

Bail Slip.

The Appellant/Accused namely Vana Rajan S/o. Ramanathan, accused in C.C.No. 52/2008 dated 19.03.2012 on the file of the Principal Special Judge for NDPS Act Cases, Chennai was directed to be relased on bail in M.P. 1/2012 in CrI.A. 265/2012 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.03.2019

PRONOUNCED ON : 08.04.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Criminal Appeal No.265 of 2012

1.Kannan
2.Vana Rajan

..Appellants

Vs

State rep. By its
The Inspector of Police,
NIBCID, Chennai
Crime No.98 of 2007

..Respondent

Prayer:- This Criminal Appeal is filed under Section 374 (2) Cr.P.C., against the judgment and sentence dated 19.03.2012 imposed in C.C.No.52/2008 by the learned Principal Special Judge for NDPS Act cases, Chennai.

For Appellants : Mr.R.C.Paul Kanagaraj
For Respondent : Mrs.Kritika Kamal.P,
Government Advocate (crl.side)

WEB COPY
JUDGMENT

This criminal appeal is directed against the judgment passed by the learned Special Judge for NDPS cases, Chennai, in C.C.No.52 of 2008.

2.The appellants herein were charged for possessing 1.050 kilograms of hashish, a narcotic drug and Rs.1,500/-, the sale proceeds of hashish and thereby committed offence under Section

8(c) r/w 21(c) & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act').

3.The case of the prosecution is that, on 11.09.2007, at about 10.00 am, the Sub Inspector of Police attached to NIBCID, Chennai, received a secret information from his informant that, on 11.09.2007, between 11.30 hours and 15.30 hours, two persons by name Kannan and Vana Rajan are likely to come near Chennai Guindy rountena bus stop, for busses proceeding towards Ashok Nagar and they will be carrying hashish oil for sale. On receiving the said information over phone, Thangavelu, Sub Inspector of Police has reduced the information into writing and placed it before the Inspector of Police. Mr.Murugaiyan, the Inspector of Police has seen it and permitted Thangavelu, sub Inspector of Police to proceed. Thereafter, Thangavelu (P.W.1) along with Pandian, Arulkumar, Karthikeyan, Raja, Chinnathambi, Head Constables and Sridhar, Grade I Constable, went to the spot and kept surveillance. At about 12.00 hours on 11.09.2007, the informant identified two persons as the persons who were carrying hashish oil. Thangavelu and his Team intercepted those two persons after introducing themselves, told them, about the information received and their intention to conduct search. One Pandian of Ambedkar Nagar was asked to be witness for search proceedings.

4.The accused persons were informed about their right to be searched before a Magistrate or before a Gazetted Officer as provided under Section 50 of the NDPS Act. They declined to exercise the said option. The notice informing the option to the accused was reduced into writing and the accused persons have affixed thier signatures in it. Thereafter, the yellow colour plastic bag carried by A.1 was searched in which, a white colour polythene bag containing 1.050 kilograms of hashish oil concealing in the bag was recovered.

5.After conducting the field test, two samples each weighing 5 grams was drawn and the same was packed separately, concealed and labeled. From A.2, Rs.1,500/- was recovered. For the recovery, a mahazar was drawn at 12.30 hours. Both the accused were arrested. Based on the information given by them, their wives were informed about the arrest through telegram. Thangavelu (P.W.1) submitted a detailed report about the seizure and arrest and placed it before the Inspector at about 15.30 hours.

6.The sample drawn from the contraband seized from the accused persons were sent for analysis, through Court. The Chemical Examiner, on examination of the substance, has given his report dated 03.12.2007, indicating that the substance seized from the accused contain cannabin oil. The substance is hashish which is a derivation from cannabis. Thangavelu, the Sub

Inspector of Police (P.W.1) who received information and recorded it as per Section 42 of the NDPS Act and conducted the seizure and arrest was examined by P.W.4, the Inspector of Police.

7.Ex.P.1 is the information and order of the Inspector dated 11.09.2007; Ex.P.2 is the search notice dated 11.09.2007 issued to A.1; Ex.P.3 is the search notice dated 11.09.2007 issued to A.2 and Ex.P.4 is the seizure mahazar dated 11.09.2007. Ex.P.11 is the Chemical Analyst Report given by Rajaraman. Based on the requisition letter sent by the Special Court, Rajaraman was examined as P.W.3.

8.The Investigating Officer - Murugaian who received the full report under Section 57 of the NDPS Act from Sub Inspector Thangavelu (P.W.1) was examined as P.W.4. Through the said witness, M.Os.1 to 4 were marked. The trial Court after analysing the evidence held that the contraband M.Os.1 to 3 were seized from the possession of A.1 and A.2. While A.1 had physical possession, A.2 had constructive possession knowing about the content in the yellow colour bag, carried by A.1. Further, A.2 had Rs.1,500/- which was the sale proceeds of contraband. Hence, held both A.1 and A.2 guilty of offence under Section 8(c) r/w 21(c) of the NDPS Act, sentenced to undergo 10 years rigorous imprisonment and to pay a fine of Rs.10 lakhs in default to undergo one year rigorous imprisonment. However, acquitted them for want of evidence for offence under Section 8 (c) r/w 29 of NDPS Act since, the prosecution could not place evidence to prove that A.1 and A.2 conspired together to commit the offence.

9.The accused persons/appellants preferred the criminal appeal on the following grounds:-

(i)The alleged information received by P.W.1 and reduced into writing does not mention about the weight of hashish oil likely to be transported by the accused persons;

(ii)The manner in which the alleged contraband seized from the accused persons creates doubt in the absence of independent witnesses;

(iii)The failure of the prosecution to examine Pandian who is alleged to have been present during the seizure is fatal to the case of the prosecution;

(iv)The time of search not mentioned in Exs.P.2 and P.3 which indicate that Ex.s.P.1 to 3 were not prepared in the manner in which the prosecution witnesses have spoken and

(v) The Crime Number found on the labels affixed on the contraband which was seized at the scene of occurrence even before registration of the F.I.R., proves the fact that the prosecution case regarding the seizure and registration of F.I.R., are false.

10. The trial Court, having rightly held that the prosecution failed to prove the charge of conspiracy in the absence of meeting of mind between A.1 and A.2 mere presence of A.2 along with A.1 without any possession of contraband will not render him liable for offence under Section 8(c) r/w 21(c) of the NDPS Act.

11. The learned counsel for the appellants would submit that the presence of two persons, in a public place, namely Bus stand and even if some incriminating materials is recovered from one of them, without establishing the fact that A.1 was in possession of hashish oil with the knowledge of A.2, there cannot be any prosecution against A.2. The trial Court has miserably failed to consider that there is no case made out. No evidence against A.2 particularly, to be punished for offence under Section 8(c) r/w 21(c) of the NDPS Act. In support of his submission, the learned counsel would rely upon the judgment of the Himachal Pradesh High Court, in Bruce Claridge vs. State of H.P (2004(4) Crimes 156) wherein, it has been held that, when the contraband was seized from a car driven by a foreign lady, in which, the accused and a child were found sitting on the rear side, without evidence from whom and where the contraband was recovered and in the absence of examining the lady traveled along with the accused, renders the prosecution defective. The conviction of the trial Court was therefore, set aside.

12. Per contra, the learned Government Advocate (crl.side) appearing for the State would submit that the appellants were brothers. They are not the residents of Chennai. Based on the specific information Ex. P.1, that they are carrying hashish oil for sale, P.W.1 and his team went to Guindy Roundtana bus stop and was keeping surveillance and after the accused being identified by the informant, before conducting search of the accused persons, appropriate notice was given to them as per Section 50 of the NDPS Act. Both the accused declined to exercise the option and they affixed their signature in search notices viz., Exs.P.2 and P.3 respectively. Thereafter, search was conducted and hashish oil weighing 1.050 kilograms and cash of Rs.1,500/- were recovered from A.1 and A.2 respectively. Both the accused were brothers and they reached together and they had the possession and control over it. Though, the trial Court has acquitted them for the offence of conspiracy, the physical possession of contraband by A.1 with knowledge of A.2 who had a constructive possession and control over the contraband, held

them guilty for the offence of possession and transport.

13. Sum of Rs.1,500/- was the sale proceeds of contraband. Under Section 54 of the NDPS act, there is a presumption against the accused in respect of possession and Section 35 of NDPS Act gives presumption of culpable state of mind. Both the accused have failed to rebut the said presumption. Distinguishing the facts of the case cited by the learned counsel for the appellants, the learned Government Advocate (crl.side) would submit that, this is a case where the accused persons were intercepted based on specific information that they are carrying hashish oil for sale. The physical possession of A.1 and the constructive possession of A.2 has been clearly proved by the prosecution from the manner in which they were traveling and being present together. A.2 cannot plead ignorance of the substance carried by A.1. He has not even able to explain his presence along with A.1 in a place which is not his place of residence or place of avocation. Distinguishing the judgment of the Himachal Pradesh High Court, rendered in Bruce Claridge case (cited supra), on facts, the learned Government Advocate (crl.side) would submit that the prosecution has scrupulously complied with the mandatory provisions of NDPS Act and had recovered commercial quantity of hashish oil from the possession of A.1 and A.2. Therefore, the trial Court has rightly found them guilty and convicted.

14. Heard the learned counsel for the appellants and the learned Government Advocate (crl.side) appearing for the State. Records perused.

15. The first contention raised by the learned counsel for the appellants is that, the information does not contain the weight of hashish oil likely to be carried by the accused. This contention has no substance for consideration. The information necessary to take action and form a reasonable belief is available as found in Ex.P.1. Section 42 of NDPS Act reads as under:-

"Section 42: Power of entry, search, seizure and arrest without warrant or authorization: (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 authorization cannot be obtained without affording opportunity for the concealment or 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."

16. Here is a case where P.W.1 on receipt of the information which he had reasonable belief has recorded the same and placed before the superior officer. P.W.4 has gone through the information and made endorsement in it thereby permitting P.W.1 to proceed. On identification of the accused by the informant, the accused persons were informed about their right under section 50 of the Act. Exs.P.2 and P.3 are the notices informing about the right of accused under Section 50 of the NDPS Act. In these two notices, the accused have also signed and their response declining to exercise their option also been recorded and signatures obtained.

17. It is contended by the learned counsel for the appellants that in the said notice, the time not mentioned. The omission to mention time is insignificant since, the mahazar - Ex.P.4 indicates that pursuant to the search, M.Os.1 to 3 were recovered from A.1, physical possession at about 12.30 hours.

18. Yet another contention raised by the learned counsel for the appellants is that Pandian who was shown as witness for recovery, not been examined. From the records as well as the judgment of the trial Court, this Court finds that the prosecution has tried to serve witness summon on Pandian to examine him as a prosecution witness. Since, he has left the place, without any intimation, they were not able to trace him, within a reasonable time. It is not the case of the accused that Pandian is a fictitious person, in fact, his full address is mentioned in the mahazar and he has also signed in the mahazar along with the accused persons. His absence in the last known address is the cause for his non-examination therefore, this contention also deserves to be negatived.

19. The learned counsel for the appellants would submit that it is highly improbable to note the crime number in the label affixed on the contraband since, according to the witness, label was affixed around 12.30 hours whereas, the F.I.R., registered and crime number was assigned only at 15.30 hours.

20. Not only in this case, in many other cases also, this defence is taken by the counsels representing the accused person. This Court, earlier held in few cases that it is highly improbable of mentioning the crime number in the sample whereas,

in the contraband or any other document which were supposed to be prepared prior to registration of F.I.R. Since, in normal practice, crime number is assigned only at the time of registering the F.I.R. However, it is explained by the learned Government Advocate (crl.side) that when a special wing like NIBCID, where the operations are only based on prior intelligence and on information, frequent registration of F.I.R., is very rare. Unless and until there is some chance recovery. Even in those circumstances, when a team of Police proceeds towards spot based on specific information, or otherwise, it is natural that they will know the last crime number registered in their Station. It is also possible for the Police immediately after seizure to ascertain the crime number over phone from the Station. In some cases, the witnesses are able to explain how the crime number finds place even in the documents which are supposed to have been prepared prior to the registration of the case. In some cases, they omit to explain. In any event, the mentioning of the crime number in contraband and other documents is for the sake of identification. At times, the crime number would have been written subsequently also. The failure on the part of the prosecution witness to explain per se will not render the seizure illegal or vitiate the prosecution. The Court has to look into overall evidence collected by the prosecution and the proof of the same and 'whether any prejudice caused to the accused otherwise'.

21.As far as the facts of this case is concerned, the accused persons were found together near Guindy roundtana bus stop. A.1 was carrying a bag containing hashish oil. A.2 had Rs.1,500/- which according to him was the sale proceeds. A.1 and A.2 both are brothers. They both native of Kochanur, Uthamapalayam, Theni District. The Court has to satisfy itself 'whether the finding of the trial Court that the contraband seized is a narcotic drug prohibited under the NDPS Act' and 'the possession of the same was with A.1 and A.2'.

22.The chemical analyst report indicates the sample found to contain cannabinoid. The evidence of P.Ws.1 and 2 proves that the contraband was seized from A.1 who was carrying it in his hand. The further evidence of P.Ws.1 and 2 is that, A.2 was also present along with A.1. It is not the case of the defence that A.2 was not present along with A.1, or, he was not aware of A.1 possession of contraband or, he was a stranger.

23.In such circumstances, the trial Court is appropriate in holding that A.1 was in actual possession of contraband and A.2 was in constructive possession of contraband. The said view of the trial Court is well supported by the detailed judgment passed by the Hon'ble Supreme Court, on this point, rendered in Madan Lal vs. State of Himachal Pradesh (2003 (7) SCC 465).

24. Since, this judgment is on the point and settles the issue of constructive possession under the NDPS Act, it is appropriate to extract the relevant portions of the judgment. Hence, the same is extracted below:-

"18. The other plea which was emphasized was the alleged statement of accused Goyal Nath that he alone was in possession of the contraband bags. The plea centers round a statement of search witness PW-1, who stated that Goyal Nath told him that contraband articles belonged to him. The statement was made totally out of context and no credence can at all be attached to the statement. The accused Goyal Nath in his examination under Section 313 of the Code of Criminal Procedure, 1973 (in short the 'Code') did not state that he was alone in possession of the contraband articles. On the contrary, he stated that he did not know anything about the alleged seizure.

19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record is that all the accused persons were traveling in a vehicle and as noted by the Trial Court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in chapter IV of the Act which relates to offence for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

21. It is highlighted that unless the possession was coupled with requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not

attracted.

22.The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors. (AIR 1980 SC 52), to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes. "

25.As far as this case is concerned, from the evidence, the animus, custody, domain and control over the prohibited substance by A.2 along with A.1 is clearly proved. Hence, in the light of Sections 35 and 54 of the NDPS Act, both A.1 and A.2 are guilty of possessing 1.050 kilograms of hashish oil. The judgment of the trial Court is in consonance with law and precedent.

26.In the result, the Criminal Appeal is dismissed and the judgment passed by the trial Court in S.C.No.52 of 2008 dated 19.03.2012 is confirmed. The bail bond, if any, shall stand cancelled. The trial Court is directed to secure the presence of the accused/appellants to undergo the remaining period of incarceration, if any.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

jbm
To

1.The Principal Special Judge for EC and NDPS Act cases,
Chennai.

2.The Public Prosecutor,
High Court, Chennai.

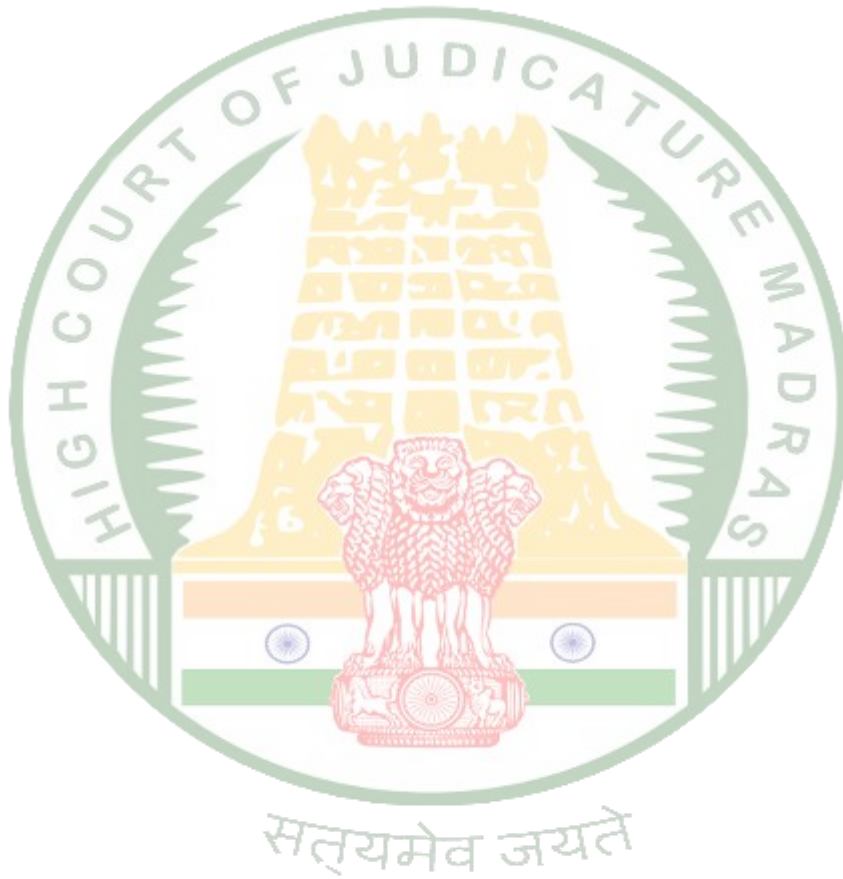
3. The Inspector of Police
NIB CID, Chennai.

4. The Superintendent
Central Prison
Puzhal, Chennai.

5.The Section Officer
Criminal Section(Records)
High Court, Madras.

Cr1.A.No.265 of 2012

SSI (CO)
SP(03/05/2019)



WEB COPY