

Bail Slip

The Appellant/Accused namely Vijaya W/o. Bose was directed to be released on bail as per order of this Court order 26/09/2013 in CrI M.P.No. 1 of 2013 in CrI A.No.618 of 2013 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 31.01.2019
PRONOUNCED ON : 01.02.2019

CORAM
THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

CRL.A.No.618 of 2013

Vijaya		.. Appellant
	Vs	
State rep. by, The Inspector of Police, N.I.B., Chennai. (Cr.No.14 of 2008)		.. Respondent

Criminal Appeal filed under Section 374(2) Cr.P.C., against the judgment of conviction and sentence dated 05.09.2013 passed by the Principal Special Judge (Special Court under NDPS Act), Chennai in C.C.No.10 of 2009.

For Appellant : Mr.P.Prince Premkumar

For Respondent : Mrs.P.Kritika Kamal, GA (CrI. Side)

J U D G M E N T

This Criminal Appeal has been preferred by the appellant against the judgment of conviction and sentence dated 05.09.2013 passed by the Principal Special Judge (Special Court under NDPS Act), Chennai in C.C.No.10 of 2009.

2.It is the case of the prosecution that on 04.02.2008, the appellant was found in possession of 7 kilograms of ganja near Moore Market complex public toilet and the same was seized by the Narcotics Intelligence Bureau-Crime Investigation Department (for brevity "NIB-CID"). After completing the investigation, the NIB-CID filed Final Report in C.C.No.10 of 2009 before the Special Court for NDPS Act Cases, Chennai (for brevity "the Special Court") for the offences under Section 8(c) r/w 20(b) (ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity "the NDPS Act") against the appellant herein.

3.On the appearance of the appellant, she was furnished with the copies of the relied upon documents under Section 207 Cr.P.C. The Special Court framed charge under Section 20(b)(ii)(B) of the NDPS Act for the possession of 7 kilograms of ganja and when questioned, the appellant pleaded 'not guilty'.

4.To prove the case, the prosecution examined five witnesses and marked ten exhibits and three material objects. When the appellant was questioned under Section 313 Cr.P.C about the incriminating circumstances appearing against her, she denied the same. No witnesses was examined nor any document marked on her side.

5.After considering the evidence on record and hearing either side, the Special Court, by judgment dated 05.09.2013 in C.C.No.10 of 2009, has convicted and sentenced the appellant as follows :

Provision under which convicted	Sentence
Section 8(c) r/w 20(b)(ii)(B) of the NDPS Act	Three years rigorous imprisonment and fine of Rs.20,000/- in default, to undergo three months rigorous imprisonment

Challenging the conviction and sentence, the appellant has filed the present appeal.

6.Heard Mr.P.Prince Premkumar, learned counsel for the appellant and Mrs.P.Kritika Kamal, learned Government Advocate (Crl.Side) appearing for the State.

7.Senthil (P.W.1), who was the Sub Inspector of Police, in NIB-CID, has stated in his examination-in-chief on 01.07.2013, that on 04.02.2008, he received intelligence from his informant around 06.00 a.m. that one Vijaya, aged about 40 will be coming near the public toilet in Moore Market complex with ganja; he recorded the information vide Ex.P1 and submitted the same to the Inspector of Police; on the orders of the Inspector of Police, he went along with a police party, comprising Malaichamy HC 657, Kumar HC 999, Murugan HC and Rani (P.W.4), a sub-staff in the department, to the said place and maintained surveillance; around 07.30 a.m., he saw the appellant coming with a blue and cement colour rexin bag, who was identified by his informant; therefore, he along with others intercepted her and introduced themselves; he informed her of her right to have the personal search conducted either before a Judicial Magistrate or a Gazetted Officer; this offer was given in writing vide Ex.P2; she declined the offer; he collected the rexin bag from the appellant through Rani (P.W.4) and inspected it; he found ganja in it and on weighment, it was found to be 7 kilograms; he drew two samples of 50 grams each and kept them

separately in two covers; he sealed the balance contraband and two samples with the NIB-CID seal; he also seized the rexin bag and affixed NIB-CID seal on it; for the seizures effected by him, he prepared a seizure mahazar (Ex.P3); he recorded the statement of the appellant and effected her arrest by serving on her, a copy of the arrest memo (Ex.P4); he took the appellant and the seized articles to his office, where he submitted a report under Section 57 of the NDPS Act (Ex.P5) to the Inspector of Police; he identified the seized contraband, which were marked as M.O.1 and M.O.2.

8. In the cross-examination, he (P.W.1) has stated that there is no separate register in the police station for recording information; but, he has made entries in the station general diary; there was no woman officer in his wing; he did not requisition the services of a woman officer from another station; the place where the appellant was found, is a busy shopping area; he called two persons to stand as witness, but, they refused to oblige; he did not take any action against those two persons, for not obliging; he has the power under the NDPS Act to conduct search and seizure. He denied the suggestion that he did not introduce Rani (P.W.4) to the appellant as a sub-staff; when he was shown M.O.1 and M.O.2 and asked whether the crime number has been written on them, he stated in the affirmative. He admitted that the superior officer, viz., the Inspector of Police examined the seized articles. He also denied the suggestion that a false case has been put on the appellant and all the documents were prepared in the police station.

9. Murugan, the Head Constable, who had accompanied Senthil (P.W.1) was examined as P.W.3 on 10.07.2013. He substantially corroborated the evidence of P.W.1.

10. Rani (P.W.4), has stated, in her examination-in-chief that she was working as a sub-staff in the NIB-CID and she accompanied Murugan (P.W.1) for the search; the appellant was having 7 kilograms of ganja in her hand; he (P.W.1) seized and drew two samples of 50 grams each. In the cross-examination, she stated that there was no woman officer in the NIB-CID at that time. She denied the suggestion that since she was working as a sub-staff, she was giving evidence in favour of the police.

11. Rajan (P.W.5), the Inspector of Police, NIB-CID, has stated that he had permitted Senthil (P.W.1) to proceed on the intelligence received by him (P.W.1); on 04.02.2008, Senthil (P.W.1) brought the accused along with the seized contraband, mahazar, arrest memo and other documents and submitted a report under Section 57 of the NDPS Act; thereafter, he registered a case in Crime No.14 of 2008 under Section 8(c) r/w 20(b)(ii)(B) of the NDPS Act against the appellant and prepared the printed

FIR (Ex.P8); he send the appellant along with the seized articles in Form-95 to the jurisdictional Magistrate for remand; he recorded the statement of the witnesses; he submitted an application (Ex.P10) to the Special Court, for sending the samples to the Forensic Science Laboratory for analysis and report; accordingly, the Special Court, by communication dated 20.02.2008 sent the sample to the Laboratory, where, they were tested by Ravichandran (P.W.2), the Scientific Officer, who in his evidence as well in the test report (Ex.P7), has stated that the samples tested positive for cannabis (ganja); after completing the investigation, Rajan (P.W.5) filed Final Report in C.C.No.10 of 2009 before the Special Court against the appellant.

12.Learned counsel for the appellant submitted that no independent witness was present along with Senthil (P.W.1), during the seizure of the contraband from the appellant and hence, the search is vitiated.

13.Absence of independent witness will not vitiate the seizure per se nor would it render the evidence of the police officer suspect. The Court is required to carefully scrutinise the evidence of the police officer and if it inspires confidence, conviction can be based on his testimony. In this case, Senthil (P.W.1), Murugan (P.W.3) and Rani (P.W.4) were examined to prove the factum of interception of the appellant and seizure of 7 kilograms of cannabis (ganja) from the bag carried by her.

14.Learned counsel for the appellant submitted that Senthil (P.W.1) in his evidence, has stated that he collected the bag through Rani (P.W.4), but, P.W.4 has not stated that she had collected the bag from the appellant and handed over the bag to P.W.1. In the opinion of this Court, it is too trivial a discrepancy for this Court to disbelieve the testimony of Senthil (P.W.1), Murugan (P.W.3) and Rani (P.W.4). It must be borne in mind that the incident had taken place on 04.02.2008 and P.W.1 and P.W.4 gave evidence on 01.07.2013 after five years. Their testimonies have been discussed in detail above and this Court does not find good reasons to suspect their evidence.

15.Learned counsel for the appellant relied upon the judgment of the Supreme Court in Arif Khan @ Agha Khan Vs. State of Uttarakhand (2018 SCC Online SC 459) and submitted that there has been violation of Section 50 of the NDPS Act and therefore, the conviction and sentence stand vitiated.

16.In Arif Khan's case (supra), the contraband was seized from the body of the accused therein, as could be seen from paragraph No.8 of the order, which reads as under :

"The raiding police party then searched the accused which resulted in seizure of "Charas" weighing around 2.5 K.G. in quantity from his body."

Whereas, in this case, the contraband was seized from a bag that was carried by the appellant. Therefore, Section 50 of the NDPS Act will not apply in this case. This issue is no more res integra, in the light of the judgment of the Supreme Court in State of Rajasthan Vs. Daulat Ram [(2005) 7 SCC 36], State of Rajasthan Vs. Baburam [(2007) 6 SCC 55] and Ajmer Singh Vs. State of Haryana [(2010) 3 SCC 746].

17.Learned counsel for the appellant contended that when the FIR was registered after the contraband was seized, the presence of the crime number on the packet contained contraband would show that a false case has been slapped on the appellant. It is true that the FIR was registered by Rajan (P.W.5), only after the interception of the appellant and seizure of the contraband by Senthil (P.W.1). Had the crime number been put in the seizure mahazar, then, one can have reasons to suspect the case of the prosecution. In this case, no document prior to registration of the FIR contains the crime number. While Senthil (P.W.1) was in the box, he was merely shown M.O.1 and M.O.2 and was asked whether the crime number is found thereon, for which, he stated in the affirmative. This by itself will not lead to the conclusion that the crime number was put by Senthil (P.W.1), at the time of seizure. It is incumbent to write the crime number on the material objects, while handing them over to the Head Clerk of the Court property room for the purpose of easy identification by him.

18.Learned counsel for the appellant further contended that there is no endorsement by the Magistrate that the properties were produced before him at the time of remand. On perusal of the evidence of Rajan (P.W.5), the Investigating Officer, he has clearly stated that the properties were sent to the Magistrate along with Form-95 and the Magistrate directed the properties to be handed over to the Special Court. On perusal of Form-95, it is seen that the Magistrate has recorded that the properties be produced before the Special Court. This is the practice in Tamil Nadu because, the Magistrate cannot retain the property in his godown, since the Special Court only has the original jurisdiction to conduct the trial of a case involving 7 kilograms of cannabis.

19.In Tamil Nadu, the accused arrested under the NDPS Act, can be produced before the nearest Magistrate for first remand. The subsequent remands will be by the Special Court. After first remand, the Magistrate would send all the documents to the jurisdictional Special Court and only thereafter, the prosecuting agency can produce the contraband there, for sending the sample for analysis. The Head Clerk of the Special Court would verify the seals and thereafter, affix the Special Court

seal and send the sample to the laboratory for test, on the orders of the Presiding Officer.

20. In this case, Ravichandran (P.W.2), has stated that the seal on the samples were found to be intact. Rajan (P.W.5), has stated that after the seized items were produced before the Magistrate at the time of initial remand and pursuant to the directions of the Magistrate to produce them before the Special Court, the contraband were in his custody for 16 days and thereafter, it was produced before the Special Court. Thus, he has explained the chain of custody of the contraband.

21. Learned counsel for the appellant submitted that Ravichandran (P.W.2) has admitted that there is a Government circular to the effect that sample should be tested within 30 days on receipt of the same. But, in this case, the same was tested beyond 30 days and therefore, the prosecution stands vitiate. In the opinion of this Court, failure of the Scientific Expert to follow the administrative circular, will not by itself vitiate the test report. Failure to follow the circular, can at the most result in departmental action against the concerned officer and will not vitiate the test report given by him.

22. Learned counsel for the appellant contended that the appellant got information under the Right to Information Act, 2005 (for brevity "the RTI Act") that there is no sub-staff by name, Rani (P.W.4) in the NIB-CID and therefore, the evidence of P.W.4 deserves to be rejected.

23. Senthil (P.W.1) and Murugan (P.W.3) have been consistently saying that Rani (P.W.4) was working as a sub-staff in the NIB-CID. During 2008, she accompanied P.W.1 and P.W.3. The reply obtained under the RTI Act, during the trial in the year 2013 and filed by the appellant along with his Section 313 Cr.P.C. statement, cannot have any evidentiary value. That apart, it was never suggested to Rani (P.W.4) that she was not working as a sub-staff in NIB-CID. In fact, it has been suggested to Rani (P.W.4) that since she was working as sub-staff in NIB-CID, she had obliged the police, which she denied. If the appellant had wanted to prove that Rani (P.W.4) was not working as a sub-staff, it should have been proved like any other fact as laid down in the Indian Evidence Act, 1872. Mere filing of a reply received in the year 2013 under the RTI Act, will not mean that the appellant has proved that Rani (P.W.4) was not working as a sub-staff in NIB-CID.

24. Be that as it may, the presence or absence of Rani (P.W.4) has no great significance in this case because, the seizure in this case has been done in a public place falling under Section 43 of the NDPS Act and the contraband was seized

from a bag, that was carried by the appellant, for which, Section 50 of the NDPS Act will not apply. Hence, this Court does not find any infirmity in the conviction of the appellant of the offence under Section 8(c) r/w 20(b)(ii)(B) of the NDPS Act.

25. Taking into consideration the fact that the appellant is a lady, aged about 50 years now and that, the quantum of ganja seized from her was 7 kilograms, this Court is of the view that interests of justice will be served, if the sentence of imprisonment is reduced from 3 years to 18 months.

In the result, this appeal is partly allowed. The conviction under Section 8(c) r/w 20(b)(ii)(B) of the NDPS Act by the Special Court, stands confirmed. The substantive sentence of imprisonment is reduced from 3 years to 18 months rigorous imprisonment. The sentence of fine and the default sentence stands unaltered. The Special Court is directed to secure the presence of the appellant to undergo the remaining period of sentence, if any. Registry is directed to send the original records to the trial Court forthwith, if any.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Principal Special Judge,
(Special Court under NDPS Act),
Chennai.
2. The Inspector of Police,
N.I.B., Chennai.
3. The Public Prosecutor,
High Court, Madras.
4. The Deputy Registrar, } with a direction to send
Criminal Section, } the original records to the
High Court, Madras. } trial Court forthwith.
5. The Metropolitan Magistrate,
XVI George Town, Chennai.
6. The Chief Metropolitan Magistrate,
Egmore, Chennai.

7.The Superintendent
Special Prison for Women,
Puzhal, Chennai.

CRL.A.No.618 of 2013

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rrs 13/03/2019