

Bail Slip

The appellant in CRL A 404/11 Viz., OM PRAKASH aged 57 years S/o Poosaram was directed to be released on bail as per order of this Court dated 13.07.2011 and made in MP.NO.1/11 IN CRL A.NO.404/2011.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.12.2018

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Crl.A. No.404 of 2011

Om Prakash

Appellant

vs.

The Inspector of Police
NIB CID
Chennai

Respondent

Criminal Appeal filed under Section 374(2) Cr.P.C. against the judgment of conviction and sentence dated 27.06.2011 and made in CC.97/08 passed by the Principal Special Judge ,Special Court under EC and NDPS Act Cases at Chennai, under Section 8 (c) r/w 20(b)(ii)(B) of the NDPS Act, 1985, as amended by Act 9 of 2001, whereby, the appellant was sentenced to undergo three years rigorous imprisonment and to pay a fine of Rs.25,000/-, in default to undergo a further period of three months rigorous imprisonment.

For petitioner

Mr. M. Shahjahan
for Mr. Raja Pandian

For respondent Mrs. P. Kritika Kamal

Govt. Advocate (Crl. Side)

JUDGMENT

This criminal appeal is directed against the judgment of conviction and sentence dated 27.06.2011 passed by the Principal Special Judge for NDPS Act Cases at Chennai, under Section 8(c) r/w 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity "the NDPS Act") as amended by Act 9 of 2001, whereby, the appellant was sentenced to undergo three years rigorous imprisonment and to pay a fine of Rs.25,000/-, in default to undergo a further period of three months rigorous imprisonment.

2 The facts in brief, leading to the institution of this criminal appeal are as under:

2.1 It is the case of the prosecution that on 06.08.2006, the officers of the NIB-CID seized 7.680 kgs. of ganja chocolates and 2.400 kgs. of ganja powder from the shop of the appellant, viz., Sri Ohm Agencies at 138, Mint Street, Sowcarpet, Chennai - 79 and sent samples of the seized materials for chemical analysis. The chemical analysis report showed the presence of cannabis in the samples, pursuant to which, the appellant was prosecuted in C.C.No.97 of 2008 before the Principal Special Judge for NDPS Act Cases, Chennai.

2.2 On the appearance of the appellant, he was furnished with the relied upon documents under Section 207 Cr.P.C. and the Trial Court framed a charge for the offence under Section 8 (c) read with 20(b)(ii)(B) of the NDPS Act. When questioned, he pleaded not guilty.

2.3 To prove the case, the prosecution examined six witnesses and marked eleven exhibits. When the appellant was questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against him, he denied the same. On behalf of the appellant, one witness was examined as D.W.1 and Exs.D1 and D2 were marked.

2.4 After considering the evidence on record, the Trial Court, vide judgment dated 27.06.2011 in C.C. No.97 of 2008, convicted the appellant and sentenced him to undergo three years rigorous imprisonment and to pay a fine of Rs.25,000/-, in default to undergo three months rigorous imprisonment. Challenging the said conviction and sentence, the appellant is before this Court.

3 Heard Mr. Shajahan, learned counsel representing Mr.Raja Pandian, learned counsel on record for the appellant and Mrs.P.Kritika Kamal, learned Government Advocate (Crl. Side) appearing for the respondent-State.

4 The prosecution case hinges on the evidence of two witnesses, viz., C. Murugaiyan (P.W.2), the Seizing Officer and Arulanandam (P.W.1), Scientific Assistant, Tamil Nadu Forensic Science Laboratory (TNFSL).

5 C. Murugaiyan (P.W.2), in his evidence, has stated that he was the Sub Inspector of Police in NIB-CID at the relevant point of time; he received secret information from his informant that one Ohm Prakash of Sri Ohm Agencies at No.138, Mint Street, Sowcarpet, Chennai 79 is selling ganja chocolates and ganja powder; he recorded the information vide Ex.P.3 and submitted the same to John Joseph (P.W.5), Inspector of Police, his superior officer, who granted permission to proceed further; he went to the place along with Kesavaramachandran (P.W.3), Head Constable and Anna Kamu, Head Constable of NIB-CID (not examined) and requested one Rasheek Kumar to stand witness; on going to the premises, he saw the appellant there and when he questioned him, the appellant himself handed over a cardboard carton, two boxes and a white colour carry bag; in

the cardboard carton, there were sixty small boxes and each box had thirty ganja chocolates, each weighing 120 gms.; this consignment was marked as P.1; in the first plastic bag, there were ten strips, each weighing 120 gms. and each strip comprised 3 sachets and this item was marked as P.2; in the second plastic bag, there were ten packets containing ganja powder which were marked as P.3; in the white colour carry bag, items similar to items found in P.1 were there and they were separately marked as P.4.; two representative samples from P.1 to P.4 were drawn and they were marked as S.1 to S.8; the main contraband and samples were sealed with NIB-CID seal and seized under the cover of mahazar (Ex.P.5); the appellant was arrested by serving on him arrest memo (Ex.P.6) and was brought to the office of the NIB-CID, where, a report under Section 57 of the NDPS Act (Ex.P.7) was submitted to John Joseph (P.W.5); FIR was registered vide Ex.P.8 and the appellant, along with the properties, was produced before the jurisdictional Magistrate for judicial custody.

6 In the cross-examination, C. Murugaiyan (P.W.2) has admitted that the contrabands that were seized by him were in sealed boxes bearing the name of the substance, name and address of the manufacturer, batch number, etc. He has also admitted that the words "Madhu Munakka with silver leaf, an Ayurvedic medicine", were found printed on the packets; similarly, the name "Madhu Vijay, an Ayurvedic medicine" was found printed in the sachets. It was suggested to him that the seized items were Ayurvedic medicines consumed orally by patients for certain ailments and that they are not narcotic drugs, which suggestion, he denied.

7 Arulanandam (P.W.1), Scientific Assistant, TNFSL, has stated in his evidence that he received samples S.1, S.3, S.5 and S.7 from the Special Court for NDPS Act Cases, for examination; the seals found therein tallied with the specimen seal in the requisition of the Court; on analysis, he found presence of cannabis in the samples and submitted his report (Ex.P.2) to the Court along with the remnant samples.

8 In the cross-examination, he has stated that the packets containing the samples had the name of the drug, name and address of the manufacturer of the drug, batch number and its ingredients printed therein. He has admitted that the packets contained the words "Ayurvedic medicine"; he did not conduct any test to find out the percentage of cannabis in the substance; small plants of cannabis would also be referred to as "Baang"; he did not perform any test to find out the presence of other substances, apart from cannabis, in the samples.

9 The prosecution examined Kesavaramachandran (P.W.3), Head Constable, who was present with C. Murugaiyan (P.W.2) at the time of seizure. He has corroborated the evidence of C. Murugaiyan (P.W.2). However, he has stated in the cross-examination that only two samples were drawn as against the

statement of C. Murugaiyan (P.W.2) that eight samples were drawn.

10 R. Ganesan (P.W.4), Head Clerk of the Special Court for NDPS Act Cases, gave evidence about the production of the contraband before the Special Court, sending of the samples to the expert for opinion and receipt of the report and remnant samples from the expert.

11 John Joseph (P.W.5), Inspector of Police, NIB-CID, has spoken to about the information report that was submitted to him by C. Murugaiyan (P.W.2) and the investigation done by him after the seizure of the contraband and arrest of the appellant by C. Murugaiyan (P.W.2).

12 S. Murugaiyan (P.W.6) succeeded John Joseph (P.W.5) as Inspector of Police, NIB-CID and filed final report in the case.

13 Mr. Shahjahan, learned counsel for the appellant, formulated the following points:

a the items seized by the police are not narcotic drugs, but, only Ayurvedic medicines;

b there are contradictions between the evidence of C. Murugaiyan (P.W.2) and Kesavaramachandran (P.W.3);

c Rasheek Kumar, independent witness, has not been examined;

d the appellant has discharged the burden under Sections 35 and 54 of the NDPS Act by consistently taking a stand that the items were not narcotic drugs, but, Ayurvedic preparations, to establish which, Shyam Shamlal Panch (D.W.1) was examined and Exs.D.1 and D.2 were marked, which aspect has not been considered by the Trial Court in the right perspective.

14 Per contra, Mrs. Kritika Kamal, learned Government Advocate (Crl. Side) refuted the contentions put forth by the learned counsel for the appellant.

15 This Court gave its anxious thought to the rival submissions.

16 As regards the alleged contradictions between the evidence of C. Murugaiyan (P.W.2) and Kesavaramachandran (P.W.3), this Court is of the opinion that they are very inconsequential, inasmuch as, C. Murugaiyan (P.W.2), the Scientific Assistant has clearly stated that he drew eight samples and numbered them as S.1 to S.8. Further, R. Ganesan (P.W.4), Head Clerk of the Special Court for NDPS Act Cases, has stated in his evidence that eight sample packets were

produced, of which, samples bearing nos.S.1, S.3, S.5 and S.7 were sent to the chemical examiner for analysis. Arulanandam (P.W.1), Scientific Assistant, TNFSL, has deposed that he received four samples, viz., S.1, S.3, S.5 and S.7 from the Special Court for NDPS Act Cases, for analysis. In such perspective of the matter, the stray statement of Kesavaramachandran (P.W.3) that only two samples were drawn cannot have the effect of demolishing the prosecution case.

17 As regards the non-examination of Rasheek Kumar, independent witness, not much ado can be made out of it, because, it is trite that the Court can go by the evidence of the Seizing Officer alone, if it is confidence-inspiring. In this case, the evidence of C. Murugaiyan (P.W.2) does inspire the confidence of this Court and therefore, non-examination of the independent witness cannot be said to be fatal to the prosecution case.

18 In this case, admittedly, the contraband was not kept in loose packets, but, were packed in sealed cartons and sachets. Further, the name of the substance, name and address of the manufacturer, batch number and ingredients were printed thereon. When the police went to the premises of the appellant, the appellant voluntarily handed over the articles to them. It is not the case of the police that they searched the appellant's premises and recovered articles. Even in the report (Ex.P.2) of the Scientific Assistant, it is stated that the samples contained the following information in print:

(a) "MADHU MUNAKKA WITH SILVER LEAF, an Ayurvedic medicine, batch No.208, mfg. dt. June 2006..." என்ற வாசகங்கள் அச்சடிக்கப்பட்ட ஒரு அட்டை பெட்டியினுள் (carton) ,ருந்த Madhu Munakka.... INDIAN PRODUCT..... BEAWAR (RAJ)/"

(b) "A Tonic Appetizer Digestive.... MADHU VIJAY Ayurvedic Medicine ... Ex.P. No.1/78-79, L R No. 2/78-79... Manufactured by Indian Products, Beawar (Raj)...."

Of course, Arulanandam (P.W.1), Scientific Assistant, has detected the presence of cannabis in the samples.

19 The appellant has examined one Shyam Shamlal Panch as D.W.1 in order to show that the seized items were manufactured by the latter and supplied as Ayurvedic medicines. Shyam Shamlal Panch (D.W.1), in his evidence, has stated that he runs a company called Indian Products; his manufacturing unit is located at Rikko, F.17, Industrial Area, Ajmer, Rajasthan, where, 15 Ayurvedic medicines, including Madhu Munakka and Madhu Vijay are manufactured; the invoice showing the supplies to Sri Ohm Agencies, Chennai, containing the percentage of ingredients that have gone into the making of batch number 206-

2005-2006 and batch number 207/2006-2007 relating to Madhu Munakka, has been marked as Ex.D.1; he supplied Madhu Munakka and Madhu Vijay to Sri Ohm Agencies vide VAT Invoice (Ex.D.2) during March to June 2006; he has Excise licence for manufacturing medicines and he procures hemp which is one of the ingredients from the Excise Department.

20 In the cross-examination, he has stated that he was not present at the time of seizure and it was suggested to him that the documents marked by him have been created for the purpose of the case, which suggestion, he denied.

21 Under Section 35 of the NDPS Act, the burden is on the accused to prove beyond reasonable doubt that he did not have the necessary mens rea for commission of the offence. In the opinion of this Court, this burden on the appellant has been discharged satisfactorily in view of the following reasons:

- When the police went to the premises of the appellant, the latter himself handed over the cardboard carton, two plastic bags and a white colour carry bag containing the items to the police.
- The items were not in their natural form, viz., plant or flowering or fruiting types. Of course, under Section 2 (iii)(c) of the NDPS Act, if the presence of cannabis is detected in any mixture, with or without any neutral material, the penal provision would stand attracted. Therefore, this Court is not holding that the seized material was only an Ayurvedic medicine. But, this Court has to bear in mind this thought process of the appellant qua the offending goods.

22 However, the substances were kept in sealed packets and sachets with their name, manufacturer's name and address, licence number, batch number, etc. printed thereon. The Investigating Officer has noticed all these and has not done scintilla of investigation to find out as to how and from where, the appellant got the substances. But, the appellant has taken a clear stand that the items seized are Ayurvedic medicines and not narcotic drugs. The appellant examined the manufacturer of the drugs, viz., Shyam Shamlal Panch as D.W.1 and has marked Ex.D.1 and D.2 to show that the seized items were manufactured by Shyam Shamlal Panch (D.W.1) as Ayurvedic medicines after obtaining hemp from the Excise Department under licence and supplied to him. The report of the Chemical Examiner (Ex.P.2) contains the description of the articles found on the label of the sample which reads as under:

"A Tonic Appetizer Digestive.... MADHU VIJAY
Ayurvedic Medicine ... Ex.P. No.1/78-79, L R No.
2/78-79... Manufactured by Indian Products, Beawar
(Raj)...."

Ex.D.2, VAT invoice contains the following particulars, which tally with the ones found in the samples extracted above:

TIN: 08620101334

Ayur D.L. No.703D

M & TPL No.1/78-79

UBL No.2/78-79

Company's VAT TIN No. 08620101334/TIN No.

23 This Court has no reason to disbelieve the testimony of Shyam Shamlal Panch (D.W.1) and that the defence witness should also be given the same importance as that of the prosecution witness is trite. [See State of Uttar Pradesh vs. Babu Ram¹. Therefore, this Court has no incertitude in holding that the appellant had purchased the seized articles from Shyam Shamlal Panch (D.W.1) with a bona fide belief that they are Ayurvedic medicines intended for public sale. It is pertinent to point out that since Shyam Shamlal Panch (D.W.1) was confident that he had not done anything illegal, he has come forward to depose that his company had manufactured and supplied the seized items to the appellant at the risk of being arrested and prosecuted by the police. Though his evidence in the Court cannot form the basis for prosecution in view of the protection afforded by the proviso to Section 132 of the Evidence Act, yet, de hors that, the police could have prosecuted him by collecting evidence afresh against him.

In view of the foregoing discussion, the conviction and sentence dated 27.06.2011 made by the Trial Court in C.C. No.97 of 2008 are liable to be set aside and are accordingly set aside. The bail bond executed by the appellant shall stand cancelled.

In the upshot, this criminal appeal stands allowed.

Sd/-

सत्यमेव जयते
Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

cad

To

1 The Inspector of Police
NIB-CID Chennai

2 The Principal Special Judge special Court under EC AND
NDPS Act Cases
Chennai

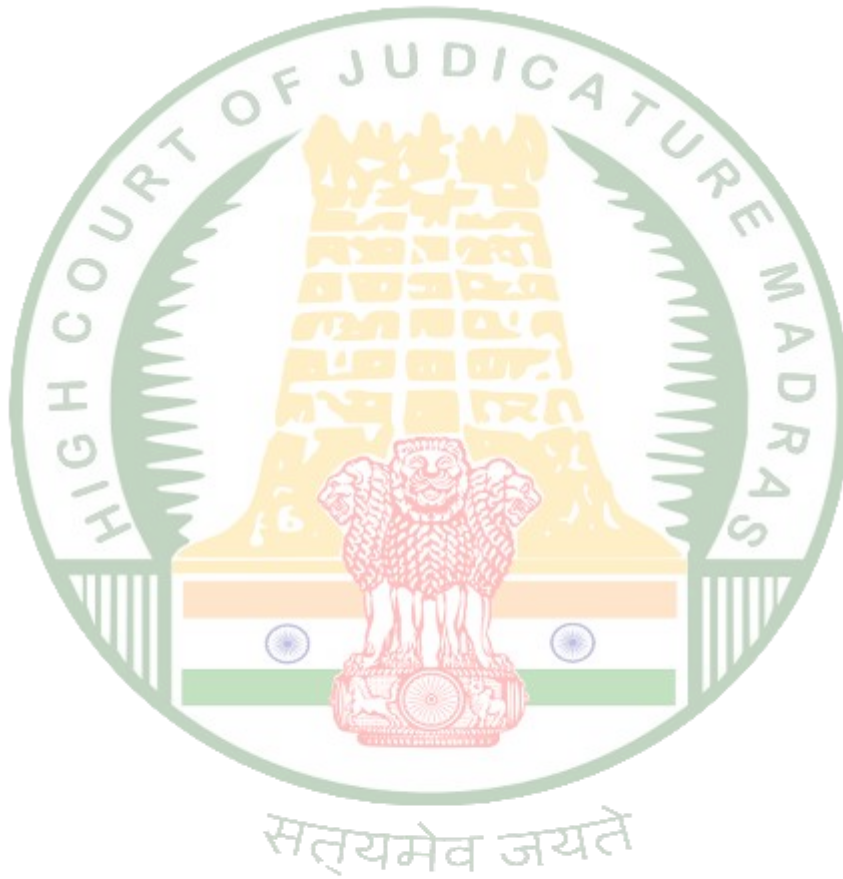
3 The Superintendent,

Central Prison,Puzhal Chennai.

4.The Public Prosecutor
Madras High Court
Chennai 600 104

+1cc to Mr.Raja Pandian , Advocate SR.No. 87055
Crl. A. No.404 of 2011

A.SK(24/01/2019)



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