

Bail Silp

The Appellant/Accused Namely 1.Madan 2.Meena was realeased on Bail on 30.09.2011 in MP.No.1/2011 in Crl.A No.730/2011. on the file of the High Court Madras and the Appellant/Accused Namely Kannagi was realeased on Bail on 30.09.2011 in MP.No.1/2011 in CRL.A 731/2011 on the file of the High Court Madras.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.07.2018

PRONOUNCED ON : 30.07.2018

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

CRL.A.Nos.730 and 731 of 2011

1. Madan
S/o.Thnagaraj
2. Meena
W/o. Pandian

... Appellants in Crl.A.No.730/11/Accused

Kannagi
W/o.Raji @ Karuppan

... Appellant in Crl.A.No.731/11/Accused

Vs

The State rep by
The Inspector of Police,
(Law and Order)
C1, Flower Bazaar Police Station,
Chennai.

... Respondent in both Crl.A./Complaiant

Prayer in both Crl.As.: Criminal Appeal filed under Section 378 of Cr.P.C., to set aside the conviction and sentence passed by the learned Principal Special Judge, Special Court under EC&NDPS Act, Chennai and made in C.C.No.38 of 2009 by judgment dated 14.11.2011.

For Appellants
in Crl.A.730/11 : Mr.T.S.Sasikumar

For Appellant
in Crl.A.731/11 : Mr.G.S.Mahesh
for Mr.T.S.Srinivasan

For Respondent
in both Crl.As. : Ms.M.Prabavathi Ganeshram
Additional Public Prosecutor.

C O M M O N J U D G M E N T

These appeals are filed as against the judgment dated 14.11.2011 in C.C.No.38 of 2009 on the file of the learned Principal Special Judge, Special Court under EC&NDPS Act, Chennai, thereby convicting and sentencing the appellants to undergo one year rigorous imprisonment and to pay a fine of Rs.2,000/- in default to undergo three months simple imprisonment under Section 8(c) r/w Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (herein after referred to as "NDPS Act").

2. The case of the prosecution is that on 11.08.2008, when P.W.1 was working as the Sub Inspector of Police in Pookadai Police Station, she received a secrete information from the informant that the accused persons were selling Ganja near Muthusamy Road, Dr.Ambedhkar railway over bridge and recorded the information in Ex.P.1 and submitted the same to P.W.5, the Inspector of Police. P.W.5 permitted her to proceed further with the case. Accordingly, P.W.1 along with her team went to the spot and found that the accused persons were selling Ganja and they caught hold them. P.W.1 issued search notice vide Ex.P.2, under Section 50(1) of NDPS Act, informing them of their right to search before the Gazetted Officer or before the Magistrate, to which the accused declined replied that it was not necessary and gave their consent that they could be searched by P.W.1 herself.

3. Thereafter, the first accused was searched and it was found to contain Ganja weighing to be 1Kg 500 grams. P.W.1 drew 200 grams of ganja and kept the sample in a kaki colour paper and sealed it. The remaining main contraband sealed in another kaki colour paper and sealed it after getting signature from the first accused and the witnesses. It was seized under mahazar Ex.P.3. The second accused was searched and it was found to contain ganja weighing to be 1 Kg 150 grams, in which 200 grams of ganja was drew as sample and sealed in a kaki colour paper. The remaining main contraband was sealed in kaki colour

paper cover with the signature of the second accused and the witnesses. It was seized under the mahazar Ex.P.4. The third accused was searched and it was found to contain ganja weighing 1Kg 100 grams, in which P.W.1 drew a sample of 100 grams of ganja and kept the sample in kaki colour paper cover and sealed it. The remaining main contraband was also sealed in the same colour paper with the signature of the third accused and witnesses. It was seized under Mahazar Ex.P.5.

4. In continuation, the accused were arrested at about 5.00 p.m., on 11.08.2008 and P.W.1 prepared arrest memo for accused 1 to 3. Thereafter, they were taken to the police station and registered a case in Crime No.679 of 2008 for the offence under Section 8(c) r/w 20(b)(ii)(B) of NDPS Act and the First Information Report was marked as Ex.P.9. The accused and the seized contraband were sent along with Remand Request to the learned XVI Metropolitan Magistrate, George Town, Chennai who remanded the accused to judicial custody. The seized contraband and samples were produced before the Special Court with request to the Court to send the samples to the Tamilnadu Forensic Science Laboratory for examination. P.W.4, Ravichandran, Science Expert tested the samples and in the report Ex.P.14, he opined that the samples were ganja. P.W.6, the Inspector of Police completed the investigation and filed charge sheet against the accused before the learned Principle Sessions Judge, Special Court for EC & NDPS Act cases, Chennai for the offence under Section 8(c) r/w 20(b) of NDPS Act. On the appearance of the accused, they were furnished the copies under Section 207 of Cr.P.C. Charges were framed against the accused and they pleaded not guilty and claimed trial.

5. In order to prove the case, the prosecution examined P.W.1 to P.W.6 and marked Ex.P.1 to Ex.P.15 and produced M.O.1 to M.O.6. The accused were questioned under Section 313 of Cr.P.C about the incriminating evidence against them, they denied the same. On considering the above oral and documentary evidence, the trial Court convicted the accused as stated above. Challenging the conviction and sentence, the present appeal.

6. The learned counsel appearing for the appellants submitted that the mandatory provisions under Section 42 of NDPS Act are not followed by the prosecution and as such the entire prosecution case has been vitiated. The place of occurrence has differed from Ex.P.1- secrete information to Ex.P.3 mahazar and as such the place of occurrence itself differs and it vitiates the entire case of the prosecution. Ex.P.2, the search notice jointly issued to all the accused. It has directly hit by Section 50 of NDPS Act and it vitiates the entire case of the prosecution.

7. The learned counsel for the appellants would further contend that there was a delay in producing the contraband before the Court. The alleged occurrence took place on 11.08.2008 and the contraband was seized from the accused on the same day. Whereas, the contraband was sent to the Court only on 11.09.2008 and in the mean time where it was kept and with whom were not explained by the prosecution and it also vitiates the case of the prosecution. Further would contend that the arrest memos were prepared by P.W.5 even before the registration of the First Information Report. Therefore, the entire case of the prosecution is cooked up one and falsely foisted the case against the accused and prayed for acquittal of the appellants.

8. Per contra, the learned Additional Public Prosecutor would submit that once the prosecution initiated the case and seized the contraband from the accused, the burden of proof shifted to the accused and as such the appellants have to prove their case. Once the possession of contraband proved, the burden shifted to the accused and they have to disprove the case of the prosecution. In respect of delay in sending the contraband to the Court, she would submit that the contraband was sent to the Court in time and the seal cannot be taken as the contraband only received on that day. Therefore, the learned trial Court rightly convicted the accused and hence she sought for dismissal of both the appeals.

9. Heard, Mr.T.S.Sasikumar, learned counsel appearing for the appellants in CrI.A.No.730 of 2018 and Mr.T.S.Srinivasan, learned counsel appearing for the appellant in CrI.A.No.731 of 2018 and Ms.Prabavathi Ganeshram, learned Additional Public Prosecutor appearing for the State and perused the records.

10. It is seen from Ex.P.1, the information recorded by P.W.1 that on 11.08.2008 at about 2.30 p.m., she received secrete information from the informant as that near to hut No.70, Muthusamy Salai, Dr.Ambedkar Nagar, the accused were selling ganja. Whereas, Ex.P.3 mahazar, in respect of seizing the contraband from the accused stated that the ganja was seized from the accused at Muthusamy Salai, Dr.Ambedkar Nager, under the railway over bridge. Therefore, it is seen from the records, both are different places and as such the prosecution did not follow the procedure laid down under Section 42 of NDPS Act. Section 42 of NDPS Act reads as follows :-

"42. Power of entry, search, seizure and arrest without warrant or authorisation.:-

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central

excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-

- (a) enter into and search any such building, conveyance or place;
- (b) in case of resistance, break open any door and remove any obstacle to such entry;
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and
- (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act: Provided that if such officer has reason to believe that a search warrant or authorisation cannot be

obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

11. It is also seen from Ex.P.2, the search memo was issued jointly to all the accused. The learned counsel for the appellants relied the judgement reported in "2014 CrI.L.J. 1756 - State of Rajasthan Vs. Parmanand & anr." which held as follows :-

"14. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhrum Sharma (2000 Cri LJ 4886)

meets with our approval. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parmanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.

Therefore, the accused must be individually informed that he has right to be searched before the Gazetted Officer or Magistrate. The common search notice issued to the accused prevented their right available under Section 50(1) of NDPS Act and it cannot be construed that the said search notice properly communicated to the accused persons.

12. The next contention raised by the learned counsel for the appellant is that the contraband seized from the accused on 11.08.2008, whereas the same was sent to the Court only on 11.09.2009, for which there is no explanation by the prosecution. Section 55 of the NDPS Act reads as follows :-

55. Police to take charge of articles seized and delivered:- An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.

Therefore there is a delay of one year and one month in sending the contraband to the Court. In absence of evidence during the said period between the seized and produced in the Court, the seized article was in custody of the officer in-charge of Police Station and the same was kept under seal, it is held that it was doubtful that the very article that was seized was sent to the Chemical Examiner and investigation was perfunctory and evidence

insufficient. Therefore, it vitiates the entire case of the prosecution.

13. In this regard, the learned counsel appearing for the appellants relied upon the judgment reported in "1993 Supp (3) SCC 665 Valsala Vs. State of Kerala" which held as follows :-

"4. We have seen the report of the Chemical Examiner and there no doubt it is mentioned that one sealed parcel was received containing a powder and it was analysed to be Brown Sugar. But from the records it is clear and it is also noted by both the courts below that the seized article was produced in the court only on 14.1.88 i.e. after a period of more than three months and there is no evidence whatsoever at all to show with whom the seized article was lying and even assuming that it was in the custody of P.W.6, the Officer-in-charge of the Police Station who seized it, there is again nothing to show whether it was sealed and kept there. The learned Counsel for the State no doubt argued that the provisions of Section 55 of the Act are not mandatory but only directory. We need not go into this legal question in this case. Suffice it to say that the article seized appears to have been not kept in proper custody and proper form so that the court can be sure that what was seized only was sent to the Chemical Examiner. There is a big gap and an important missing link. In the mahazar Ex.P.2 which is immediately said to have been prepared, there is nothing mentioned as to under whose custody it was kept after seizure. Unfortunately for the prosecution even P.W.6 does not say that he continued to keep it in his custody under seal till it was produced in the court on 14.1.88. The evidence given by P.W.6 Police Sub-Inspector, who seized the article is absolutely silent as to what he did with the seized article till it was produced in the court. As a matter of fact he did not produce it in the court. P.W.3, A.S.I. is supposed to have produced the same in the court. But P.W.3 does not say anything about this. It is only P.W.7. the Circle Inspector who comes into the picture at a later date, who admitted in the cross-examination that the seized article was sent by P.W.3 (A.S.I.) to the court and

P.W.7 in his cross-examination further admitted that he did not even see if the recovered material object was sealed but still he claims that he made the necessary application for sending the material object for chemical examination and it is only through P.W.7 that the Chemical Examiner's Report is marked. P.W.7 further admitted that he did not even know when it reached the court. We are constrained to say that the investigation in this case has been perfunctory and on important aspects the evidence of the concerned officers is highly discrepant and unconvincing and does not throw much light. Therefore the evidence adduced is wholly insufficient to conclude that what was seized from the appellant alone was sent to the Chemical Examiner. Though this is purely a question of fact but this is an important link. Both the courts below have not examined this aspect in a proper perspective. No doubt the trafficking in narcotic drugs is a menace to the society but in the absence of satisfactory proof, the courts can not convict."

14. It is also seen that Ex.P.6 to Ex.P.8, arrest memos have been prepared by P.W.1 before registering the First Information Report, which creates doubt with regard to the prosecution case. In such view of the matter, this Court is of the opinion that the conviction and sentence imposed on the accused deserve to be set aside.

15. In the result, these criminal appeals are allowed and the judgement dated 14.11.2011 passed in C.C.No.38 of 2009 on the file of the learned Principal Special Judge, Special Court under EC & NDPS Act, Chennai is hereby set aside and the appellants/accused in both Criminal appeals acquitted of all charges. Fine amount, if any paid, shall be refunded to the appellants forthwith. Bail bonds, if any executed, shall stand cancelled.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

To

1. The Principal Special Judge,
Special Court under EC & NDPS Act, Chennai

2. The Presiding Officer
The Principal Special Court,
Special Court under EC&NDPS Act, Chennai

4. The Inspector of Police,
(Law and Order)
C1, Flower Bazaar Police Station,
Chennai.

5. The Superintendent,
Central prison For Women,
Puzhel Chennai

6. The Superintendent,
Central Prison Puzal I,
Chennai

7. The Public Prosecutor,
High Court,
Chennai.

+1cc to Mr.T.S.Sasi Kumar, Advocate, S.R.No.51298

+1cc to Mr.T.S.Srinivasan, Advocate, S.R.No.51963

CRL.A.Nos.730 & 731 OF 2011

KK(CO)
GSP(07/08/2018)

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