

Bail Slip

The Appellant/Accused, namely Vetri @ Vetriselvan S/o.Arumugam was directed to be released on bail as per order dated 21.12.2012 and made in MP.NO.1/12 IN CRL A.NO.540/2012.

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 24.10.2019
PRONOUNCED ON : 01.11.2019
CORAM
THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

CRL.A.No.540 of 2012

Vetri @ Vetriselvan ... Appellant/Accused
Vs.

State rep. by
The Inspector of Police,
K-6 T.P.Chathiram Police Station,
Chennai.
(Crime No.536 of 2007) ... Respondent/Complainant

Criminal Appeal filed under Section 374(2) Cr.P.C., to set aside the judgment and judgment and order dated 08.08.2012 passed by the Principal Special Judge, Special Court under E.C. & NDPS Act, Chennai in C.C.No.42 of 2008.

For Appellant : Mr.R.C.Paul Kanagaraj
For Respondent : Mrs.P.Kritika Kamal,
Govt. Advocate (Crl. Side)

J U D G M E N T

This criminal appeal is directed against the judgment and order of conviction and sentence dated 08.08.2012 passed by the Principal Special Judge, Special Court under E.C. & NDPS Act, Chennai in C.C.No.42 of 2008.

2.The prosecution story is as under :

2.1.While Kottaisamy (P.W.2), the Sub Inspector of Police, T.P.Chathiram Police Station was in the station on 08.09.2007, his informant gave an information to the effect that one Vetri @ Vetriselvan, S/o.Arumugam, aged about 35 years, is selling ganja near the water tank in 21st cross street, T.P.Chatram. This information was recorded vide (Ex.P3) and was placed before Anbazhagan (P.W.4), Inspector of Police, who permitted Kottaisamy (P.W.2) to proceed with the case further. Accordingly, Kottaisamy (P.W.2) along with his two constables viz. Palanisamy (P.W.3), HC 6707 and Ganesan (P.W.3) HC 11621, went to the said place and on they showing

of the informant, they found the appellant with a huge bag of ganja. They effected seizure of the contraband under cover of mahazar (Ex.P5) and on weighment, it was found to weigh 22.410 kgs. They drew one sample weighing 50 gms and packed the same separately and marked it as S-1. The accused was arrested and brought to the police station. On the report of Kottaisamy (P.W.2), a case in Crime No.536 of 2007 was registered on 08.09.2007 under Section 8(C) read with 20(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (For brevity "the NDPS Act"). Kottaisamy (P.W.2) gave a report under Section 57 of the NDPS Act to the Inspector of Police. The accused along with the contraband was produced before the V Metropolitan Magistrate, who remanded the accused to custody and directed the police to produce the contraband before the Special Court for NDPS cases. The contraband and the sample were produced before the Special Court for NDPS cases, with a requisition to send the sample to the Tamil Nadu Forensic Sciences Laboratory for examination. Accordingly, the Special Court send the sample vide (Ex.P1) to the Tamil Nadu Forensic Sciences Laboratory on 18.10.2007. The sample was analysed by Sofia (P.W.1), Assistant Chemical Examiner (Gr.II), who in her evidence as well as in her report, has stated that the sample answered positive for the presence of cannabinoids and it was ganja. After examining the witnesses and collecting various reports, the police filed a final report in C.C.No.42 of 2008 before the Special Court for NDPS cases against the accused.

3. On appearance, the provisions of Section 207 Cr.P.C. were complied with and the Special Court framed a charge under Section 8(c) read with 20(b)(ii)(C) of the NDPS Act against the accused and when questioned, he pleaded "not guilty".

4. To prove the case, the prosecution examined 5 witnesses and marked Exs.P1 to P12 and M.O.1 and M.O.2. When the accused was questioned under Section 313 Cr.P.C on the incriminating circumstances appearing against him, he denied the same. No witness was examined on the side of the accused. However, Ex.D1 (history of the case) was marked in the cross-examination of Anbazhagan (P.W.4-Inspector of Police).

5. After considering the evidence on record and hearing either side, the Special Court, by judgment and order dated 08.08.2012 in C.C.No.42 of 2008, acquitted the accused of the charge under Section 8(c) read with 20(b)(ii)(C) of the NDPS Act, but convicted him of the offence under Section 8(c) read with 20(b)(ii)(B) of the NDPS Act and sentenced him to undergo five years rigorous imprisonment and pay a fine of Rs.20,000/- in default, to undergo two months rigorous imprisonment. Challenging the conviction and sentence, the accused have filed the present appeal.

6. Heard Mr.R.C.Paul Kanagaraj, learned counsel for the

appellant/ accused and Mrs.P.Kritika Kamal, learned Government Advocate (Crl. Side) appearing for the respondent State.

7.Mr.Paul Kanagaraj contended that the seizure was not conducted in the presence of any independent witness and therefore, the same is vitiated. He also submitted that there is gross violation of the provisions of Section 42 and 50 of the NDPS Act. It is his further submission that the contraband was produced before the Special Court only on 18.10.2007 and there is no material to show as to where the contraband was till then.

8.Per contra, learned Government Advocate (Crl. Side) refuted the contentions.

9.This Court gave its anxious consideration to the rival submissions.

10.Kottaisamy (P.W.2), in his evidence, has stated that while he was on duty on 08.09.2007, his informant gave him an information, which he reduced into writing vide Ex.P1 and submitted the same to the Inspector of Police; on the instructions of the Inspector of Police, he went to the water tank in 21st cross street along with his informant, Palanichamy (P.W.3), Head Constable and Ganesan (P.W.5), Head Constable; on showing by the informant, he saw the appellant, who was carrying a sack; along with his party, he intercepted the appellant and questioned him; he told the appellant that he has got a right to be searched before a Magistrate or a Gazetted Officer and gave the option in writing vide Ex.P4; he checked the sack and it was found to contain ganja; he had the sack weighed at the spot and it weighed 22.410 kgs; he took 50 gms sample and sealed it separately; the contraband was seized under mahazar (Ex.P5); the appellant was arrested and brought to the station, after which, he prepared the F.I.R. (Ex.P9) and Form-95 (Ex.P10); he submitted a report under Section 57 of the NDPS Act (Ex.P11) to the Inspector of Police and thereafter, produced the appellant before the Magistrate for remand.

11.In the cross-examination, Kottaisamy (P.W.2) has stated that he was in the police station, when the information was received and the time then was 03.30 in the morning. He has further stated that though the informant did not give the description of the appellant, the informant said that he will come with them and identify the appellant from far. He admitted that since no one came forward to stand as witness at that hour, he had to effect the seizure only in the presence of the two Head Constables viz. Palanisamy (P.W.3) and Ganesan (P.W.5). He further stated that he did the weighment at the place of occurrence, since they carried with them the weighing

scales etc. However, he admitted that he did not weigh the gunny bag separately. Ultimately, it was suggested to him that a false case was put up by the police, which he denied.

12.The testimony of Kottaisamy (P.W.2) has been adequately corroborated by Palanisamy (P.W.3) and Ganesan (P.W.5).

13.Coming to the contention of Mr.Paul Kanagaraj that the provisions of Section 42 of the NDPS Act had been violated, it is seen that Kottaisamy (P.W.2) has recorded the information (Ex.P3) that was given by the informant and also produced the same to Anbazhagan (P.W.4), Inspector of Police, who has endorsed in Ex.P3 itself that he may proceed further. The question of applicability of Section 42 of the NDPS Act will come, only when the officer is intending to search a building, conveyance or enclosed place. In this case, the seizure was near the water tank in 21st cross street, which is a public place and only the provisions of Section 43 of the NDPS Act will apply (See Ravindran Vs. The Superintendent of Customs [(2007) 6 SCC 410]). As regards the violation of Section 50 of the NDPS Act, the seizure was effected from the sack that was carried by the accused and not from the search of his person. This issue is no more res integra, in the light of the authoritative pronouncement of the Supreme Court in State of Rajasthan Vs. Daulat Ram [(2005) 7 SCC 36] and State of H.P. Vs. Pawan Kumar [(2005) 4 SCC 350].

14.As regards the contention of Mr.Paul Kanagaraj that the contraband reached the Special Court only on 18.10.2007, it is seen that the contraband was produced before the V Metropolitan Magistrate along with the accused, which is evident from the endorsement made by the Magistrate in Form-95 (Ex.P10). After the records were transmitted from the Court of the V Metropolitan Magistrate to the Special Court, the contraband was produced once again there and the sample was sent to the Tamil Nadu Forensic Sciences Laboratory through the Special Court. Coming to his next contention that no independent witness was associated in the search, the explanation offered by Kottaisamy (P.W.2) that none came forward to stand as witness and therefore, he effected the seizure in the presence of the two Head Constables accompanying him, cannot be rejected. In this context, it may be apt to extract paragraph 20 of the judgment of the Supreme Court in Ajmer Singh Vs. State of Haryana [(2010) 3 SCC 746].

"20. We cannot forget that it may not be possible to find independent witness at all places, at all times. The obligation to take public witnesses is not absolute. If after making efforts which the court considered in the circumstances of

the case reasonable, the police officer is not able to get public witnesses to associate with the raid or arrest of the culprit, the arrest and the recovery made would not be necessarily vitiated. The court will have to appreciate the relevant evidence and will have to determine whether the evidence of the police officer was believable after taking due care and caution in evaluating their evidence."

15. In a case of this nature, the Court is required to scrutinize the evidence of the seizing officers with great caution. The seizure of contraband in this case is about 21 kgs of Ganja, which is a commercial quantity, for which, the law prescribes a minimum sentence. However, the Special Court has held that since the police did not weigh the gunny sack separately, the weight could be less than 20 kgs and on that premise, the appellant has been convicted for possession of in-between quantity under Section 20(b)(ii)(B) of the NDPS Act. There is no suggestion put to the seizing officer that he has foisted such a huge quantity, due to previous enmity or motive. The evidence of Kottaisamy (P.W.2), Palanisamy (P.W.3) and Ganesan (P.W.5) are indeed very cogent and not suffered from any infirmity. After the seizure, the investigation of the case was taken over by Anbazhagan (P.W.4), Inspector of Police, who examined witness and filed the final report.

16. Sofia (P.W.1), Assistant Chemical Examiner, Tamil Nadu Forensic Sciences Laboratory, has stated that on 18.10.2007, her office received a parcel with a covering letter from the Special Court for NDPS cases, for analysis and report. Accordingly, she analysed the sample in the parcel and it was found to contain cannabis. The remnant sample that was sent to the Special Court was marked as M.O.1. and the report given by her was marked as Ex.P2.

17. On a cumulative analysis of the evidence on record, this Court finds no good reason to disbelieve the prosecution case. Mr. Paul Kanagaraj submitted that this Court may show leniency in the sentence and that the appellant was not involved in any case whatsoever thereafter. The learned Government Advocate (Crl. Side) did not produce any material to show that the appellant was involved in any case subsequent to the present case. In such view of the matter, interests of justice will be served, if the sentence is reduced to three years rigorous imprisonment.

In the result, this criminal appeal is partly allowed. The conviction of the appellant of the offence under Section 8 (c) read with 20(b)(ii)(B) of the NDPS Act by the Special Court stands confirmed, but the sentence is reduced from five

years rigorous imprisonment to three years rigorous imprisonment. The Special Court is directed to secure the appellant and commit him to prison to undergo the remaining period of sentence, if any. Registry is directed to transmit the records to the Court concerned forthwith.

Sd/-
Assistant Registrar(insp cell)

//True Copy//

Sub Assistant Registrar

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To

1.The Principal Special Judge,
Special Court under E.C. & NDPS Act,
Chennai.

2.The Inspector of Police,
K-6 T.P.Chathiram Police Station,
Chennai.

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

4.The Superintendent, Central Prison,
Puzhal, Chennai

5.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.R.C.Paul Kanagaraj , Advocate SR.No. 91649

CRL.A.No.540 of 2012

vd (CO)
A.SK(27/11/2019)

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