the chief affidavit can only be treated as an outcome of the leading questions put to the witness.

10. In ***Ekene Godwin and Another v. State of Tamil Nadu*** [2024 SCC OnLine 337], the Honourable Supreme Court held thus:

> "6. When the examination-in-chief of a material prosecution witness is being recorded, the presence of the Advocate for the accused is required. He has a right to object to a leading or irrelevant question being asked to the witness. If the trial is conducted in such a manner, an argument of prejudice will be available to the accused."

11. In ***Ashok v. State of Uttar Pradesh*** [2024 KHC 6668], the Honourable Supreme Court held that if the examination-in-chief of a prosecution witness is recorded in the absence of the advocate for the accused, a very valuable right of objecting to the questions asked in examination-in-chief is taken away. Therefore, I find merit in the argument of the learned counsel representing the appellant that the

impugned judgment of the trial court is liable to be set aside on that ground alone.

12. The learned counsel representing the appellant invited my attention to Exhibit P1 mahazar and pointed out that the samples are included as items 1, 3 and 5 in the mahazar and apart from the description of items 1, 3 and 5, there is nothing in the contents of the mahazar regarding the procedure adopted by PW1, Detecting Officer, for drawing the sample. However, it is not in dispute that it was PW1 who prepared the samples at the spot.

13. In paragraphs 13 and 14 of the decision of the Honourable Supreme Court in ***Union of India v. Mohnalal and another*** [2016 KHC 6069], it was held thus:

> "13. It is manifest from S.52A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under S.53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory (b) certifying photographs of such drugs or substances taken before the Magistrate as true and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn. Sub-section (3) of S.52A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer

concerned is in law duty bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to S.52A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-section (2) and (3) of S.52 - A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure. Be that as it may, a conflict between the statutory provision governing taking of samples and the standing order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties.

The Central Government would, therefore, do well, to re - examine the matter and take suitable steps in the above direction.

14. Mr. Sinha, learned Amicus, argues that if an amendment of the Act stipulating that the samples be taken at the time of seizure is not possible, the least that ought to be done is to make it obligatory for the officer conducting the seizure to apply to the Magistrate for drawing of samples and certification etc. without any loss of time. The officer conducting the seizure is also obliged to report the act of seizure and the making of the application to the superior officer in writing so that there is a certain amount of accountability in the

entire exercise, which as at present gets neglected for a variety of reasons. There is in our opinion no manner of doubt that the seizure of the contraband must be followed by an application for drawing of samples and certification as contemplated under the Act. There is equally no doubt that the process of making any such application and resultant sampling and certification cannot be left to the whims of the officers concerned. The scheme of the Act in general and S.52A in particular, does not brook any delay in the matter of making of an application or the drawing of samples and certification. While we see no room for prescribing or reading a time frame into the provision, we are of the view that an application for sampling and certification ought to be made without undue delay and the Magistrate on receipt of any such application will be expected to attend to the application and do the needful, within a reasonable period and without any undue delay or procrastination as is mandated by sub-section (3) of S.52A (supra). We hope and trust that the High Courts will keep a close watch on the performance of the Magistrates in this regard and through the Magistrates on the agencies that are dealing with the menace of drugs which has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Magistracy in this country addresses a problem of such serious dimensions."

14. In paragraph 20 of the above judgment, the Honourable Supreme Court held thus:

20. To sum up we direct as under:

(1) No sooner the seizure of any Narcotic Drugs and Psychotropic and controlled Substances and Conveyances is effected, the same shall be forwarded to the officer in - charge of the nearest police station or to the officer empowered under S.53 of the Act. The officer concerned shall then approach the

Magistrate with an application under S.52A(ii) of the Act, which shall be allowed by the Magistrate as soon as may be required under sub-S.3 of S.52A, as discussed by us in the body of this judgment under the heading 'seizure and sampling'. The sampling shall be done under the supervision of the magistrate as discussed in paras 13 and 14 of this order.

(2) The Central Government and its agencies and so also the State Governments shall within six months from today take appropriate steps to set up storage facilities for the exclusive storage of seized Narcotic Drugs and Psychotropic and controlled Substances and Conveyances duly equipped with vaults and double locking system to prevent theft, pilferage or replacement of the seized drugs. The Central Government and the State Governments shall also designate an officer each for their respective storage facility and provide for other steps, measures as stipulated in Standing Order No. 1/89 to ensure proper security against theft, pilferage or replacement of the seized drugs.

(3) The Central Government and the State Governments shall be free to set up a storage facility for each district in the States and depending upon the extent of seizure and store required, one storage facility for more than one districts.

(4) Disposal of the seized drugs currently lying in the police maalkhans and other places used for storage shall be carried out by the DDCs concerned in terms of the directions issued by us in the body of this judgment under the heading 'disposal of drugs'."

15. In ***Simarnjit Singh v. State of Punjab*** [AIR 2023 SC (Supp) 1010], the Honourable Supreme Court followed the dictum in ***Mohanlal*** (supra) that the prosecution is vitiated when the drawing of

sample was done by the detecting officer without taking recourse to sub-Section 2 of Section 52A of the NDPS Act.

16. In view of the above stated reasons, I find that the case of the prosecution is not free from suspicion and therefore, the accused is entitled for the benefit of reasonable doubt. Accordingly, the impugned judgment is set aside and the appellant is acquitted of the offences charged against him. The appellant is directed to be released forthwith from the custody, unless otherwise his custody is required in connection with any other case.

This appeal is allowed as above.

The registry is directed to forward a copy of this judgment to the superintendent of the concerned jail where the accused is detained, for necessary information and compliance.

sd/-
JOHNSON JOHN,
JUDGE.

Rv