

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.11.2017

PRONOUNCED ON : 21.12.2017

CORAM :

THE HONOURABLE MR.JUSTICE P.N. PRAKASH

Crl.A.No.403 of 2013

Saritha

... Appellant

Vs.

Inspector of Police
NIB-CID
Chennai.

... Respondent

Criminal Appeal filed under Section 374 (2) of Cr.P.C. r/w Section 36-B of NDPS Act against the judgment dated 24.05.2013 under the NDPS Act, Chennai in C.C.No.29 of 2006, on the file of the Special Judge-II, Additional Special Court under NDPS Act, Chennai.

For Appellant : Mr.T.S.Sasikumar
For Respondent : Mr.K.Madhan
Govt.Advocate (crl.side)

J U D G M E N T

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This appeal has been filed against the judgment dated 24.05.2013 passed in C.C.No.29 of 2006 by the learned Special Judge-II, Additional Special Court under NDPS Act, Chennai.

2. The factual matrix of the case is as under:

a] On 21.03.2015, around 10.15 a.m., Murgaiyan [P.W.2], the Sub-Inspector of NIB-CID received information via phone that one Saritha, a lady aged about 20 years will be coming with ganja between 11 a.m. and 1.00 p.m. for selling the same near the railway foot over bridge in Muthusamy Road. Murgaiyan [P.W.2] recorded the information vide Ex.P.2 and sent the same to V.Ashok Kumar [P.W.5], Inspector of Police, who instructed him to proceed to the place with the police party. Accordingly, Murgaiyan [P.W.2] went along with Pandiyan [P.W.3], Sub-Inspector of Police and Rani [P.W.4], a Station Sweeper and maintained surveillance.

b] On noticing the accused, they intercepted her and introduced themselves as Officers of NIB CID. Murgaiyan [P.W.2] apprised the accused of her right under Section 50 of the Narcotic Drugs and Psychotropic Substances Act [for short "the NDPS Act"], by issuing a written notice [Ex.P.3] asking for her option to be taken to a Gazetted Officer or a Magistrate for personal search and the accused had declined the offer. Her answer was recorded in Ex.P.3 and her signature has been obtained.

c] The accused was found carrying a blue colour bag and on checking the bag, it was found to contain ganja. On weighing, it was found to be of 1.200

kgs. Murgaiyan [P.W.2] drew two samples of 50 gms. each and kept the samples in separate covers and the main contraband was also kept in the same bag and sealed with NIB seal. A Seizure Mahazar [Ex.P.4] was prepared for the seizure of the contraband and drawal of samples in the presence of the accused. The accused was arrested by serving on her the arrest memo [Ex.P.5] and was taken to the Police Station, where Murgaiyan [P.W.2] submitted a report under Section 57 of the NDPS Act [Ex.P.6] to the Inspector of Police, NIB-CID. Thereafter, Murgaiyan [P.W.2] registered an FIR [Ex.P.7] in Cr.No.27 of 2005 under Section 8(c) read with 20(b)(ii)(B) of the NDPS Act.

d] The accused, along with the seized contraband, was produced before the Metropolitan Magistrate, George Town on 21.03.2005 at 8.05 p.m. and she was remanded to judicial custody. The sample was sent through the Special Court for NDPS Act cases to the Forensic Sciences Department, where Shankar Kumar [P.W.1] Chemical Examiner tested the same and found that it answered positive for ganja. He submitted his Chemical Report [Ex.P.1] to the Special Court. Further investigation was conducted by V.Ashok Kumar [P.W.5] Inspector of Police, who filed the charge sheet against the accused before the Special Court for NDPS Act Cases for offences under Sections 8(c) read with 20(b)(ii)B of the NDPS Act.

e] On the appearance of the accused, she was furnished with the copies of documents under Section 207 Cr.P.C. and a charge under Section 20(8)(c)

20(b)(ii)(B) of the NDPS Act was framed against her. When questioned by the trial Court, she pleaded not guilty.

f] The prosecution examined 5 witnesses, marked 9 exhibits and 3 material objects. When the accused was questioned under Section 313 Cr.P.C. about the incriminating circumstances appearing against her, she denied the same. No witness was examined on behalf of the accused nor any document marked.

g] After hearing either side and analysing the evidence on record, the trial Court, by judgment dated 24.05.2013, convicted the accused for offence under Section 8(c) r/w 20(b)(ii)(B) of the NDPS Act and sentenced her to undergo one year Rigorous Imprisonment and to pay a fine of Rs.5,000/- in default to undergo Rigorous Imprisonment for a further period of one month. Challenging the said conviction and sentence, this appeal has been filed.

3. Heard Mr.T.S.Sasikumar, learned counsel for the appellant and Mr.K.Madhan, learned Government Advocate (Crl.Side) appearing for the State.

4. Mr.T.S.Sasikumar, learned counsel submitted as under:

[a] that though the place of seizure was a public place, the prosecution did not avail any independent witness for the search; that in the arrest memo

[Ex.P.5], the crime number of the case has been given, whereas, the FIR was registered only subsequently;

[b] that in the evidence of Shankar Kumar [P.W.1], he has stated that the accused told him that it would suffice if the search is conducted in the presence of Rani [P.W.4], whereas in Ex.P.3, it is stated that the accused had stated that it would suffice if the search is conducted in the presence of the Sub-Inspector of Police himself;

[c] that Rani [P.W.4] was not included in the memo of evidence and only subsequently, she was examined as a witness by invoking Section 311 Cr.P.C;

[d] that Rani [P.W.4] did not sign in any one of the documents, like Seizure Mahazar etc.;

[e] that the telegram informing the relatives of the accused was sent at 12.32 hours, when the arrest was at 12.30 hours and hence, there is a serious doubt in the prosecution case.

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

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

7. The case of the prosecution rests on the evidence of Murgaiyan [P.W.2], Pandiyan [P.W.3] and Rani [P.W.4]. Murgaiyan [P.W.2], in his evidence, has stated that he received information over phone that one Saritha, aged about 20 years, would be coming to the railway foot over bridge for selling ganja and that he recorded the information vide Ex.P.1 and after getting the permission of the Inspector of Police, proceeded to the spot with Pandiyan [P.W.3] and Rani [P.W.4] and maintained surveillance. On seeing the accused, he intercepted her and introduced and gave her an option under Section 50 of the NDPS Act vide Ex.P.3. In the evidence, he has further stated that the accused declined the option and agreed that the search be conducted in the presence of the lady employee accompanying the raiding party, but, in Ex.P.3 it is stated that she agreed for the search to be conducted in the presence of the Sub-Inspector of Police himself. In the opinion of this Court, this cannot be stated to be a contradiction, because Rani [P.W.4] was also a part of the police party and that apart, the contradiction, if any, was not even put to the witness, which is mandatory under Section 145 of the Evidence Act. Similarly, the mentioning of the crime number in the arrest memo was not put to Murgaiyan [P.W.2] in the cross examination.

8. In **State of Uttar Pradesh v. Nahar Singh (Dead) and others [(1998) 3**

SCC 561], the Supreme Court has 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."

Therefore, in the absence of giving an opportunity to Murgaiyan [P.W.2] to give explanation when he was in the witness box, this Court cannot put these

aspects against the prosecution. A fact is said to contradict another fact when the existence of the one makes the existence of the other improbable. That apart, in this case, the seizure was effected in a public place where provisions of Section 43 of the NDPS Act would apply and the seizure has been effected from the bag that was carried by the accused and not on account of the search of her person. The issue is no more *res integra* in the light of the law laid down by the Supreme Court in **State of Rajasthan vs. Babu Ram [2007 AIR SCW 3799]** and **Ajmer Singh vs. State of Haryana [2010 (2) MLJ (Crl.) 292]**.

9. Thus, even if there is any infraction of Section 50 of the NDPS Act (though there is none in this case), since the seizure has been effected from a bag that was carried by the accused, the seizure will not stand vitiated. As regards non-joinder of independent witnesses, Murgaiyan [P.W.2] has clearly stated in his evidence that he called a few people including one Selvam, a shop vendor and Suseela, a fruit vendor, in that area, but they refused to associate themselves with the search. Absence of independent witness for a seizure will not *ipso facto* vitiate the seizure [See: **Akmal Ahmad vs. State of Delhi (1999) SCC (crl.) 425**]. In this case, the evidence of Murgaiyan [P.W.2] has been sufficiently corroborated by the evidence of Pandiyan [P.W.3] and Rani [P.W.4].

10. As regards the contention that the telegram was sent at 12.32 hrs., but the arrest was effected at 12.30 hrs., this Court is of the view that this, by itself,

can only throw doubt on the time of arrest and cannot have the effect of vitiating the seizure which was at an anterior point of time, viz., at 12.00 p.m. That apart, the telegram was not sent before the arrest, but has been sent only after the arrest and this aspect also has not been confronted to Murugaiyan [P.W.2]. From the evidence of Shankar Kumar [P.W.1] who analysed the sample, it has been established that the sample with seal in bag was received by the Forensic Science Laboratory from the Special Court and the test answered positive for ganja.

In such view of the matter, this Court does not find any serious infirmity in the impugned judgment warranting interference. However, taking into consideration the quantum of the contraband and the fact that the appellant is a lady, the sentence of one year Rigorous Imprisonment imposed by the learned Special Judge-II, Additional Special Court under NDPS Act, Chennai, in C.C.No.29 of 2006 is reduced to six months Rigorous Imprisonment.

With the above modification in sentence, the appeal is dismissed.

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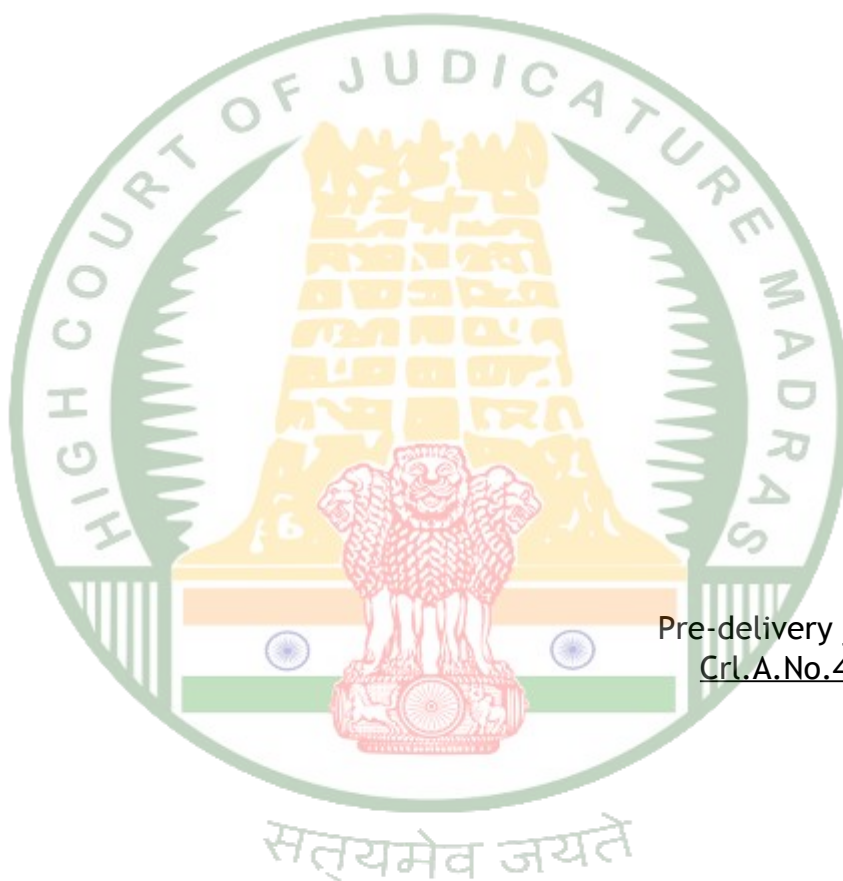
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To

1. The Inspector of Police, NIB-CID, Chennai.

2. The Special Judge-II, Additional Special Court under NDPS Act, Chennai.

3. The Public Prosecutor, High Court, Madras.



Pre-delivery judgment in
CrL.A.No.403 of 2013

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