

Bail Slip

The Appellant herein/Accused viz Babu S/o.Ehiraj was directed to be released on bail as per order of this court dated 01/08/2013 made in MP.1/2013 in CRL.A.506/2013 by this Hon'ble Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 31.07.2018

PRONOUNCED ON : 30.08.2018

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

CRL.A.No. 506 of 2013

Babu
S/o. Ethiraj

... Appellant

Vs

The State rep by
The Inspector of Police,
NIBCID, Chennai.

... Respondent

Prayer: Criminal Appeal filed under Section 374(2) of Cr.P.C., against the conviction and sentences passed by the Special Judge, I Additional Special Court under NDPS Act, Chennai made in C.C.No.293 of 2004 by judgment dated 12.07.2013.

For Appellant : Mr.G.S.Magesh
for T.S.Srinivasan

For Respondent : Mr.R.Ravichandran
Government Advocate (Crl.Side)

J U D G M E N T

This appeal is directed as against the judgment dated 12.07.2013, passed in C.C.No.293 of 2004 on the file of the learned Special Judge, I Additional Special Court under NDPS Act, Chennai, thereby convicted the appellant and sentenced him to undergo two years of rigorous imprisonment and to pay a fine of Rs.10,000/- in default of payment to undergo one month rigorous 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 on 17.11.2013 at about 6.30 a.m., P.W.2, Ravikumar, Head Constable of NIBCID Police Station, received an information through telephone that the appellant, who was residing at No.43, 21 Cross Street, T.P.Chatram, Chennai, sold ganja at the junction of 4th Street, T.P.Chatram and Devagiammal Street on 17.11.2003 at about 7.30 hours to 8.30 hours. P.W.2 recorded the information in Ex.P.3 and submitted the same to the superior officer. On permission, P.W.2 along with his team members consisting of the Head Constable 7313, 5425 and woman Head Constable 245 of NIBCID Police Station, along with necessary equipment, went to the place of occurrence and mounted the surveillance.

3. At that time the accused came there with white colour polythene bag and he was apprehended as identified by the informant. He was informed about his right to be searched in the present of Gazetted Officer or Magistrate, for which, he preferred to search by the police. The search notice Ex.P.4 under Section 50 of NDPS Act, prepared and obtained signature from the accused. Two independent witnesses namely Siva S/o. Govindasamy, and Kannan, S/o. Munusamy were called to stand as witnesses, but they refused to stand. Therefore, the Head Constables were deputed as witnesses. The accused was searched and found possession of 5 Kg of ganja in white colour polythene bag. Out of the said quantity two samples of each 50 grams were taken and packed into two separate covers and sealed with NIB Seal as M.O.1 and M.O.2. The remaining contraband after taking samples weighing 4 Kg 900 grams was produced as M.O.3. The accused had no licence or permit to possess ganja. Hence he was arrested after informing him the ground of the arrest.

4. The case has been registered in Crime No.92 of 2003 for the offence under Section 8 (c) r/w. 20 (b) (ii) (B) of NDPS Act. Thereafter, a report was prepared under Section 57 of NDPS Act and sent to the superior officer. The Investigation Officer after completion of investigation filed a charge sheet as against the accused for the offence under Section 8(c) r/w. 20 (b) (ii) (B) of NDPS Act. On the appearance of the accused, he was furnished with the copies under Section 207 of Cr.P.C. The trial Court framed charges against the accused for the above said offence and he pleaded not guilty and claimed for trial.

5. In order to prove the case, the prosecution examined P.W.1 to P.W.5 and marked Ex.P.1 to Ex.P.11 and produced M.O.1 to M.O.3. When the accused was questioned about the incriminating circumstances appeared against him under Section 313 of Cr.P.C., he denied the same, however, he did not lead any evidence. After considering the evidence adduced by the prosecution and also hearing either side, the trial Court

convicted the accused as stated above. As against which, the present appeal.

6. The learned counsel appearing for the appellant contended that the prosecution has failed to adhere the mandatory provisions under Sections 50 and 57 of NDPS Act. Further he would submit that the Lab analyst, P.W.1 was not examined by the Police. Therefore, the samples sent to P.W.1 has not been proved by the prosecution and the analysis report dated 16.02.2004, which was marked as Ex.P.2 given by P.W.1 is not a reliable one. He would further submit that the alleged occurrence place is a busy public place and there are so many shops located, even then the police persons have not examined any independent witness.

7. The learned counsel appearing for the appellant would further contend that there is a delay in sending the contraband to the trial Court. Originally the contraband produced before the learned Magistrate on 17.11.2003. Thereafter, it was produced before the trial Court only on 23.12.2003 and the prosecution failed to explain the delay of 36 days in sending the property to the trial Court. Therefore, the prosecution failed to prove the case against the accused and prayed for set aside the conviction.

8. Per contra, the learned Government Advocate (Crl. Side) appearing for the State submitted that the prosecution proved the case beyond all reasonable doubts and the trial Court rightly convicted the appellant and the impugned judgment is liable to be confirmed. Therefore, he prayed for dismissal of this appeal.

9. Heard the arguments advanced by Mr.G.S.Magesh, learned counsel appearing for the appellant and Mr.R.Ravichandran, learned Government Advocate (Crl.Side) appearing for the respondent/State and perused all the materials available on record.

10. It is seen from the records, P.W.1, the Lab-analyst deposed that he was not examined by the Investigating Officer and he did not mention the order for analysis in the analysis report. P.W.2, the Head Constable deposed that he prepared search notice and explained the right of the accused to be searched before the Gazetted Officer or Magistrate, for which the appellant declined and had no objection to be searched by P.W.2 himself. Therefore, admittedly the search was made by P.W.2 before the witnesses of Head Constables. Though two witnesses lend their names, they did not stand as witnesses for the search.

11. It is relevant to rely the judgment passed by the Hon'ble Supreme Court of India in "Crl.A.No.273 of 2007 (Arif Khan @ Agha Khan Vs. State of Uttarakhand) dated 27.04.2018" which held as follows:

"25. In our considered view, the evidence adduced by the prosecution neither suggested and nor proved that the search and the recovery was made from the appellant in the presence of either a Magistrate or a Gazetted Officer.

26. It is the case of the prosecution and which found acceptance by the two Courts below that since the appellant (accused) was apprised of his right to be searched in the presence of either a Magistrate or a Gazetted Officer but despite telling him about his legal right available to him under Section 50 in relation to the search, the appellant (accused) gave his consent in writing to be searched by the police officials (raiding party), the two Courts below came to a conclusion that the requirements of Section 50 stood fully complied with and hence the appellant was liable to be convicted for the offence punishable under the NDPS Act.

27. We do not agree to this finding of the two Courts below as, in our opinion, a search and recovery made from the appellant of the alleged contraband "Charas" does not satisfy the mandatory requirements of Section 50 as held by this Court in the case of Vijaysinh Chandubha Jadeja (supra). This we say for the following reasons.

28. First, it is an admitted fact emerging from the record of the case that the appellant was not produced before any Magistrate or Gazetted Officer; Second, it is also an admitted fact that due to the aforementioned first reason, the search and recovery of the contraband "Charas" was not made from the appellant in the presence of any Magistrate or Gazetted Officer; Third, it is also an admitted fact that none of the police officials of the raiding party, who recovered the contraband "Charas" from him, was the Gazetted Officer and nor they could be and, therefore, they were not empowered to

make search and recovery from the appellant of the contraband "Charas" as provided under Section 50 of the NDPS Act except in the presence of either a Magistrate or a Gazetted Officer; Fourth, in order to make the search and recovery of the contraband articles from the body of the suspect, the search and recovery has to be in conformity with the requirements of Section 50 of the NDPS Act. It is, therefore, mandatory for the prosecution to prove that the search and recovery was made from the appellant in the presence of a Magistrate or a Gazetted Officer."

12. It is also seen from the records, the prosecution examined the officials as P.W.1 to P.W.5. But none of them deposed that the search or recovery was made in the presence of any Magistrate or Gazetted Officer. Therefore the prosecution failed to ensure mandatory compliance of Section 50 of NDPS Act as the alleged search of the contraband made before the Magistrate or Gezettered Officer and recovered from the appellant was not done in consonance with the procedure prescribed under Section 50 of NDPS Act.

13. The another contention of the learned counsel appearing for the appellant is that there is a delay in sending the property to the trial Court. In this regard it is relevant to rely the judgment of this Court in "Crl.A.No.53 of 2008 (Mathi alias Mathiyalagan Vs. State, rep. by Inspector of Police, Ariyamangalam Police Station, Trichy District) dated 04.03.2010" wherein it was held 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 prosecution failed to explain the delay in sending the property to the trial Court which vitiates the entire case of the prosecution.

14. For the above mentioned reasons and discussions, this Court is of the considered view that the prosecution has failed to prove the search and recovery of contraband from the appellant was inconsonance with the procedure prescribed under Section 50 of the NDPS Act. Since the non-compliance of the mandatory procedure prescribed under Section 50 of the NDPS Act is fatal to the prosecution case and found that the prosecution was failed to prove the compliance as required in law, the appellant is entitled to claim benefit of acquittal.

15. In view of the same, the appeal succeeds and is allowed. The impugned judgment of conviction and sentence made in C.C.No.293 of 2004 dated 12.07.2013 on the file of the learned Special Judge, I Additional Special Court under NDPS Act, Chennai is set aside and the appellant/accused is 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 IV)

//True Copy//

Sub Assistant Registrar

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To

1. The Presiding Officer
The Special Court,
I Additional Special Court
under NDPS Act, Chennai
2. The Inspector of Police,
NIBCID, Chennai.
3. The Public Prosecutor,
High Court, Madras.
4. The Section Officer,
Criminal Section, High Court,
Madras.

+1cc to Mr.T.S.Srinivasan, Advocate sr.no.60478

CRL.A.506 OF 2013

vsnii(co)
nr 26/09/2018

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