

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.11.2017

PRONOUNCED ON : 21.12.2017

CORAM :

THE HONOURABLE MR.JUSTICE P.N. PRAKASH

Crl.A.No.362 of 2013

Ashokan @ Chinnathambi

... Appellant

Vs.

State By
Inspector of Police
NIB-CID, Vyasarpadi
Chennai 600 039.

... Respondent

Criminal Appeal filed under Section 374(2) Cr.P.C. to set aside the judgment of conviction and sentence passed in C.C.No.82 of 2007 dated 06.03.2013 by the I Additional Special Court (NDPS Act Cases), Chennai.

For Appellant : Mr.V.Sambamurthy
For Respondent : Mr.K.Madhan
Govt.Advocate (Crl.Side)

JUDGMENT

This appeal has been filed against the judgment dated 06.03.2013 passed in C.C.No. 82 of 2007 by the I Additional Special Court (NDPS Act Cases), Chennai.

2. It is the case of the prosecution that Murugaiyan [P.W.1], Sub-Inspector of Police, received information from his informant around 5.00 p.m. on 19.12.2005 that one Ashokan @ Chinnathamabi, will be coming to the Rajaji Salai and Gopal

Chetty Street junction, with ganja for sale between 6.00 p.m. and 8.00 p.m. Murugaiyan [P.W.1] recorded the information vide Ex.P.1 and sent the same to John Joseph [P.W.5], Inspector of Police, who gave him permission to proceed further. Accordingly, Murgaiyan [P.W.1] went along with Pandiyan [P.W.2], Police Constable and others to the place and was maintaining surveillance.

[a] Around 6.15 p.m., the accused being identified by the informant, Murugaiyan [P.W.1], intercepted him and gave a written option under Section 50 of the Narcotic Drugs and Psychotropic Substances Act [for short "the NDPS Act"], for personal search in the presence of a Gazetted Officer or a Magistrate, vide Ex.P.2, which option was declined by the accused. The accused was found to be carrying a polythene bag and on checking the same, it was found to contain ganja. On weighing, it was found to be of 1.100 kgs. Murugaiyan [P.W.1] drew two samples of 50 gms. each and sealed the samples and the main contraband with NIB seal. He prepared a Seizure Mahazar [Ex.P.3] and arrested the accused at 8.00 p.m. by serving on him the Arrest Memo [Ex.P.4]. Thereafter, he was brought to the Police Station, where, Murugaiyan [P.W.1] submitted a report under Section 57 of the NDPS Act [Ex.P.5] to the Inspector of Police.

[b] At the Police Station, a case in Cr.No.128 of 2005 was registered on 19.12.2005 at 9.00 p.m. under Section 8(c) read with 20(b)(ii)(B) of the NDPS Act,

against the accused. The accused and the seized contraband were produced before the jurisdictional Magistrate for remand, who remanded the accused to custody. After the records were sent by the remand Magistrate to the Special Court for NDPS Act Cases, John Joseph [P.W.5], Inspector of Police, gave a requisition to the Special Court for NDPS Act Cases, vide Ex.P.6, to send one sample to the Tamil Nadu Forensic Science Laboratory for analysis and report. The sample so sent was examined by Banumathy [P.W.3], who, in her evidence as well in her report [Ex.P.7], has stated that the sample tested answered positive for ganja. After completing the investigation, John Joseph [P.W.5], Inspector of Police, filed a Charge Sheet in C.C.No.82 of 2007 before the Special Court for NDPS Act Cases against the accused for the offences under Sections 8(c) read with 20(b)(ii)(B) of the NDPS Act.

3. On the appearance of the accused, he was furnished with the copies of the relied upon documents under Section 207 Cr.P.C. and a charge under Section 8 (c) read with 20(b)(ii)(B) of the NDPS Act was framed against him. When questioned by the trial Court, he pleaded not guilty.

4. To prove the case, the prosecution examined 5 witnesses, marked 9 exhibits and 2 material objects. When the accused was questioned under Section 313 Cr.P.C. about the incriminating circumstances appearing against him, he

denied the same. No witness was examined on behalf of the accused nor any document marked.

5. After hearing either side and analysing the evidence on record, the trial Court, by judgment dated 06.03.2013, convicted the accused for the offence under Section 8(c) r/w 20(b)(ii)(B) of the NDPS Act and sentenced him to undergo one year Rigorous Imprisonment and to pay a fine of Rs.10,000/-, in default to undergo Rigorous Imprisonment for a further period of three months. Challenging the said conviction and sentence, this appeal has been filed.

6. Heard Mr.V.Sambamurthy, learned counsel for the appellant/accused and Mr.K.Madhan, learned Government Advocate (Crl.Side) appearing for the State.

7. Murugaiyan [P.W.1], Sub-Inspector of Police, in his evidence, has stated that on 19.12.2005, he received information at 5.00 p.m. that the accused is coming to a particular place with ganja between 6.00 p.m. and 8.00 p.m. He recorded information, vide Ex.P.1 and after submitting the same to John Joseph [P.W.5], Inspector of Police, proceeded to the place and maintained surveillance with the police party. On the accused being identified by his informant, Murugaiyan [P.W.1] intercepted him and seized 1.100 kgs. of ganja, prepared the Mahazar [Ex.P.3] at 6.45 p.m. and arrested the accused at 8.00 p.m. at the place of occurrence. Only thereafter, he came to the Police Station and reported the

matter to the Inspector of Police, who registered the case in Cr.No.128 of 2005 at 9.00 p.m. In the cross-examination of Murugaiyan [P.W.1], it was suggested that the accused was taken from his house and a case was foisted on him.

8. Learned counsel for the accused submitted that even according to the Police, the recovery and arrest were at 8.00 p.m. and the FIR was registered only at 9.00 p.m., whereas, the Arrest Memo shows the crime number in it. In other words, it is his submission that, if the crime number itself was assigned only at 9.00 p.m., the probability of mentioning the crime number in the Arrest Memo at 8.00 p.m. would make the entire operation suspect.

9. Per contra, the learned Government Advocate [Crl.Side] refuted the contentions.

10. This Court gave its anxious consideration to the rival submissions.

11. This ground has been frequently raised before this Court and in several cases, this Court has held that any contradiction requires to be put to the witnesses for his explanation and only then, the same can be considered by the Court. In rejecting the plea, this Court has relied upon the judgment of the Supreme Court in **State of Uttar Pradesh v. Nahar Singh (Dead) and others [(1998) 3 SCC 561]**, wherein, it is held as follows:

"13. It may be noted here that that part of the statement of PW 1 was not cross-examined by the accused. In the absence of cross-examination on the explanation of delay, the evidence of PW 1 remained unchallenged and ought to have been believed by the High Court. Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by allowing a witness to be questioned:

- (1) to test his veracity,
- (2) to discover who he is and what is his position in life, or
- (3) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

14. The oft-quoted observation of Lord Herschell, L.C. in *Browne v. Dunn* [(1893) 6 R 67] clearly elucidates the principle underlying those provisions. It reads thus:

"I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses."

This aspect was unfortunately missed by the High Court when it came to the conclusion that explanation for the delay is not at all convincing. This reason is, therefore, far from convincing."

12. However, in this case, specific questions have been put twice to

Murugaiyan [P.W.1] on this aspect, despite which, he has not given any

explanation as to how the crime number was noted in the Arrest Memo [Ex.P.4]. Further, in the Arrest Memo [Ex.P.4], apart from the signatures of two independent witnesses, the signature of the wife of the accused, Mariyal is found therein. This probablises the defence version that the accused was arrested from his house and not arrested at the road junction, as projected by the prosecution. In the facts and circumstances of the cases, the seizure and arrest become suspect and hence, this appeal deserves to be allowed.

In the result, this appeal is allowed. The conviction and sentence imposed by the trial Court in C.C.No.82 of 2007 by the I Additional Special Court (NDPS Cases), Chennai are hereby set aside. The bail bond, if any, executed, shall stand discharged.

21.12.2017

To

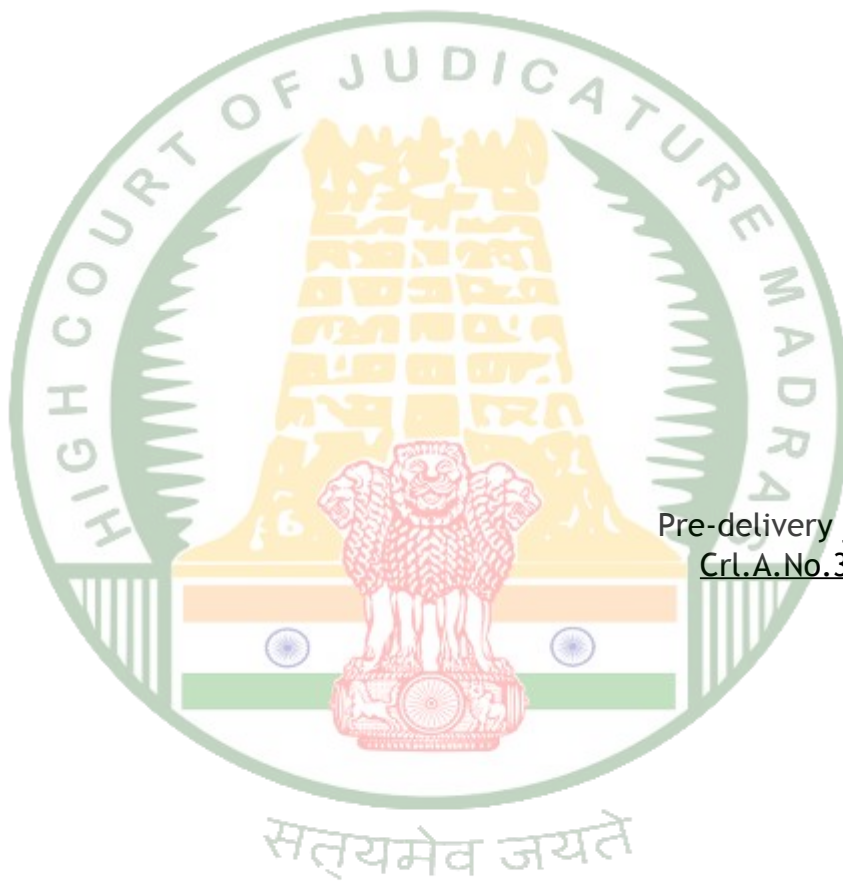
1.The Inspector of Police
NIB-CID, Vyasarpadi
Chennai 600 039.

2.I Additional Special Court (NDPS Cases),
Chennai.

3.The Public Prosecutor,
High Court,
Madras.

P.N.PRAKASH, J.

gms



Pre-delivery judgment in
Crl.A.No.362 of 2013

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