

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.11.2017

PRONOUNCED ON : 21.12.2017

CORAM :

THE HONOURABLE MR.JUSTICE P.N. PRAKASH

Crl.A.No.539 of 2013

Anbuselvan

... Appellant

Vs.

Inspector of Police
NIB-CID
Chennai.

... Respondent

Criminal Appeal filed under Section 374 Cr.P.C. r/w Section 36-B of NDPS Act against the judgment dated 02.08.2013 under the NDPS Act, by the learned II Additional Special Judge, Special Court for NDPS Act, Chennai in C.C.No.21/2008 convicting and sentencing the appellant to undergo 2 years R.I. and to pay a fine of Rs.5000/- (Rupee five thousand only) or in default to undergo further period of three months R.I.

For Appellant : Mr.M.Ramesh
For Respondent : Mr.K.Madhan
Govt.Advocate (Crl.Side)

JUDGMENT

This appeal has been filed against the judgment dated 02.08.2013 passed in C.C.No.21 of 2008 by the II Additional Special Judge, Special Court for NDPS Act Cases, Chennai.

2. It is the case of the prosecution that Murugaiyan [P.W.2], Sub-Inspector of Police, received information around 9.00 a.m. on 15.07.2006 that one Anbuselvan, S/o Rasappa will be coming to the Rajaji Salai and Gopal Chetty Street junction, with ganja for sale between 10.00 a.m. and 1.00 p.m. Murugaiyan [P.W.2] recorded the information in Ex.P.3 and sent the same to John Joseph [P.W.4], Inspector of Police, who gave him permission to proceed further. Accordingly, Murugaiyan [P.W.2] went along with the police party, including Pandiyan [P.W.3], Head Constable and waited incognito.

[a] On being shown by his informant, Murugaiyan [P.W.2], intercepted the accused who was carrying with him a white bag. The police party questioned the accused and gave a written option in Ex.P.4 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, which option was declined by the accused. Murugaiyan [P.W.2] called one Subramani, S/o Kaliyan and Krishnamurthy, S/o Muthan to be witnesses for search, but they declined. Thereafter, he proceeded to check the bag that was carried by the accused in the presence of Pandiyan [P.W.3], Head Constable and Kesava Ramachandran, Head Constable 651 and found that it contained ganja. On weighing, it was found to be of 2.50 kgs. Murugaiyan [P.W.2] drew two samples of 50 gms. each and sealed the samples and the balance contraband with NIB seal. The accused was arrested at 12 noon and was brought to the Police Station. At the Police Station, Murugaiyan

[P.W.2] gave a report under Section 57 of the NDPS Act [Ex.P.7] to the Inspector of Police.

[b] Further investigation was taken over by John Joseph [P.W.4], Inspector of Police, who sent the accused and the contraband to the jurisdictional Magistrate for remand. The Investigating Officer recorded the statement of some of the witnesses and gave a requisition to the Special Court for NDPS Act Cases, vide Ex.P.5, to send one sample to the Tamil Nadu Forensic Science Laboratory for chemical examination. At the Forensic Science Laboratory, M.Sankar Kumar [P.W.1], who analysed the sample, in his evidence and his report [Ex.P.2] has opined that the sample tested answered positive for ganja. After completing the investigation, John Joseph [P.W.4], Inspector of Police, filed the Final Report before the Special Court for NDPS Act Cases against the accused for offences under Section 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 4 witnesses, marked 11 exhibits and 3 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 was marked.

5. After hearing either side and analysing the evidence on record, the trial Court, by judgment dated 02.08.2013, 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 two years Rigorous Imprisonment and to pay a fine of Rs.5,000/-, 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.M.Ramesh, learned counsel for the appellant and Mr.K.Madhan, learned Government Advocate (Crl.Side) appearing for the State.

7. Learned counsel for the accused submitted:

[a] that the police have failed to rope in independent witnesses, though the seizure was in a public place.

[b] that no proper notice was issued under Section 50 of the NDPS Act for personal search.

[c] that the property was seized on 15.07.2006, but was sent to the Court only on 26.07.2006.

[d] that the label that was affixed on the main contraband was not available.

[e] that the report under Section 42 of the NDPS Act was not properly submitted.

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

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

10. Murugaiyan [P.W.2], in his evidence, has stated that on 15.07.2006, he received information that the accused will be coming near Rajaji Salai and Gopal Chetty Street junction, with ganja and that he recorded the information vide Ex.P.2 and submitted the same to John Joseph [P.W.4], Inspector of Police and went to the said place with his informant. On the showing of the informant, he intercepted the accused. He called two persons by name Subramani and Krishnamurthy to stand as witnesses, but they declined. However, he proceeded to issue notice under Section 50 of the NDPS Act vide Ex.P.4, giving option to the accused to be searched either before a Gazetted Officer or a Magistrate, which the accused declined. Thereafter, he examined the bag that was being carried by the accused and it was found to contain ganja, which when weighed, was found to be of 2.50 kgs. Two samples of 50 gms. each were drawn and they were sealed

with the NIB seal. The accused was arrested and was taken to the Police Station and a report under Section 57 of the NDPS Act was given to the Inspector of Police.

11. Similar is the evidence of Pandiyan [P.W.3], who accompanied Murugaiyan [P.W.2]. In his cross-examination, he was questioned as to whether the label that was affixed on the cover of the main contraband as noted in the Mahazar is available or not, for which, he stated that the label must have fallen on account of efflux of time. It is seen that the seizure was on 15.07.2006 and Murugaiyan [P.W.2] was examined in the Court on 12.06.2013, nearly six years later. Therefore, the label that was affixed on the plastic cover must have fallen and that cannot be put against the prosecution.

12. As regards the non-joinder of independent witnesses, it is seen that an attempt was made by Murugaiyan [P.W.2] to call two persons as witnesses, but when they declined, he proceeded to examine the bag that was with the accused. In the opinion of this Court, non-joinder of independent witnesses by itself, cannot vitiate the seizure, if the evidence of the seizure Officer inspires the confidence of the Court.

13. In **Sahib Singh vs. State of Punjab [(1996) 11 SCC 685]**, the Supreme Court has stated that before conducting a search, the Police Officer is required to call upon some independent and respectable people of the locality as witnesses.

In a given case, it may so happen that no such person is available or, even if available, is not willing to be a party to such search. It may also be that after joining the search, such persons later on turn hostile. In such cases, the evidence of the Police Officer cannot be disbelieved. If it is found that no attempt was even made by the Police Officer to join independent witnesses, it would only affect the weight of the evidence, though not its admissibility. In this case, the defence are not able to make any serious dent in the evidence of Murugaiyan [P.W.2] and Pandiyan [P.W.3].

14. The provisions of Section 50 of the NDPS Act would apply only when there is a personal search and not when a bag that is being carried by a person is being checked. In this case, the seizure was from the bag that has been carried by the accused and therefore, even if there is any infraction of Section 50 of the NDPS Act, that will not enure to the advantage of the accused.

15. As regards the information report [Ex.P.3], the necessity to record the information has been emphasised only in Section 42 of the NDPS Act, when the Police Officer is about to enter into and search any building, conveyance or place. It will not apply to a seizure in a public place under Section 43 of the NDPS Act.

16. As regards the delay in sending of the contraband to the Court, it is seen that the contraband was produced along with the accused before the remand

Magistrate on 15.07.2006 itself and the Magistrate has affixed his signature in green ink on Form-95 [Ex.P.10]. After the records were transmitted from the Court of the Magistrate to the Special Court, the contraband was once again produced before the Special Court on 26.07.2006, which cannot be said to be illegal. The Special Court has accepted the contraband so produced and had sent the sample to the Tamil Nadu Forensic Science Laboratory, where it was analysed by Sankar Kumar [P.W.1], who, in his evidence, has stated that the sample tested answered positive for ganja. In the cross-examination of Sankar Kumar [P.W.1], he has stated that he performed the two tests two months after it was received from the Court. In the opinion of this Court, that cannot, in any way, affect the test result, as ganja is not a chemical composition that would undergo changes on its own. It is a cannabis plant.

17. In view of the foregoing discussion, this Court does not find any serious infirmity in the impugned judgment, warranting interference. However, the substantive sentence of two years Rigorous Imprisonment imposed on 02.08.2013 in C.C.No.21 of 2008 by the II Additional Special Judge, Special Court for NDPS Act Cases, Chennai, is reduced to one year Rigorous Imprisonment.

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

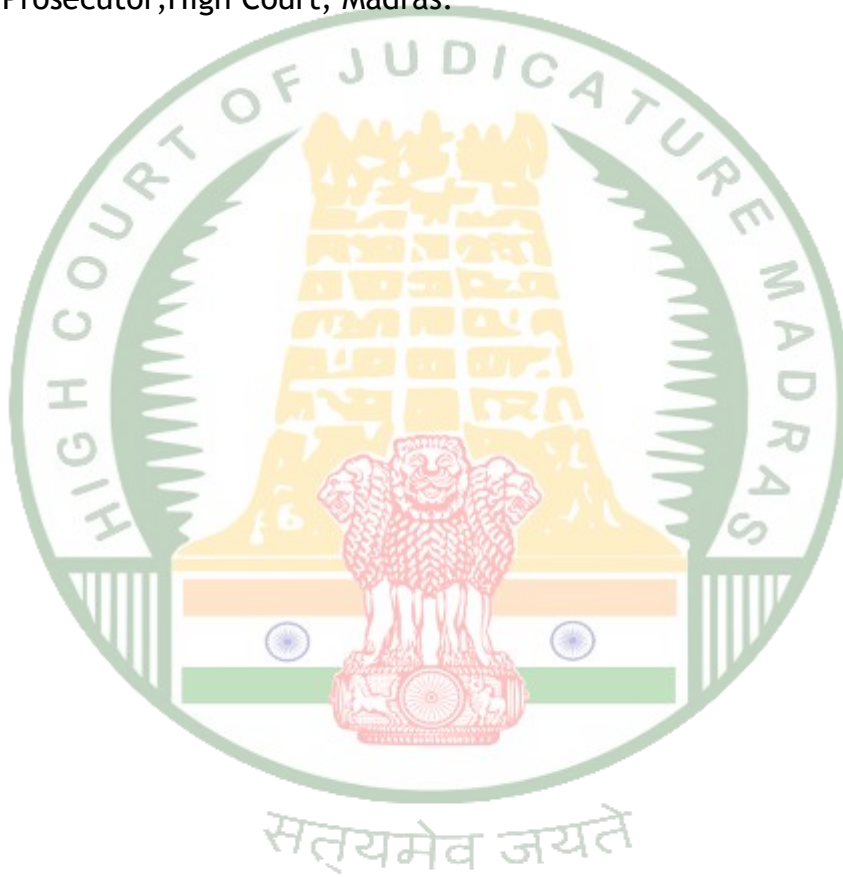
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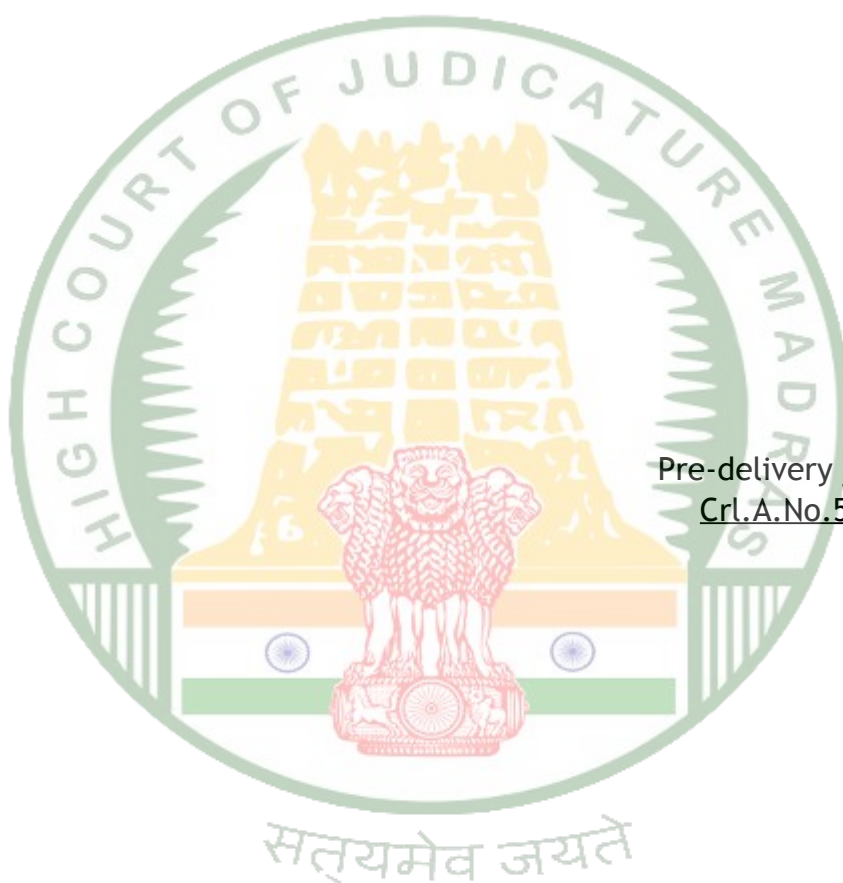
1. The Inspector of Police
NIB-CID, Chennai.

2. II Additional Special Judge,
Special Court for NDPS Act Cases, Chennai.

3. The Public Prosecutor, High Court, Madras.



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Pre-delivery judgment in
Crl.A.No.539 of 2013

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