

Bail Slip

The Appellant/Accused Namely Prakash S/o Murugan was directed to be released on bail as per order of this Court dated 17/03/2014 in M.P.No.1 of 2014 in Crl.Appeal No.87/2014 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.11.2018

PRONOUNCED ON : 07.01.2019

CORAM :

THE HONOURABLE MR.JUSTICE P.N. PRAKASH

Crl.A.No.87 of 2014

Prakash

... Appellant

Vs.

State rep. by
Deputy Superintendent of Police
NIB CID
Kanchipuram
(C.C.No.28/2010)

... Respondent

Criminal Appeal filed under Section 374 (2) Cr.P.C. against the judgment passed by the Special Judge, I Additional Special Court under NDPS Act, Chennai 104 in C.C.No.28 of 2010 dated 19.02.2014 convicting the appellant for alleged offence under Section 8(c) r/w 18(c) of NDPS Act and sentencing him to undergo rigorous imprisonment for 6 months and fine of Rs.20,000/- and in default of the fine amount to undergo further R.I. for one month.

For Appellant : Mr.N.S.Ramesh Durai
For Respondent : Mrs.Kritika Kamal, P
Govt.Advocate (Crl.Side)

J U D G M E N T

This appeal has been filed against the judgment dated 19.02.2014 passed by the Special Judge, I (Additional Special Court under NDPS Act), Chennai 104 in C.C.No.28 of 2010 convicting the appellant for the alleged offence under Section 8

(c) r/w 18(c) of the Narcotic Drugs and Psychotropic Substances Act (for short "the NDPS Act") and sentencing him to undergo rigorous imprisonment for 6 months and fine of Rs.20,000/-, in default to undergo further R.I. for one month.

2. On 17.09.2009 around 12.00 noon, when Gnanaraj [P.W.1], the Inspector of Police NIB CID was in his office, he received information by phone from his informant that, one Prakash of Thiruvotriyur is transporting abin (opium) by Bajaj Discover motor cycle bearing Registration No.TN-21-AC-2416 and that he will be coming to the banyan tree bus stand on Thiruvallur Road in Red Hills. The informant came forward to identify Prakash. Gnanaraj [P.W.1] recorded the information vide Ex.P.1 and submitted the same to the Deputy Superintendent of Police, NIB CID and proceeded to the spot with the police party comprising Durai Kalaiselvan [P.W.3], Krishnan [P.W.4] and waited. Around 3.30 p.m., Prakash came in Bajaj Discover motorcycle bearing Registration No.TN-21-AC-2416 and on identification by the informant, he was intercepted and questioned. On personal search, the police recovered 1 kg. and 50 gms. of opium under the cover of Mahazar [Ex.P.3] and samples were drawn on the spot. Prakash was arrested and brought to the NIB station.

[a] On the complaint lodged by Gnanaraj [P.W.1], Mahabharathi [P.W.6], the Deputy Superintendent of Police registered a case in NIB Cr.No.20 of 2009 under Section 8(c) read with 18(c) and 27-A of the NDPS Act and took over investigation of the case. The contraband and samples and motorcycle along with the accused (Prakash) were produced before the Judicial Magistrate No.II, Ponneri and thereafter, they were also produced before the Special Court for NDPS Act Cases, Chennai. The samples were sent through the Court to the Forensic Science Laboratory for chemical analysis. Mahabharathi [P.W.6], the Deputy Superintendent of Police, prepared the Rough Sketch [Ex.P.11] and Observation Mahazar [Ex.P.12]. Rajaram [P.W.2] Scientific Assistant, Grade-II, tested the sample under the supervision of Ravichandran, Scientific Officer and prepared a report dated 23.10.2009 [Ex.P.9] opining that the sample tested positive for abin (opium).

[b] Mahabharathi [P.W.6] examined the witnesses and after completing the investigation, filed final report which was taken on file as C.C.No.28 of 2010 by the Special Court for NDPS Act Cases. The trial Court framed a charge under Section 8(c) read with 18(c) of the NDPS Act on 18.10.2010 and when the accused was questioned, he denied the same.

3. To prove the case, the prosecution examined 6 witnesses, marked 14 exhibits and 4 material objects. When the accused was questioned under Section 313 Cr.P.C. about the incriminating

circumstances appearing against him, he denied the same. No witness was examined on behalf of the accused nor was any document marked.

4. The trial Court, after considering the evidence on record and hearing either side, by judgment dated 19.02.2014, convicted the accused for the offence under Section 8(c) r/w 18(c) of the NDPS Act and sentenced him to undergo 6 months Rigorous Imprisonment and pay a fine of Rs.20,000/-, in default to undergo Rigorous Imprisonment for a further period of one month. Challenging the said conviction and sentence, this appeal has been filed.

5. Heard Mr.N.S.Ramesh Durai, learned counsel for the appellant/accused and Mrs.Kritika Kamal, P., learned Government Advocate (Crl.Side) appearing for the respondent-State.

6. The prosecution case rests on the evidence of Gnanraj [P.W.1], the Inspector of Police and Krishnan [P.W.4], Head Constable. Gnanaraj [P.W.1], in his evidence, has stated that he received information around 12.00 noon on 17.09.2009 from his informant, who told him that one Prakash, S/o Murugan is transporting drugs by Bajaj Discover motorcycle bearing Registration No.TN-21-AC-2416 and that he would come to the banyan tree bus stand on Thiruvallur Road in Red Hills ; he recorded the information vide Ex.P.1 and after submitting the same to the Deputy Superintendent of Police, NIB CID, proceeded to the spot with a team of police officials and waited with his informant near the bus stop; on identification by the informant, he intercepted the Bajaj Discover motorcycle bearing Registration No.TN-21-AC-2416 which came around 3.30 p.m. and questioned the accused; the accused disclosed his name as Prakash; the accused was apprised of his right under Section 50 of the NDPS Act to be taken before a Gazetted Officer or a Magistrate for search and this right was apprised to him in writing by giving him a notice Ex.P.2; the accused declined the offer which has also been recorded in Ex.P.2; since none from the public came forward to stand as witness, the search was conducted in the presence of Durai Kalaiselvan [P.W.3] and Mahalingam, Head Constable, [not examined]; the accused was keeping an yellow cloth bag in his pocket and on examination of the bag, it was found to contain a polythene cover, in which, a black colour pasty substance was found; on weighment, it was found to be 1 kg. and 50 gms.; 2 samples of 5 gms. each were drawn therefrom and the two samples and the main contraband were individually packed and sealed with NIB seal, labelled and signature of the accused and witnesses was obtained thereon; a seizure mahazar [Ex.P.3] was prepared, under which, the contraband samples and the motorcycle [M.O.4] were seized; the accused was served with arrest memo [Ex.P.4] and was placed

under arrest; the accused, along with the seized articles, was brought to the station and a report under Section 57 of the NDPS Act [Ex.P.7] was submitted to the Deputy Superintendent of Police; the examination-in-chief was done on 22.02.2011 and on the same day, the accused did not cross-examine the witness; the witness was recalled on 25.07.2012 and was cross-examined.

[a] In the cross-examination, Gnanaraj [P.W.1] has stated that after recording the information, he proceeded in his official vehicle along with the police party to the place of occurrence. He was questioned about the nature of the substance that was found by him in the plastic bag, for which, he stated that it was a black pasty substance; he has also stated in the cross-examination that the police party had carried with them a weighing scale and a test kit; to a specific question as to who brought the motorcycle to the Police Station, Gnanaraj [P.W.1] stated that it was brought to the station by Krishnan [P.W.4], the Head Constable; when questioned about the colour of the motorcycle, he has stated that the accused came in a blue colour motorcycle; ultimately, it was suggested to him that a false case has been foisted against the accused by the police, which suggestion he denied.

[b] Krishnan [P.W.4], the Head Constable, in his examination-in-chief, has stated that on 17.09.2009, he accompanied Gnanaraj [P.W.1] along with a test kit, weighing machine and other tools and waited near the banyan tree bus stand on Thiruvallur Road in Red Hills; around 3.30 p.m., they spotted the motorcycle bearing Registration No.TN-21-AC-2416 and on the identification by the informant, the vehicle was intercepted and the accused was questioned; the accused was given the option to be taken before a Gazetted Officer or the nearest Magistrate for search, which option he declined; on personal search, he was found in possession of a pasty substance suspected to be abin; on weighment, it was found to be 1 kg. and 50 gms.; two samples of 5 gms. each were drawn and the samples and the contraband were sealed with NIB seal; the articles were recovered under the cover of Mahazar in the presence of Mahalingam and Durai Kalaiselvan [P.W.3], the Head Constable; the accused was arrested by serving on him the arrest memo; his statement was recorded and he was brought to the Police Station around 21.00 hours; the Inspector of Police gave report under Section 57 of the NDPS Act to the Deputy Superintendent of Police, who took over the further investigation of the case on 18.09.2009; he accompanied the Deputy Superintendent of Police to the place of interception where the Rough Sketch [Ex.P.11] and Observation Mahazar [Ex.P.12] were prepared by the Deputy Superintendent of Police.

[c] In the cross-examination, he stated that the police party went by bus from the Police Station to the place of occurrence and returned to the station by bus; however, in the cross-examination, he has also stated that it was he who brought the motorcycle from the place of occurrence to the Police Station after the seizure and arrest.

[d] The prosecution have examined Abdur Rakheep [P.W.5], the owner of the Bajaj Discover motorcycle bearing Registration No.TN-21-AC-2416, who, in his examination-in-chief, has stated that during the relevant time, he was working in Benz Club and on 17.09.2009, when he was in the Office, the accused who is known to him and working with him, wanted to meet a client, for which, he needed the motorcycle; his Manager Stanley told him to give the motorcycle to the accused and therefore, he gave his motorcycle; even after the office hours, the accused did not return; after night fall also, the accused did not return and so, the Manager asked him to go home saying that the matter can be looked into the next day; the next day also, till evening, Prakash did not return to the Office; on the third day, a friend of Prakash informed him that the police have arrested Prakash with narcotics and his vehicle has been seized; the police came in search of him to his house and later, to his office and he was questioned; thereafter, he filed an application before the Court and took interim custody of his vehicle after producing the R.C. Book and other documents; he was not cross-examined on 13.08.2012, however, he was recalled and cross-examined on 21.02.2013; in the cross-examination, he was questioned as to whether he had signed the attendance register on 17.09.2009, for which, he stated that he had not; when asked whether he would normally lend his vehicle to friends, he stated that he would not, but, since his Manager told him to give the vehicle, he gave; ultimately, it was suggested to him that he had lost his vehicle somewhere and suppressing that, he had joined with the police to foist a case against the accused, which suggestion, he denied.

[e] Rajaram [P.W.2], in his examination-in-chief, has stated that he was working as Scientific Officer, Grade-I in the Tamil Nadu Forensic Science Laboratory and that the laboratory received a sealed packet from the Court with a requisition letter no.936/2009 dated 14.10.2009; the seals on the requisition and the package were compared and were found to tally; the packet was opened and the substance inside that was tested and was found to contain abin (opium), morphine, codeine, thepeine, peppaverin and norcotin; the requisition letter was marked as Ex.P.8 and the report dated 23.10.2009 was marked as Ex.P.9; in his evidence before the Court as well in the report [Ex.P.9], he has stated that the substance is abin (opium).

[f] In the cross-examination, he was asked to explain the nature of the substance and he stated that it was in the form of a black paste; he stated that initially, opium will be of dark grey in colour and as time passes, it will acquire blackish colour; opium is a mixture and all the substances mentioned in his report were found in that mixture; ultimately, it was suggested to the witness that he had received only an empty cover from the Court and that he had given the report to help the police, which suggestion, was denied; the examination-in-chief was done on 29.08.2011 and on the same day, the accused did not cross-examine the witness; the witness was recalled and cross-examined on 05.04.2013, nearly 2 years later.

[g] Mahabharathi [P.W.6], the Deputy Superintendent of Police, submitted that Gnanaraj [P.W.1] received information and after recording the same, submitted to him vide Ex.P.1 and thereafter, went to the spot with the police party. After the seizure and arrest of the accused, Gnanaraj [P.W.1] submitted a report, based on which, he registered the FIR in Cr.No.20 of 2009 and sent the same to the jurisdictional Magistrate, who received it on 18.09.2009 at 3.50 p.m. as could be seen from the endorsement thereon. The accused, along with the case properties, was produced before the Judicial Magistrate No.II, Ponneri, on 18.09.2009 itself and thereafter, on the directions of the Magistrate, the properties were once again produced before the Special Court for NDPS Act Cases with a requisition to send the samples for analysis. In his evidence, he has further stated that he prepared the Rough Sketch [Ex.P.11] and Observation Mahazar [Ex.P.12] and after receipt of the report from the Tamil Nadu Forensic Science Laboratory, he completed the investigation and filed final report. In the cross-examination, he has stated that the seized vehicle was black in colour. Apart from questioning on the general aspect of investigation, it was ultimately suggested to him that a false case has been foisted on the accused, which of course, he denied.

7. The learned counsel for the accused made the following submissions:

[a] There is a discrepancy with regard to the colour of the motorcycle between the evidence of Gnanaraj [P.W.1] and Abdur Rakheep [P.W.5].

[b] Gnanaraj [P.W.1] has stated that he had gone to the place of occurrence in his official vehicle, whereas, Krishnan [P.W.4] has stated that the police party went by bus.

[c] No independent witness was associated by the police while effecting search and seizure.

[d] The provisions of Section 50 of the NDPS Act have been violated, inasmuch as the search and seizure was not conducted in the presence of either a Gazetted Officer or a Magistrate.

8. Per contra, the learned Government Advocate [CrI.Side] refuted the contentions put forth by the learned counsel for the accused.

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

10. It is the specific case of the prosecution that Gnanaraj [P.W.1] received information that the accused will come to a particular spot by a Bajaj Discovery motorcycle bearing Registration No.TN-21-AC-2416. Accordingly, the accused was intercepted and the motorcycle was seized. The seizure mahazar [Ex.P.3] and Form 95 [Ex.P.14] clearly state that the motorcycle is black in colour. Even in the information report [Ex.P.1], the number of the motorcycle has been given as TN-21-AC-2416. This motorcycle, along with the contraband, was produced before the jurisdictional Magistrate immediately on 18.09.2009 when the accused was produced for remand. The prosecution have examined Abdur Rakheep [P.W.5], the owner of the motorcycle, who, in his evidence, has stated that the accused was working with him in Benz club and at the instance of his Manager, Stanley, the motorcycle was given to the accused as he wanted to meet a party on 17.09.2009. The accused did not return for two days and only on the third day, information was received that the accused was caught by the police in a narcotics case along with the motorcycle. The police came in search of Abdur Rakheep [P.W.5] to his house as well to the office and he was thoroughly interrogated. Abdur Rakheep [P.W.5] filed an application before the Special Court and obtained custody of the motorcycle after producing the R.C.book and other documents to show ownership. He has withstood the cross-examination though he was cross-examined nearly four months after the examination-in-chief. A reading of the evidence of Abdur Rakheep [P.W.5] does inspire the confidence of this Court.

11. It is true that Krishnan [P.W.4], in his evidence, has stated that the police party went by bus from NIB CID Police Station to the place of occurrence and also returned by bus, whereas, Gnanaraj [P.W.1] has stated that the police party went by official vehicle. In the cross-examination, Krishnan [P.W.4] has stated that he only took the two wheeler from the place of occurrence to the Police Station after seizure. He has stated that when he went to the Police Station in the vehicle, the police party had already reached there with the accused. Dictates of common sense would state that, had the police party gone by bus along with the accused and contraband from the place

of occurrence to the Police Station, they would have never reached the Police Station before Krishnan [P.W.4]. For an occurrence which is said to have taken place on 17.09.2009, Krishnan [P.W.4] has given evidence on 07.08.2012 and this Court should bear in mind this aspect while appreciating his evidence. A pedestrian approach in the appreciation of evidence cannot be resorted to. If the police had wanted to foist a case against the accused, there would not have been any necessity to introduce a motorcycle belonging to Abdur Rakheep [P.W.5], a colleague of the accused. Neither in the cross-examination nor under Section 313 Cr.P.C. examination, the accused has denied his acquaintance with Abdur Rakheep [P.W.5].

12. Coming to the alleged discrepancy in the colour of the motorcycle between the evidence of Gnanaraj [P.W.1] and Abdur Rakheep [P.W.5], nothing much can be inferred from that, inasmuch as, the motorcycle itself has been produced before the Court immediately after seizure on 18.09.2009 itself and thereafter, it has been returned by the trial Court under Section 451 Cr.P.C. to Abdur Rakheep [P.W.5]. Again during trial, the Bajaj Discover motorcycle was brought to the Court and was marked as M.O.4.

13. Coming to the violation of Section 50 of the NDPS Act, a Constitution Bench of the Supreme Court, in Vijaysinh Chandubha Jadeja vs. State of Gujarat [(2011) 1 SCC 609], has held as follows:

"29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the

suspect may or may not choose to exercise the right provided to him under the said provision.

32. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

From a reading of the above, it is clear that a duty has been cast upon the Police Officer to apprise the accused of his right of being searched before a Magistrate or a Gazetted Officer and breach of it would render the recovery suspect.

14. Paragraph 29 of Vijaysinh (supra) deals with the importance and significance of giving the option and that it should not be illusory, but, it should be given in letter and spirit. In this case, a separate notice has been given to the accused vide Ex.P.2 under Section 50 of the NDPS Act and answer given by the accused has also been recorded therein. The accused has declined the offer and only thereafter, the search commenced. Hence, there is no infirmity in the finding of conviction recorded by the Trial Court and therefore, the conviction of the accused stands confirmed.

15. Coming to the aspect of sentence, this Court is of the view that the Trial Court has not awarded excessive sentence for this Court to interfere with.

Resultantly, this criminal appeal is dismissed as being devoid of merits. The Trial Court is directed to secure the presence of the appellant and commit him to prison for undergoing the balance period of sentence after set off under Section 428 Cr.P.C.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

gms

To

1.The Special Judge,
I Additional Special Court under NDPS Act,
Chennai 600 104.

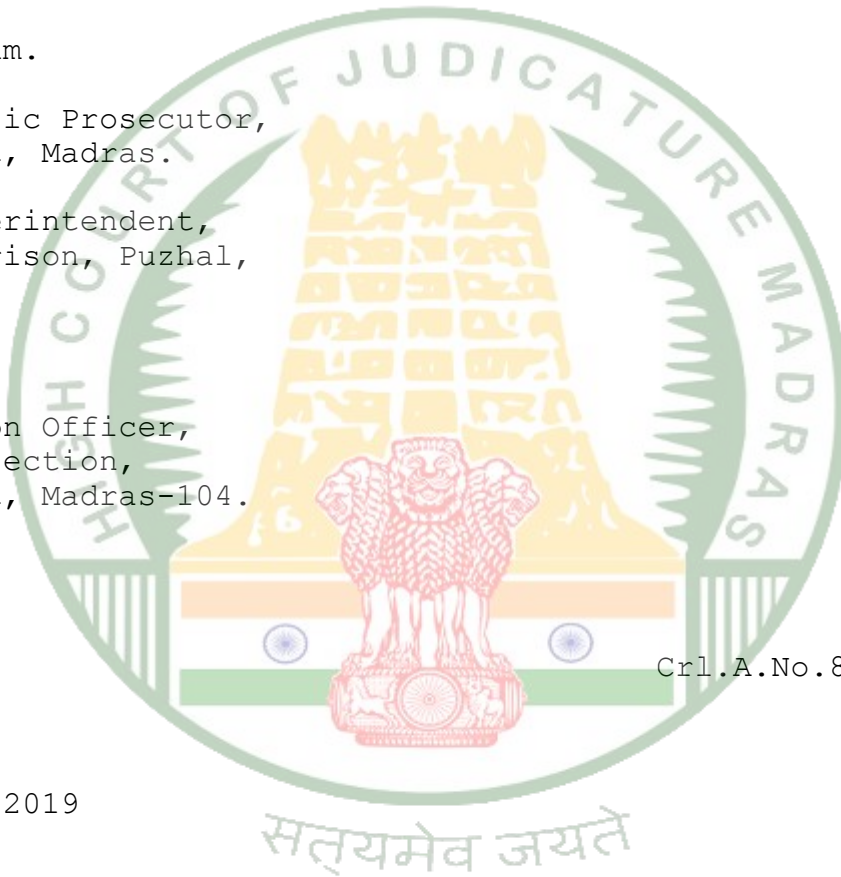
2.The Deputy Superintendent of Police
NIB CID
Kanchipuram.

3.The Public Prosecutor,
High Court, Madras.

4.The Superintendent,
Central Prison, Puzhal,
Chennai.

Copy to

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



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