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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :30.10.2018

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.617 of 2013

and

M.P.No.2 of 2013

Parasakthi

...Appellant/Accused

Vs.

State rep. By
The Inspector of Police,
N.I.B., Chennai.
(Crime No.17/2008)

...Respondent/Complainant

The Criminal Appeal is filed under Section 374(2) of Code of Criminal Procedure to call for the records in C.C.No.11 of 2009 on the file of the learned Principal Sessions Judge, Special Court, under N.D.P.S. Act, Chennai City, Chennai, judgment dated 06.09.2013.

For Appellant : Mr.P.Prince Prem Kumar
For Respondent : Mr.R.Ravichandran
Government Advocate (Crl.Side)

J U D G M E N T

This Criminal Appeal has been filed to call for the records in C.C.No.11 of 2009 on the file of the learned Principal Sessions Judge, Special Court, under N.D.P.S. Act, Chennai City, Chennai, judgment dated 06.09.2013.

2. The case of the prosecution is that, on 06.02.2008 at about 6.30 A.M., when P.W.1/Sub Inspector of Police was in the Mettupalayam Police Station, an informant contacted him over phone and informed that a lady aged about 40 years by name Parasakthi, has come to sell the Ganja. If the police party come between 7.30 A.M. to 10.00 A.M to the Poonamallee High Road, Victoriya Hall, nearby Subway, they shall identify the accused. P.W.1, after receiving the information, passed it on to P.W.5/Inspector of Police. The Inspector of Police/P.W.5 gave instructions to P.W.1 to form a team and go for search. After receiving instructions



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from P.W.5, the team went to the place at 7.30 a.m. where the informant told and made surveillance. At that time, one lady has come near the place carrying two bags with her. In her right hand, she had a Reebok Black Colour Rixin Bag and in left hand, she had a textile bag with Bamboo Stick handle. Immediately, the informant identified the lady as the one who sells Ganja. Therefore, the team surrounded her. After surrounding her, the police asked two individual persons to stand as witness. After giving their name and address, they refused to stand as witnesses. Therefore, P.W.1 called P.W.3 and P.W.5 to stand as witness. They informed the accused/appellant that they are going to subject her to a search and asked her willingness to be searched either before a Magistrate or before a Gazetted Officers, for which she has stated that they need not search either before a Magistrate or before a Gazetted Officers and the Sub Inspector of Police, himself can search the accused. The police gave notice under Section 50 of NDPS Act and after intimating the right under Section 50 of NDPS Act, she was searched by P.W.1. At the time of search, the accused voluntarily handed over the bags to the police in which Ganja weighing about 6 Kg. was found. About two 50 grams of Ganja was taken as sample for testing. The respondent police sealed the samples as per the rules and the witnesses have signed in the samples. Thereafter, P.W.2 searched the appellant/accused. However, nothing was recovered from the body of the accused. Then they prepared a mahazar and she has also voluntarily come forward and given a confession statement and the same was recorded. The appellant was arrested. The police filed a report under Section 57 of N.D.P.S. Act and registered an F.I.R. The respondent police sent the materials and samples along with the accused to the learned Magistrate. P.W.5 conducted the investigation. After completing the same, filed charge sheet against the accused and sent a request to the Special Court to send the samples for chemical analysis. Accordingly, the Special Court sent the sample materials for chemical analysis. Charge sheet was filed against the appellant/accused for offence under Section 8(c) read with Section 20(b)(ii)(B) NDPS Act. After completing the legal formalities, taken the case on file in C.C.No.11 of 2009, the Special Court framed charges against the appellant/accused.

3. During trial, in order to prove the case of the prosecution, as many as 5 witnesses viz., P.W.1 to P.W.5 were examined and 10 documents were marked viz., Ex.P.1 to Ex.P.10 and 6 material objects were produced. After completing the prosecution side evidence, the accused was questioned under Section 313 Cr.P.C. about the incriminating materials found against her.



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4. On the side of the Appellant/Accused, no oral evidence and documentary evidence was produced. The learned Special Judge after hearing the arguments, convicted the appellant/accused for the offence punishable under Section 8(c) read with Section 20(b)(ii)(B) NDPS Act and sentenced her to undergo rigorous imprisonment for a period of three months and to pay a fine of Rs.20,000/-, in default, to undergo three months rigorous imprisonment. Against the judgment of the learned Special Judge, the appellant/accused has preferred the present appeal.

5. The learned counsel for the appellant would submit that the prosecution has not complied with the mandatory provisions under Section 50 of the N.D.P.S. Act and the person who is alleged to have searched the appellant/accused is not the competent person. Further P.W.4/Rani, working as Scavenger, has deposed that she was not working on that day. Therefore, the presence of P.W.4 is suspicious and search and recovery is also suspicious. Further, the crime number mentioned in the arrest memo is not in accordance with the provisions of the N.D.P.S. Act. After getting information, the police went to the spot and after completing the search and recovery, they submitted a report under Section 57 of NDPS Act before the Station House Officer. Then only they could register the case and crime number would be allotted. Whereas in this case, before filing the FIR and before going to the Police Station and before filing the report under Section 57 of NDPS Act, crime number has been assigned. Hence, it is doubtful. Therefore, there is a material contradiction between the evidence of prosecution. P.W.2/Chemical analyst has not given a positive report and further sample was sent in a belated stage and examination was also done belatedly. The prosecution has failed to prove this case beyond any reasonable doubt if two views are possible, the views which is favourable to the accused has to be taken into consideration. The prosecution has failed to prove its case beyond reasonable doubt and the benefit of doubt should have been extended to the accused. But the learned Special Judge failed to consider these aspects and mechanically convicted the accused for the offence punishable under Sections 8(c) read with Section 20(b)(ii)(B) of N.D.P.S. Act, which warrants interference of this Court. In support of his contention, the learned counsel for the appellant placed reliance on the following decisions:-

1. 2014-1-L.W.(Crl.) 764 (Gurjant @ Janta Vs. State of Punjab)



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2. (2015) 1 MLJ (Crl.) 645 (R.Balamurugan V. State rep. by the Superintendent, Customs, Customs Prevention Unit, Kanyakumari.

3. Unreported judgment of the Hon'ble Apex Court, dated 27.04.2018 in the case of Arif Khan @ Agha Khan Vs. State of Uttarakhand

6. The learned Government Advocate (Crl.Side) appearing for the respondent police would submit that P.W.1 received information from an informant and the same was reduced into writing in the register maintain in the police station and placed before P.W.5/superior officer. As per the directions of the superior officer, the team went to the spot and made a surveillance. At the time, the appellant/accused passed by that place and the informant identified the accused. The police surrounded the appellant, and after completing the mandatory provisions of Section 50 N.D.P.S. Act, search was made. The police team called independent witnesses for search and they refused to stand as witness. Two persons who were part of police team, stood as witness. After completing the search and recovery, sample was taken. The accused gave confession statement and it was recorded under Section 67 of the NDPS Act. The sample was collected through magazar and they were sealed in accordance with provisions and the signature of the accused and witnesses were obtained and made receipt and took all the materials to the Police Station and filed a report under Section 57 of the Act. P.W.5 investigated the matter and filed the Charge Sheet. It is seen from the evidence of P.W.1 that provision of Section 50 of NDPS Act has been duly complied with and the search and mahazar are also in tune with the Act and confession statement was recorded under Section 67 of the NDPS Act. The officer under the NDPS Act is not police officer. They have got right to search and recover the materials. At the time of preparing the arrest and other records, since they have already informed the police, Crime Number was ascertained. Mere mentioning of Crime Number in the arrest memo the entire prosecution case need not be doubted. P.W.5 has clearly explained as to how they allotted the Crime Number. The prosecution witnesses have established the case of the prosecution. Therefore, the contention of the learned counsel for the appellant are not acceptable. Because the provisions of Section 50 of the NDPS Act has been duly complied with in this case. Therefore, there is no merit in the appeal and the appeal is liable to be dismissed.

7. Heard the learned counsel appearing for the appellant and the learned Government Advocate (Crl.Side)



8. In order to prove the case of prosecution, P.W.1 who has received the secret information from the informant and recorded the information in the register maintain in the police station has been examined as P.W.1. He has clearly stated during the examination as witness before the trial Court that on receiving information, he passed it on to his superior officers and the police team was given instructions. They went to the spot, on seeing the accused one who was identified by the informant, they surrounded her and gave notice under Section 50 of NDPS Act and also recovered the contraband and recorded the statement under Section 67. P.W.2 is the chemical analyst and he has spoken about the receipt of the samples and he has

9. P.W.3 is one of the members of the team of search and he has clearly spoken about spotting of the accused, they surrounded the accused and also complied with all the legal formalities, recovered ganja, taken the samples and recording confession statement, arrested the accused. His evidence corroborates the evidence of P.W.1. P.W.4 was a lady Scavenger working in the respondent police and she has spoken about the search and recovery. Her evidence was also corroborated with the evidence of P.W.1 and P.W.3.

Ex.P.1 information recorded by P.W.1.

Ex.P.3 is the mahazar. It shows the place of occurrence and search and recovery made from the accused.



Ex.P.4 is the arrest memo which shows that the appellant was arrested by P.W.1 who recovered Ganja and also recorded the statement under Section 67 of the NDPS Act.

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Ex.P.5 is the special report filed by P.W.1 under Section 57 of the NDPS Act before P.W.5.

Ex.P.6 is the sample sent from the Court to the Director, Forensic Department.

Ex.P.7 is the chemical analyst report which shows that they received the sample bags and examined the samples.

Ex.P.8 is the copy of F.I.R.

Ex.P.9 Intimation given to the relatives of the appellant regarding arrest of the accused.

Ex.P.10 Requisition letter to the Court to send the case properties to lab for chemical examination.

11. From the oral and documentary evidence, the prosecution has proved its case beyond reasonable doubt that a secret information was received by P.W.1 and after getting information, they recorded the same under Section 42 of the NDPS Act and as per the instruction of P.W.5, they went to the spot, identified the accused and surrounded the accused. P.W.1 has clearly intimated the right of the accused to be searched either before the Magistrate or Gazetted Officers and also they have clearly stated that independent witnesses were called but they refused to stand as witness. Therefore, P.W.3 and P.W.4 stood as witnesses for search and recovery. The evidence of prosecution clearly reveals that the appellant, after understanding the right to be searched in the presence of either before the Magistrate or the Gazetted Officer, has told that search can be conducted by P.W.1 himself through P.W.4. Even before the personal search, appellant voluntarily handed over the two bags; One was Reebok Black Colour Bag and another bag was textile bag with Bamboo stick hand. It was searched through P.W.4 and 6 Kg. of Ganja was seized. Then they took samples, through mahazar, sample bag sealed with NCB and also obtained signatures of the appellant and the witnesses. The appellant has voluntarily given a confession statement and the same was recorded under Section 67 of the NDPS Act. Further arrest was also made and from the evidence of P.W.1 to P.W.5 and



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Ex.P.1 to Ex.P.10, prosecution has clearly established that the accused has committed the offence. As stated by the learned counsel for the appellant no statutory provision has been violated and a reading of evidence of P.W.1 clearly shows that the prosecution has not violated any mandatory provisions. Though Section 50 of NDPS Act shows that before conducting search, right of the accused has to be intimated to the accused, reading of evidence of P.W.1, shows that the said right has been explained to the appellant/accused. Though the learned counsel for the appellant would submit that P.W.4 is not a competent person to search the accused, the Act only says that before conducting search, the right of the accused has to be explained. When the accused expressed their willingness for search in the presence of Magistrate or Gazetted Officer, search has to be done either before the Magistrate or Gazetted Officers. When they have not exercised their option and voluntarily given up their right and ask police team to search themselves, then they can search. In this case search was made through the lady scavenger who is one of the team member during the search, no Ganga was recovered from the body of the appellant/accused. As per the evidence of P.W.1, P.W.3 and P.W.4 that after informing the right of the accused, the accused had voluntarily handed over the two bags. The bags were recovered by an officer. The body of the accused was searched by a lady. The appellant/accused handed over the two bags voluntarily before search, they recovered contraband weighing 6 Kgs. in each bag and sample was taken. When the body of the accused was searched by the member of the team, nothing was recovered. After taking samples, they recovered all the Ganja and also arrested the accused and recorded her statement.

12. On a reading of evidence of P.W.1, it is seen that, there is no violation of mandatory provisions. The authorities cited by the learned counsel for the appellant are not applicable to the present case on hand.

13. From the evidence of prosecution, both oral and documentary, this Court is of the view that the prosecution has proved its case beyond reasonable doubts and the conviction imposed on the appellant is sustainable. As regards to the quantum of the sentence is concerned, the offence committed by the appellant is serious in nature and a crime against society. Therefore, this Court is not inclined to show any leniency to reduce the sentence.



14. In view of the above, the Criminal Appeal is dismissed. The judgment of conviction and sentence dated 06.09.2013 made in C.C.No.11 of 2009 on the file of the learned Principal Sessions Judge, Special Court, under N.D.P.S. Act, Chennai City, Chennai, is hereby confirmed.

Sd/-
Assistant Registrar(insp cell)

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Sub Assistant Registrar

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To

1. The Principal Sessions Judge, Special Court under NDPS Act,
Chennai City, Chennai.
2. The Public Prosecutor,
High Court of Madras.
3. The Inspector of Police,
N.I.B., Chennai.

Copy to
The Section Officer,
Criminal Section,
High Court, Madras

CrI.A.No.617 of 2013

A.SK(08/08/2019)