

Bail Slip

The appellant/Accused namely Rathinam, aged 50 years S/o.Karupu Thevar was directed to be released on bail by the order of this Court dated 9.12.2011 in MP.No.1/2011 in Crl.A.No.765 of 2011 by this Hon'ble Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.07.2018

PRONOUNCED ON : 03.08.2018

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

CRL.A.No.765 of 2011

Rathinam

S/o.Karupu Thevar

... Appellant/Accused

Vs

The State rep by

The Inspector of Police,

K3, Aminjikarai Police Station,

Chennai.

... Respondent/Complaint

Prayer: Criminal Appeal filed under Section 374 of Cr.P.C., to set aside the conviction and sentences passed by the learned Principal Special Judge, Special Court under EC & NDPS Act Cases, Chennai made in C.C.No.222 of 2003 by the judgment dated 25.11.2011.

For Appellant : Mr.J.Asokan

for Mr.M.Shahjahan

For Respondent : Mr.R.Ravichandran

Government Advocate (Crl.Side)

J U D G M E N T

This appeal has been preferred as against the judgment dated 25.11.2011 made in C.C.No.222 of 2003 on the file of the learned Principal Session Judge, Special Court under EC & NDPS Act Cases, Chennai thereby convicting the appellant and sentenced him to undergo two years rigorous imprisonment and to pay fine of Rs.5,000/- in default three months simple imprisonment for the offence under Section 8(c) r/w 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 P.W.3, the Sub Inspector of Police, Amenjikarai Police Station received an information on 22.01.2003 at about 6.00 p.m., regarding the possession of ganja in a bag with wooden handle by the accused for the purpose of selling the contraband and he was at Door No.13, 21st Street, NSK Nagar. P.W.3 recorded the information and placed the same before the Inspector of Police, P.W.4 to grant permission to investigate the case. P.W.4 perused the same and granted permission. Thereafter, P.W.3, the Sub Inspector of Police accompanied with Natarajan and Krishnadass, Head Constables proceeded to the place and reached there at about 6.40 p.m.

3. The Informant identified the appellant, who was having the bag with wooden handle. Then P.W.3, along with his party surrounded the appellant and introduced themselves and enquired with the appellant. P.W.3 informed about the right of the appellant, in respect of the search before the Magistrate or the Gazetted Officer, to which the appellant replied that it was not necessary and consenting that he can be searched by P.W.3 himself. P.W.3 requested one Ramu and Mohammed Ibrahim to stand as witnesses. But they refused to stand as witnesses and they have only gave their names. Thereafter P.W.3 made the Head Constables Natarajan and Krishnadass as witnesses and prepared the search notice Ex.P.1 in the presence of the witnesses and the accused. The accused himself handed over the bag and found two bundles containing ganja weighing 2 Kg each. P.W.3 took sample of 50 grams each and sealed the samples and the remaining main contraband weighing total 3Kg 900gr sealed separately. It was seized under mahazar Ex.P.2 and then P.W.3 arrested the accused at 8.15 p.m., and prepared the inspection memo Ex.P.6.

4. Thereafter, the accused was brought to the police station with the contraband and registered the First Information Report in Cr.No.108 of 2003 for the offence under Section 8(c) r/w 20(b)(ii)(B) of NDPS Act. The First Information Report marked as Ex.P.7. Thereafter the accused along with all the documents was submitted to the Inspector of Police, P.W.4. He the Inspector of Police took up the case and sent the property to the Court under Ex.P.9A with Form 95 and requested the Court under Ex.P.10 for sending the property for chemical analysis. Thereafter, P.W.5 took charge of the case. P.W.2, the Chemical Analyst on analysing the contraband M.Os.1 & 2, gave the report Ex.P.4, stating that the contraband contains Cannabinoides, which is the chemical substance of ganja. P.W.5 after obtained the report, filed a final report under Section 8(c) r/w 20(b)(ii)(B) of NDPS Act against the appellant. The trial framed the above said charges as against the appellant and the appellant pleaded not guilty and claimed trial.

5. The prosecution in order to establish the case, examined P.Ws.1 to 5 and marked Ex.P.1 to Ex.P.10 and produced M.O.1 to M.O.5. When the accused was questioned under Section 313 of Cr.P.C., with regard to the incriminating circumstances available against him, he denied the same and explained his complexity. On the defense side the appellant examined D.W.1 and marked Ex.D.1. The trial Court after analysing the evidence, convicted and sentenced the accused as stated above. As against which, the present appeal.

6. The learned counsel appearing for the appellant submitted that in Ex.P.5 and Ex.P.8, P.W.3, the Sub Inspector of Police strike out the time mentioned as 22.30 hrs & 18.15 hrs and corrected as 18.15 hrs & 22.30 hrs respectively. It vitiates the entire case of the prosecution and the false case has been foisted as against the accused. Further submitted that no independent witness has been examined by the prosecution to prove the alleged seizure of contraband from the accused, though the alleged contraband seized in a public place.

7. The learned counsel appearing for the appellant would further contend that there is a delay in sending the contraband to the trial Court. Admittedly the alleged contraband was seized and produced before the Court on 22.01.2003 and the said contraband was produced before the trial Court only on 04.03.2003. There is no explanation by the prosecution and as such it is a false case foisted as against the accused. Further would contend that Ex.D.1, the Arrest Memo clearly shows that before registering the First Information Report, the crime number furnished in the arrest memo. Therefore it vitiates the case of the prosecution.

8. Per contra, the learned Government Advocate (Crl.Side) appearing on behalf of the respondent submitted that when P.W.3, the Sub Inspector of Police requested two persons to stand as independent witnesses for the search proceedings, they refused to stand as witnesses and they furnished their names only. As such the mahazar was prepared in the presence of other witnesses. Further, he would submit that in respect of sending the property to the Court, there is no delay and the Section 50 of NDPS Act complied with and there is no violation. Therefore, he sought for dismissal of this appeal.

9. This Court considered the rival submissions made by Mr.J.Asokan, learned counsel appearing for the appellant and Mr.R.Ravichandran, learned Government Advocate(Crl. Side) appearing for the State and perused the materials placed before this Court.

10. According to P.W.3, the Sub Inspector of Police, he went to the spot on prior information with his party men, but he failed to take any independent witness along with him. Though some persons were present at the scene of occurrence and when they were call upon to stand as witnesses, they refused. But the said fact did not find place in the mahazar Ex.P.2. Admittedly, the alleged contraband seized in a public place and the prosecution failed to examine any independent witnesses to the search and the mahazar.

11. Further the learned counsel appearing for the appellant would contend that Ex.D.1 the arrest memo contains the crime number, and even before registering the First Information Report, the arrest memo which was prepared at the place of seizure, contains the crime number and the offence for which the case was registered against appellant, which creates the doubt with regard to the prosecution case. In this regard, the learned counsel appearing for the appellant relied upon the judgment dated 04.04.2014, passed by this Court in "Criminal Appeal No.704 of 2013 Pandian Vs. State rep by the Inspector of Police" which held as follows :-

"9. In the absence of any independent witnesses supporting the evidence of P.Ws.1 and 2, the evidence let in by the prosecution for search and seizure does not inspire the confidence of this Court. That apart, it is relevant to state that though the F.I.R. has been registered at 8.00 pm., on 01.08.2012 and crime number was given at the same time and date, however in Ex.P.4, the arrest memo prepared at the place of seizure, contains the crime number and the offence under which the case was registered against the appellant which creates doubt with regard to the prosecution case.

10. P.W.4, Investigation Officer had admitted that the appellant was arrested at 7.30 p.m., and the arrest memo was prepared at the same time. However, he admitted that the crime number and other details mentioned in the arrest memo which has been prepared half an hour prior to the registration of F.I.R.

11. In the facts and circumstances of the case, in the absence of any independent witness to corroborate the testimony of the interested witness namely Police Officials, conviction cannot be based solely on the uncorroborated testimony of

those witnesses. Therefore, I hold that the prosecution has not proved its case beyond reasonable doubt."

Therefore, it creates bundle of doubt with regard to the case of the prosecution.

12. The next contention raised by the learned counsel appearing for the appellant is that Section 50 of NDPS Act has been violated by the prosecution. Section 50(1)(2) and (3) of NDPS Act reads as follows:-

"50. Conditions under which search of persons shall be conducted:-

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made."

In this regard it is relevant to rely the judgment 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 Lekhram 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.

In the case on hand, the prosecution failed to comply with the procedure laid down under Section 50 of NDPS Act, with regard to the search of the accused. Therefore, it vitiates the entire case of the prosecution and the benefits of doubt goes in favour of the accused.

13. Admittedly the contraband was produced before the Magistrate on 22.01.2003 and the same was produced before the trial Court only on 04.02.2003. In this regard, it is relevant to rely the judgement dated 04.03.2010, passed by this Court in "*Cr1.A.(MD)No.53 of 2008 - Mathi Alias Mathiyalagan Vs. State rep by the Inspector of Police*" which reads as follows:-

"5.While advancing his argument, the learned counsel has made stress on the evidence given by the P.W.3 and Ex.P2 Chemical analysis report. In his evidence P.W.3 would state that when the samples were prepared SHO seal was affixed even in the presence of the witnesses. But, whereas in Ex.P2 it does not have any reference to show that SHO seal was affixed in the samples which were received by the Forensic Sciences Laboratory. The evidence given by P.W.2 chemical examiner would substantiate this fact. Moreover, the constable who had taken the samples to the Forensic Science Laboratory had not been examined by the prosecuting agency for the reasons best known to them. In this regard, the learned counsel for the accused would submit that there is one day delay in reaching contraband to the Court which has not been satisfactorily explained by the prosecuting agency. In this regard, he has placed reliance upon the decision reported in 1993 SCC (Cri) 1082 (Valsala v. State of Kerala) wherein it is observed by the Apex Court that in absence of evidence to show that during the long period (of over three months in this case) between the seizure and production in Court, the seized article was in the custody of the Officer-in- Charge of Police Station and that the same was kept under seal. It is also observed that it was doubtful whether the very article that was seized was sent to Chemical Examiner.

6. On coming to the present case on hand, since there is a delay in reaching the contraband to the Court the non-examination of the Head Constable who took the contraband to the Court has created doubt in the case of the prosecution. As per the case of the prosecution, the contraband was seized on 14.11.2003, and it appears that it was reached the Court only on 17.11.2003. Though no specific question was put to the Investigating Officer with regard to the delay, it appears explicitly to the Court that it affects the very root of the case of the prosecution."

Therefore, the delay in sending the contraband to the trial Court vitiates the entire case of the prosecution and it failed to prove the case beyond any doubt. In view of the above facts and circumstances of the case, this Court holds that the prosecution has not proved its case beyond reasonable doubt.

14. In the result, this criminal appeal is allowed. The judgment of conviction and sentence imposed on the appellant in C.C.No.222 of 2003 dated 25.11.2011, on the file of the Principal Special Court, Special Court under EC&NDPS Act Cases, Chennai is hereby set aside and the appellant/accused acquitted of all charges. Fine amount, if any paid, shall be refunded to the appellant forthwith. Bail bonds, if any executed, shall stand cancelled.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To

1. The Presiding Officer
The Principal Special Court,
Special Court under EC & NDPS Act Cases,
Chennai
2. The Inspector of Police,
K3, Aminjikarai Police Station,
Chennai
3. The Public Prosecutor,
High Court, Madras.
4. The Superintendent, Central Prison,
Puzhal, Chennai.

+1cc to MR.M.Shahjahan, Advocate SR.NO.53460

SJ(CO)

sm:20.8.2018

JUDGMENT IN
CRL.A.765 OF 2011