

Bail Slip

That the Appellant/Accused viz Raja @ Kulla Raja S/o Ramkumar, was directed to be released on bail as per order of this court dated 28/3/13 made in M.P.No.1/13 in CrI.A.No.232/13 on the file of this court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.08.2018

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CrI.A.No.232 of 2013

Raja @ Kulla Raja ...Appellant/Accused
Vs.

State by:
The Inspector of Police,
P.5, M.K.B.Nagar Police Station,
Chennai. ...Respondent/Complainant

The Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure seeking to set aside the judgment of conviction and sentence passed by the learned I Additional Special Judge for NDPS cases, Chennai, made in C.C.No.243 of 2005 dated 20.03.2013.

For Appellant : Mr.Ganesh Rajan
For Respondent : Mr.R.Ravichandran
Govt. Advocate (CrI.Side)

Judgment

This criminal appeal has been filed against the judgment of conviction dated 20.03.2013 made in C.C.No.243 of 2005 by the learned I Additional Special Judge for NDPS Act, Chennai.

2 According to prosecution, while P.W.2, the Sub Inspector of Police, NIB CID, Chennai, was on duty, had received information about the illicit sale of Heroin by the accused. Immediately, P.W.2 had reduced the same into writing and submitted before his immediate higher officer, P.W.4/the Inspector of Police and obtained permission to proceed further. Thereafter P.W.2 proceeded with his team to the place of occurrence and identified the accused through informer. They introduced themselves and the accused was informed about his right to be searched either before the Magistrate or before the

Gazetted Officer and P.W.2 enlightened about Section 50(1) of the NDPS Act, through Ex.P4 Notice, wherein the appellant/accused signed and refused to avail the rights provided under Section 50 of NDPS Act and stated that the officer/P.W.2 himself can make search. Thereafter, P.W.2 called two persons, who were available at the place, since they had refused to come as witness for the search to be made, P.W.2 searched the accused before two witnesses, who were accompanied with him and recovered contraband i.e. 7 gms of Heroin.

3 P.W.2 packed the contraband in brown cover, tied and sealed and obtained signatures of accused and witnesses. Thereafter, prepared recovery Mahazar Ex.P5 and issued arrest memo Ex.P6 and inspection memo was marked as Ex.P7. After coming to the Police Station, P.W.2 had prepared his special report/Ex.P10, FIR/Ex.P9 and Form 95/Ex.P11 and entrusted all the above to P.W.4, the Inspector of Police for further investigation.

4 P.W.4, the Inspector of Police after receiving Ex.P10/Report from P.W.2, since the accused had no valid license or any permission for possession of the contraband, had registered a case in Crime No.332 of 2004 against the appellant/accused under Sections 8 (c) r/w 21 (b) of NDPS Act, 1985, and after investigation, had filed a final report and forwarded all the above to the learned Magistrate and thereafter transferred to the learned Special Judge, I Additional Special Court under NDPS Act, Chennai, which was taken on file in C.C.No.243 of 2005.

5 Before the trial Court, in order to prove the case of the prosecution, P.W.1 to P.W.5 were examined and Ex.P1 to Ex.P13 were marked along with one Material Object, which was the contraband, seized from the accused. On the side of the accused, D.W.1 & D.W.2 were examined and Ex.D1 to Ex.D3 were marked.

6 The learned Special Judge, after trial, found the accused guilty of offence under Sections 8 (c) r/w 21 (b) of NDPS Act, 1985, and by judgment dated 20.03.2013, convicted him and sentenced to undergo rigorous imprisonment for a period of six months and to pay a fine of Rs.10,000/-, in default, to undergo rigorous imprisonment for a further period of one month.

7 Aggrieved against the judgment of conviction dated 20.03.2013, the convict had preferred this present criminal appeal before this Court.

8 The learned counsel for the appellant/accused would submit that the appellant was taken to Police Station on 05.06.2004, i.e. one day prior to the date of alleged occurrence

and on the next day i.e.06.06.2004, the respondent Police had foisted false case on the appellant/accused. In fact, the appellant/accused had informed his counsel about his arrest on 05.06.2004 through telegram, which had been marked as Ex.D1 & D2. The appellant/accused also examined his counsel as D.W.1 to prove his defence. The respondent Police had not sent the recovered contraband to the Magistrate and sent the contraband only to the Special Court that too on 07.07.2004 i.e. after the lapse of 30 days from the seizure and P.W.4 also not in the respondent Police Station, at the time of occurrence, he was in Police Station situated at Vysarbadi. The learned counsel further submitted that purity test has not been conducted, in order to prove quantity of Narcotic Drug of Psychotropic substance and whether the seized quantity of contraband is commercial or intermediate or small. All the above are fatal to the case of the prosecution. Further more, P.W.3 said to have been witness to the search, had not signed in Ex.P4/Notice and Ex.P7/Inspection Memo and the signature of another witness, namely Ramesh, is also seems to be forged. The appellant/accused was not informed about his right to be searched either before the Magistrate or Gazetted Officer and hence mandatory provision of Section 50 and 47 of NDPS Act were not complied with. In order to support his contentions, the learned counsel has placed his reliance on the decisions rendered by this Court reported in 2010 (2) Drugs Cases (Narcotics) 90 (Mathi Alias Mathiyalagan vs. State) & 2011 (1) MWN (Cr.) 591 (Siva Kumar and others vs. State) and as well as the decision rendered by the Hon'ble Supreme Court in Criminal Appeal No.1880 of 2011 in the case of Mohan Lal vs. the State of Punjab). The trial Court had failed to consider all these aspects and erroneously convicted the appellant/accused, which warrants interference and therefore, the appellant is entitled for acquittal.

9 The learned Government Advocate (Crl.Side) would submit that the Investigating Officer, soon after receiving the secret information, reduced the same into writing and obtained necessary permission from his immediate superior and proceeded to the place of occurrence. He identified the accused and duly informed the accused/appellant about the right to be searched either before the Magistrate or before the Gazetted Officer and issued Notice/Ex.P4 under Section 50(1) of the NDPS Act, and obtained signature, thereby the mandatory provision has been duly complied with. After completing legal formalities, since no one had come forward to stood as witness, the team members, who accompanied with P.W.2, had stood as witness for the search and recovery mahazar and recovered 7 gms of Heroin from the accused and took the appellant to the Police Station. P.W.4, after verifying all the documents submitted by P.W.2, since the accused had no valid lisenace for possession of 7 gms of Heroin, had registered a case in Crime No.332 of 2004. After

investigation and preparation of Form 95/Ex.P9, had forwarded all the documents and produced the accused before the Magistrate and after completing legal formalities, all the above had been taken to the I Additional Special Judge for NDPS Act, Chennai, for further trial. The Chemical Analyser, who examined as P.W.1, had given a report Ex.P2, which reveals that the contraband seized from the accused is Heroin, which is prohibited. Since the appellant/accused, neither had any valid license nor got any permission for possession of 7 gms of Heroin, he was in conscious possession of the contraband and thereby committed offence punishable under Sections 8 (c) r/w 21 (b) of NDPS Act, 1985. Hence, the trial Court had rightly appreciated the evidence of prosecution side witnesses and convicted the appellant.

10 Heard the rival submissions made by the learned counsel appearing on either side and perused the original records.

11 According to the learned counsel for the appellant/accused, even one day prior to the occurrence, the appellant was taken to Police Station by the respondent Police, the appellant informed the same to his counsel and on the next day, the respondent Police foisted a false case against the appellant/accused. There was no explanation offered by the prosecution for the above fact stated by the appellant.

12 On a perusal of the records, it reveal that the appellant had examined his Counsel as D.W.1 and marked the telegram as Ex.D1 & Ex.D2, which were sent by him to his Counsel/D.W.1. Further, it was stated by the prosecution that P.W.2 made search before two witnesses namely, P.W.3 and one Ramesh, who were accompanied with P.W.2, at the time of occurrence. But, P.W.3, one of the witnesses for search and Mahazar, had not signed in Ex.P4 Notice and Ex.P7 Inspection Memo. The another signature, found on the above two documents also seems to be not that of another witness, namely, Ramesh. Though it was stated that Section 50(1) of the NDPS Act had been complied with in the presence of two witnesses, one witness had not signed and another signature is not that of the other witness, thereby, prosecution had failed to prove compliance of Section 50(1) of NDPS Act. There is no valid explanation from the prosecution, as to why P.W.3 had not signed in Ex.P4 Notice and Ex.P7 Inspection Memo. All the above facts creates doubts in the mind of the Court.

13 Hence, this Court is of the view that prosecution had miserably failed to prove its case beyond reasonable doubt. The trial Court had failed to consider the documents submitted by the prosecution, which was not proper. When the defence taken by the accused would shake the evidence of prosecution, and when

two views are possible, the view, favourable to the accused has to be considered and benefits of doubts should be extended to the accused.

14 In the result, the criminal appeal stands allowed, judgment of conviction dated 20.03.2013 made in C.C.No.243 of 2005 by the learned I Additional Special Judge for NDPS Act, Chennai, is hereby set aside. The bail bond, if any, submitted by the accused shall stand cancelled and fine amount, if any, paid by the appellant/accused shall be refunded to the appellant/accused.

Sd/-
Assistant Registrar (CO)

//True copy//

Sub Assistant Registrar

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To

1. The I Additional Special Judge for NDPS Act, Chennai.
2. The Public Prosecutor, High Court of Madras.
3. The Inspector of Police,
P.5 M.K.B. Nagar Police Station, Chennai.
4. The Superintendent Central Prison, Puzhal, Chennai.

Copy To

The Section Officer, Criminal Section,
High Court, Madras-104.

+1cc to Mr.Ganeshrajan, Advocate SR.No.59946

WEB COPY

CrI.A.No.232 of 2013

RK (CO)

GMV (09/11/2018)