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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.06.2017

CORAM:

THE HON'BLE MR.JUSTICE C.T. SELVAM

Crl.A.No.40 of 2013

Rose  
S/o.Kannan

..Appellant/Accused

Vs.

The Inspector of Police,  
NIBCID, Chennai.  
(Crime No.67 of 2006)

..Respondent/Respondent

Criminal Appeal filed under Section 374 of the Criminal Procedure Code praying to call for the records and to set aside the judgment and sentence dated 05.01.2013 imposed in C.C.No.102 of 2007 on the file of learned I Additional Special Judge for NDPS Cases, Chennai, and quash the same.

For Appellant : Mr.R.Vivekananthan

For Respondent : Mr.B.Ramesh Babu  
Government Advocate(Crl.Side)

#### JUDGMENT

This appeal arises against the judgment of learned I Additional Special Judge for NDPS Cases, Chennai, passed in C.C.No.102 of 2007 on 05.01.2013.

2. Prosecution case is that on 22.09.2006 at about 12.30 hours, appellant/accused was found in possession of 2 kgs. of ganja without any valid licence at Bharatha Mada Street, Erikarai Road, near Sanatorium Railway Gate, Tambaram, Chennai. A case was registered in Crime No.67 of 2006 on the file of respondent. Before trial Court, prosecution examined 4 witnesses and marked 10 exhibits and 3 material objects.

3. PW-1, Sub-Inspector of Police, spoke to obtaining information through telephone, recording and placing before Inspector of Police and after obtaining permission, went to place of occurrence and arresting the accused. PW-1 also spoke to seizure of material objects, preparation of mahazars and



handing over the same to Inspector of Police. PW-2, Sub-Inspector of Police has also spoken on the same lines.

4. PW-3, Assistant Director, Forensic Department, spoke to obtaining samples in a sealed cover and of submitting a report informing the same to be Ganja.

5. PW-4, Assistant Commissioner of Police, spoke to giving permission to PW-1 after perusing Ex.P1, information and instructing him to proceed further. PW-4 also spoke to registration of Ex.P9, First Information Report in Crime No.67 of 2006 upon obtaining report from PW-1 u/s.57 of NDPS Act, forwarding seized material objects to Forensic Science Department, obtaining reports and submitting the same to Court, examination of witnesses and upon of completion of investigation, filing of charge sheet informing commission of offences u/s.8(c) r/w 20(b)(ii)(B) of NDPS Act. The case was tried in C.C.No.102 of 2007 on the file of learned Special Judge, I Additional Special Court under NDPS Act, Chennai.

6. On appreciation of materials before it, trial Court, under judgment dated 05.01.2013, convicted appellant/accused for offence u/s.8(c) r/w 20(b)(ii)(B) of NDPS Act, 1985, as amended by Act, 9/2001 and sentenced him to 7 months R.I. and fine of Rs.5,000/- i/d 1 month R.I. Against such finding, the present appeal has been filed.

7. Heard learned counsel for appellant and learned Government Advocate(Crl.Side).

8. Learned counsel for appellant submits that the prosecution has foisted the case on the appellant. The same is evident from the fact that both Ex.P.1 the information and Ex.P.3 the Mahazar allegedly prepared at that time seizure of the contraband from the appellant both reflect the change in the timing as admitted to by P.W.1- Sub Inspector of Police who said to have received the information and P.W.4- Inspector of Police who investigated the case. Though the seizure allegedly was effected from the appellant at around 04.00 p.m. in a busy street viz., Pillayar Koil street near Tambaram Sanatorium, no independent witness have been called to witness the same. PW1 has deposed to the presence of two persons at the time of seizure and that such persons refused to be witnesses.

9. Learned counsel submits that in the circumstances, the entire prosecution case becomes highly doubtful and the appellant would be entitled to the benefit of such doubt. Learned counsel relied on the decision of this Court in 2013 (2) MWN (Cr.) 184 as also the decision of the Apex Court in Ritesh Chakravarti vs. State of M.P, 2006 12 SCC 321.



10. Heard learned Additional Public Prosecutor, who informs that on due appreciation of evidence before it, a just finding of conviction stands arrived at by the Court below.

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11. On consideration, this Court finds that the prosecution case necessarily must fail in the face of admitted alteration of timings in both in the information and seizure mahazar which are indicative of manipulation/ preparation of records at the Police Station. The failure to effect seizure in the presence of independent witnesses particularly when it is shown that the seizure was at a busy place and at a time is 4 p.m. when in all probability the place would attract frequent visitors, can only be read against prosecution.

12. In decision of the Supreme Court in (2006) 12 Supreme Court Cases 321, Ritesh Chakravarti vs State of M.P. Illustration (g) to sec.114 of the Indian Evidence Act has been usefully reproduced:

'26. Illustration (g) appended to Section 114 of the Indian Evidence Act reads thus:-

"The Court may presume-

(a)-(f)

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.'

In circumstances where P.W.1 admits to the presence of independent witnesses but alleges their refusal to be witnesses to the seizure, this Court would presume that failure to produce independent witnesses arises only out of the nervousness of the prosecution in their deposing against it.

13. This Court also follows the reasoning in the decision in 2013(2) MWN Cr.184, Karnam thakka Babu vs. Stae rep. by Inspector of Police, Koyambedu Police Station, Chennai, which reads as under:

" 6. This Court heard the submissions made by the counsel for both sides and perused the materials placed on record. According to the prosecution, 30 kilograms of ganja was seized from the appellant/accused. PW2, Women Sub-Inspector of Police seized the contraband from the accused from the occurrence spot. In support of the seizure, prosecution examined PW3 and 4, who have accompanied PW2 to the occurrence spot and signed as witness in the seizure mahazar. Even according to Pws 2, 3 and 4, the place where the accused was seen



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is a busy locality, being the main road where vehicles have been frequently passing through, besides that shops are also located. According to them, though attempt was made by them to procure an independent witness from the public, they have refused to stand as witness. This part of the evidence by the prosecution is not acceptable. PW2 has not given the details as to whom she called to stand as witness but refused. It is not the case of PW2 that she took action against the person who refused to stand as witness as contemplated under Section 100 (8) of Cr.P.C. Section 100 (8) of Cr.P.C. is extracted hereunder:-

"(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under Section 187 of the Indian Penal Code (45 of 1860)."

7. Though it is not mandatory that seizure should be made by the Police only in the presence of independent witness, wherever it is possible, the police must secure independent witness in respect of seizure made by them and must let in evidence to gain the confidence of the Court. In this case, though PW2 had gone to the occurrence spot along with her team, on reaching the occurrence spot, she has not taken any effective steps to procure independent witness. Even if no independent witness was available and even if the accused has opted to search in the presence of police witness, PW2 could have taken the accused before a gazetted officer or Magistrate and seizure could have been made in the presence of such officer, in the absence of any independent witness. Thus, the manner in which the seizure was made in the present case by the police officials does not inspire the confidence of this Court and no sufficient evidence is let in by the prosecution. Merely because huge quantity of contraband is seized, the Court cannot jump to a conclusion that the contraband was seized



only in the manner alleged by the prosecution. As the punishment is more stringent, the standard of proof required also is more."

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The appeal shall stand allowed. The judgment of conviction and sentence passed by the learned I Additional Special Judge for NDPS Cases, Chennai, passed in C.C.No.102 of 2007 on 05.01.2013, shall stand set aside. The appellant is acquitted of the charges against him in C.C.No.102 of 2007. Fine, if any, paid, shall be refunded. Bail bonds, if any, executed shall stand cancelled.

Sd/-

Assistant Registrar (CO)

// True Copy //

Sub Assistant Registrar

To

1. The Inspector of Police,  
NIBCID, Chennai.
2. The I Additional Special Judge of NDPS Cases,  
Chennai.
3. The Superintendent of Central Prison,  
Puzhal.
4. The Public Prosecutor,  
High Court, Madras-104.

Copy To: The Section Officer,  
Criminal Section,  
High Court, Madras-104.

Cr1.A.No.40 of 2013

RJ (CO)  
RMP (24/09/2018)