

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 31.10.2017

PRONOUNCED ON : 21.12.2017

CORAM :

THE HONOURABLE MR.JUSTICE P.N. PRAKASH

Crl.A.No.799 of 2013

Murugan

... Appellant

Vs.

State by
The Inspector of Police
NIB-CID
Coimbatore.

... Respondent

Criminal Appeal filed under Section 374(2) of Cr.P.C. to call for the records and set aside the conviction made in the judgment dated 11.11.2013 made in C.C.No.154 of 2011 on the file of the Special Court for Essential Commodities Act Cases, Coimbatore and acquit the appellant.

For Appellants : Mr.D.Jaganathan
For Respondent : Mr.K.Madhan
Govt.Advocate (crl.side)

JUDGMENT

This appeal has been filed to set aside the conviction made in the judgment dated 11.11.2013 passed in C.C.No.154 of 2011 on the file of the Special Court for Essential Commodities Act Cases, Coimbatore.

2. It is the case of the prosecution that on 13.01.2011, Palanisamy [P.W.1], Head Constable of NIB-CID, received information from his source that a 35 year old man is likely to bring ganja by his motorcycle around 16.30 hrs., near Chennai Silks Showroom in Oppanakkara Street. Palanisamy [P.W.1] recorded the information vide Ex.P.1 and sent the same to the Inspector of Police and sought permission for proceeding to the place with police party. After obtaining permission from Vijayakumar [P.W.6], Inspector of Police, NIB-CID, Palanisamy [P.W.1], along with Manoharan [P.W.2], Police Constable and others, waited with their informant near the Chennai Silks Showroom.

3. On the showing of the informant, Palanisamy [P.W.1] intercepted the accused who came to the place around 17.15 hrs., in a motorcycle bearing Registration No.TN-41-AA-8763. After introducing themselves, the police party gave a written option [Ex.P.2] required under Section 50 of the NDPS Act for conduct of personal search, which was declined by the accused. The police found a white colour plastic bag placed on the petrol tank of the motorcycle and on checking the bag, they found it to contain ganja. On weighing, it was found to be of 3 kgs. Two samples weighing 25 gms. each were drawn from the contraband and the samples were kept separately in covers and sealed. The balance contraband was also sealed with NIB-CID seal. A Seizure Mahazar [Ex.P.3] was prepared, under which, the contraband and the motorcycle bearing Registration No.TN-41-AA-8763 were seized by the police.

4. The accused was taken to the Police Station and an FIR in Cr.No.5 of 2011 [Ex.P.6] was registered against the accused under Section 8(c) read with 20(b)(ii)(B) and 25 of the Narcotic Drugs and Psychotropic Substances Act [for brevity "the NDPS Act"]. The statement of the accused was recorded and he was placed under arrest. A report under Section 57 of the NDPS Act [Ex.P.7] was submitted by Palanisamy [P.W.1] to Vijayakumar [P.W.6], Inspector of Police. The seized contraband, along with two samples, was sent to the Special Court for NDPS Act cases, where it was received by Palaniammal [P.W.7], Head Clerk on 31.01.2011 and on the requisition made by the police, one sample [M.O.2] was sent to the Tamil Nadu Forensic Science Laboratory, where it was examined by Velmurugan [P.W.3], Chemical Analyst, who in his evidence as well in his report [Ex.P.8], has stated that the substance that was examined by him tested positive for ganja. The police examined Chandraprakash [P.W.4], the financier of the motorcycle and Murali [P.W.5] the R.T.O. and after completing the investigation, filed a final report in C.C.No.154 of 2011 before the Special Court for NDPS Act Cases, Coimbatore, against the accused for the aforesaid offences.

5. On the appearance of the accused, he was furnished with the relied upon documents under Section 207 Cr.P.C. and the trial Court framed charges against the accused under Section 8(c) read with 20(b) (ii) (B) and 25 of the NDPS Act.

6. When questioned, the accused pleaded not guilty. To prove the charges, the prosecution examined 7 witnesses, marked 13 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 marked.

7. After analysing the evidence adduced by the prosecution and after hearing either side, the trial Court, by judgment dated 11.11.2013 in C.C.No.154 of 2011 convicted the accused for the offence under Section 8(c) read with 20(b) (ii) B of the NDPS Act and sentenced him to undergo one year Rigorous Imprisonment and pay a fine of Rs.10,000/- in default to undergo 3 months Rigorous Imprisonment. Challenging the conviction and sentence, the accused is before this Court.

8. Heard Mr.P.M.Duraiswamy, learned counsel for the accused and Mr.K.Madhan, learned Government Advocate (Crl.Side) appearing for the State.

9. Mr.P.M.Duraiswamy, learned counsel made the following submissions:

[a] that there has been an infraction of Section 42 of the NDPS Act, inasmuch as the police had failed to record the information that was received by them in a proper manner;

[b] that there has been an infraction of Section 50 of the NDPS Act, inasmuch as the accused was not properly apprised of his right to be searched before a Gazetted Officer or a Magistrate;

[c] that the contraband that has been seized on 13.01.2011 was submitted to the Special Court for NDPS Act cases only on 31.01.2011, which delay has not been explained;

[d] that the prosecution had not examined any independent witness to prove the search and seizure;

[e] that there was a discrepancy in the weight of the sample that is said to have been drawn at the place of occurrence and at the time of weighment in the Court.

10. Per contra, learned Government Advocate (Crl.Side) refuted the contentions put forth by the learned counsel for the accused.

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

12. Palanisamy [P.W.1] Head Constable of NIB-CID has stated in his evidence that on 13.01.2011 when he was in the station, he received information through

his source that a person will come around 16.30 hours by a motorcycle near Chennai Silks showroom in Oppanakkara Street with ganja and that he recorded the information [Ex.P.1] and sent the same to the Inspector of Police; after obtaining the permission of the Inspector of Police, he proceeded with the police party to Oppanakkara Street and waited for the informant near Chennai Silks Showroom; on the showing of the informant, the accused who came by motorcycle was intercepted and he was given option under Section 50 of the NDPS Act to be taken before a Magistrate for personal search, which the accused declined.

13. It is the further evidence of Palanisamy [P.W.1] that he found a white bag placed on the petrol tank of the motorcycle driven by the accused and on checking the same, it was found to contain ganja; on weighing, it was found to be of 3 kgs.; two samples weighing 25 gms. each were drawn; the samples and the main contraband were sealed with NIB seal; the vehicle and the contraband were seized under the cover of Mahazar Ex.P.3; the accused was arrested by serving on him the arrest memo Ex.P.5 and was taken to the Police Station, where FIR [Ex.P.6] was registered and the accused was produced before the learned Judicial Magistrate No.V, Coimbatore at 5.30 p.m. on 14.01.2011, who remanded him to judicial custody. Palanisamy [P.W.1] also submitted a report under Section 57 of the NDPS Act [Ex.P.7] to the Inspector of Police, NIB-CID.

14. In the cross examination, Palanisamy [P.W.1] was questioned as to why he did not obtain any written statement from his informant, for which, he stated that he reduced the oral information given by his informant vide Ex.P.1. In the cross-examination, he has further stated that there are two Chennai Silks in Oppanakkara Street and that he has not clearly stated about that in his seizure mahazar.

15. The evidence of Palanisamy [P.W.1] has been corroborated by Manoharan [P.W.2], Special Sub-Inspector of Police, who was with him at the time of interception and seizure. It may be relevant to state here that Palanisamy [P.W.1] was examined-in-chief on 06.08.2012 and he was not cross-examined immediately. He was recalled and cross-examined on 18.06.2013 and 03.10.2013 extensively, despite which, the defence was not able to make any dent in the substratum of the evidence. Similarly, Manoharan [P.W.2], Special Sub-Inspector of Police was examined-in-chief on 17.12.2012 and at that time, he was not cross-examined. He was recalled and cross-examined on 20.05.2013.

16. As regards the contention of Mr.P.M.Duraiswamy, learned counsel for the accused, that the prosecution has failed to examine any independent witness to prove the seizure, this Court is of the view that non-examination of independent witness is not fatal in every case. In this case, the evidence of Palanisamy [P.W.1] and Manoharan [P.W.2] does inspire the confidence of this

Court and hence, non-examination of the independent witness cannot be a reason to disbelieve their testimonies.

17. As regards the contention that Palanisamy [P.W.1] did not get any written report from his informant, there is no legal necessity for that. The oral information given by the informant has been recorded by Palanisamy [P.W.1] and the same has been sent to his superior official, viz., the Inspector of Police, NIB CID.

18. At this juncture, it may be relevant to state here that the provisions relating to recording of information and sending the same to the superior officer is adumbrated in Section 42 of the NDPS Act, which relates to entry into a premises for search and seizure and not Section 43 of the NDPS Act, which relates to seizure in a public place. The limitations imposed by Section 42 of the NDPS Act will not apply to a seizure in a public place covered by Section 43 of the NDPS Act. In this case, the interception and seizure of the accused was at Oppanakkara Street, which is a public place and therefore, even if there is any violation with regard to recording of information, that will not enure to the advantage of the accused.

19. As regards the violation of Section 50 of the NDPS Act, the seizure was not pursuant to the search of the person of the accused. The bag was on the petrol tank of the motorcycle, from where the contraband was seized and

therefore, there is no question of applying Section 50 of the NDPS Act in the facts and circumstances of the case. In any event, the accused was given a written notice [Ex.P.2] asking for his option to be taken to a Gazetted Officer or a Magistrate for personal search and the accused had declined the offer.

20. Mr.P.M.Duraiswamy, learned counsel for the accused contended that the contraband was not sealed properly by the police and hence, there is scope for tampering.

21. It is seen that the contraband was sent by the Special Court with the Court seal to the Tamil Nadu Forensic Science Laboratory and the same has been spoken to by Velmurugan [P.W.3], Chemical Examiner and therefore, the contention of Mr. P.M.Duraiswamy, cannot be accepted.

22. Coming to the alleged delay in sending the contraband, on a perusal of the original records, it is seen that Form-95 containing the description of the contraband has been submitted along with the contraband to the Judicial Magistrate at the time of remand on 14.01.2011 and only after the receipt of records from the Court of the Judicial Magistrate No.V to the Special Court for NDPS Act Cases, can the police submit the contraband to the Special Court. In this case, there is no suggestion to any of the witnesses that there has been substitution of the contraband by the police. The report of the Chemical

Examiner clearly states that the sample that was sent to the Special Court for test answered positive for ganja.

23. Mr.P.M.Duraiswamy, learned counsel contended that P.W.7 Head Clerk of the Special Court has stated in her cross-examination that when the sample was weighed by the Court, it was of 30 gms., whereas, in Form-95, the weight has been given as 25 gms. and therefore, he contended that there has been substitution.

24. However, Mr.Velmurugan [P.W.3], Chemical Examiner, in his evidence as well in his report [Ex.P.8], has stated that the weight of the sample was 25 gms. The Tamil Nadu Forensic Science Laboratory has the state of the art facilities including computerised weighing machine, but the Courts are provided with mechanical scales where there could be marginal error. Thus, the discrepancy in the weight is only 5 gms. This cannot lead to the inference that there has been a substitution of the contraband, especially in the light of the fact that the contraband was contemporaneously produced before the remanding Magistrate along with the accused as could be seen from the endorsement of the Magistrate in Form-95.

25. Chandraprakash [P.W.4] has stated in his evidence that he had financed for the purchase of the Hero Honda Splendour Plus motorcycle bearing Registration No.TN-41-AA-8763 to Murugan, the accused herein. Similarly, Murali [P.W.5],

R.T.O., has, in his evidence, stated that the Hero Honda Splendor Plus bearing Registration No.TN-41-AA-8763 stands in the name of Murugan, S/o Chinnakannu in the records of the RTO. Thus, the prosecution has satisfactorily established that the motorcycle [M.O.3], by which, the accused came to the place of occurrence with the contraband, belongs to him.

26. As regards sentence, it is seen that the trial Court has awarded a sentence of one year Rigorous Imprisonment, which is not excessive especially in the light of the fact that the accused will be entitled to set off.

27. In fine, this Court is of the view that the prosecution have proved the case beyond doubt and the conviction and sentence imposed by the trial Court stands confirmed.

In the result, this appeal stands dismissed.

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P.N.PRAKASH, J.

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To

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

2. The Special Court for Essential Commodities Act Cases,
Coimbatore.

3. The Public Prosecutor,
High Court, Madras.



Pre-delivery judgment in
Crl.A.No.799 of 2013

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