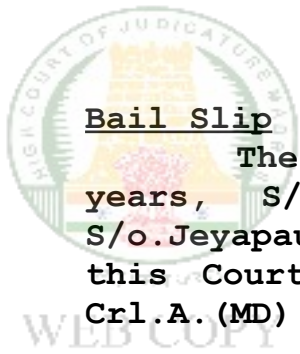




Bail Slip

The Appellants/Accused namely 1) Ananthan, aged about 29 years, S/o.Periyakaruppan, 2) Suresh, aged about 30 years, S/o.Jeyapaul are directed to be released on bail as per order of this Court dated 27.08.2009 and made in MP(MD).No.1 of 2009 in Crl.A.(MD).No.235 of 2009 on the file of this Court.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED :16.09.2019

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.A(MD)No.235 of 2009

1.Ananthan

2.Suresh

... Petitioners/Appellants / Accused

Vs.

State represented by
The Inspector of Police,
Prohibition Enforcement Wing,
Theni District.

[Crime No.124 and 125 of 2005] ... Respondents/Respondent/
Complainant

PRAYER: Appeal filed under Section 374 of the Code of Criminal Procedure, to set aside the order dated 21.08.2009 passed by the learned Special District and Sessions Judge (for NDPS Act Cases), Madurai in CC No.366 of 2005.

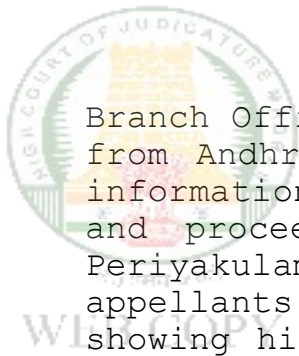
For Appellants : Mr.M.Karunanithi

For Respondent : Mrs.S.Bharathi,
Government Advocate (crl side)

JUDGMENT

The appellants in this Criminal Appeal are the accused Nos.1 and 2 in C.C.No.366 of 2005 and the trial Court found them guilty under Section 8 (C) r/w 20 (b)(ii)(B) of The Narcotic Drugs and Psychotropic Substances Act, 1985, convicted and sentenced them to undergo three years rigorous imprisonment, with a fine of Rs.5,000/- and in default of payment of fine amount, two weeks of simple imprisonment was also ordered.

2.The case of the prosecution in nutshell is that on 31.07.2005 at about 8.00 am, when PW4 was in charge of the Special



Branch Office, Theni, he received an information that three persons from Andhrapradesh came to Theni for selling Ganja. Based on this information, PW.4 intimated the information to his higher official and proceeded to the place namely Annanji Vilakku on Theni - Periyakulam Road along with Head Constable, where he found the appellants and A3 carrying white colour bags. He intercepted them by showing his identity and informed them about their right of search being made in front of an Executive Officer or Judicial Magistrate. But, the accused gave their consent in writing that the search can be made by the Police Official themselves and therefore, the bags carried by the accused were searched in their presence by PW.4 and 9 Kgs of Ganja were found in the bag belonging to A1, 9 Kgs of Ganja were found in the bag belonging to A2 and 7 Kgs of Ganja were found in the bag belonging to A3. He took two 50 gms of Ganja each from the bags recovered as sample and duly sealed them. Thereafter, he produced the accused before the Prohibition Enforcement Wing, Theni and three cases were registered by the Prohibition Enforcement Wing, Theni in Crime Nos.124 to 126 of 2005, under Section 20 (b) (ii) (B) of NDPS Act. He also intimated the relatives of the accused through Intimation Ex.P14 to Ex.P17. The First Information Report is marked as Ex.P18.

3.The samples collected were sent for chemical analysis and the Scientific Assistant of Regional Forensic Science Lab, Madurai, submitted his reports in Ex.P.7, Ex.P.10 and Ex.P13 in Crime No.125 of 2005 respectively. According to his reports, the presence of cannabis were found in the samples.

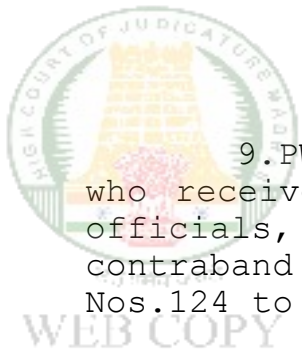
4.The further investigation was taken over by the Inspector of Police, Prohibition Enforcement Wing, Theni on 31.07.2005. He collected the lab reports and examined the witnesses and filed a final report as against the accused on 19.09.2005, for the offence under Section 8 (C) r/w 20(b) (ii) (B) of NDPS Act.

5.On the side of the prosecution 5 witnesses were examined and 19 documents were marked and 9 material objects were produced.

6.PW1 is the Sub Inspector of Police, Prohibition Enforcement Wing, who received the intimation, conducted the search, seized the contraband and registered FIR.

7.PW2 is the Head Constable attached with Kumuli Police Station, who stood as witness for the search and seizure, since no independent witness was prepared to be a witness for the same.

8.PW3 is the Scientific Assistant of Regional Forensic Science Lab, Madurai and he examined the samples received from the Special District and Sessions Court, for EC Act and NDPS Act Cases, Madurai, in Crime Nos.124 to 126 of 2005 and submitted his report, which are marked as Ex.P.7, Ex.P.10 and Ex.P13 respectively.



9.PW4 is the Sub Inspector of Police, Special Branch, Theni, who received the information and intimated the same to the higher officials, though Ex.P14, examined the accused, seized the contraband from them, arrested and registered the case in Crime Nos.124 to 126 of 2005.

10.PW5 is the Investigating Officer, who conducted further investigation, collected the reports from the Forensic Lab and filed the final report.

11.The incriminating materials from the prosecution were put to the accused under Section 313 CrPC and the accused have denied the same. Though the accused had stated that there were witnesses for their side, they had not examined any person as defence witness. In conclusion of the trial, the Special District and Sessions Court, for EC Act and NDPS Act Cases, Madurai, by order dated 21.08.2009 found the appellants guilty, convicted and sentenced them as stated above. As against the conviction and sentence, the appellants preferred the present criminal appeal.

12.Heard learned Counsel for the appellant and the learned Government Advocate (Crl side).

13.The learned Counsel for the appellants submitted that there is no individual search memo and the search memos were made by way of a common search and it is violative of the provision under Section 50 of NDPS Act. He also pointed out that A3 in this case is a woman and Section 50(4) of the NDPS Act mandates that a female shall be searched only by a female officer and in this case no such procedure was followed.

14.The information received was that two men and one woman came from Andhrapradesh to sell Ganja and on that information only, PW4 went and made search. However, he did not make any prior arrangement to examine A3, who is a woman, by a female officer and therefore, the mandatory provisions have been deliberately violated in this case and therefore, on that ground alone the prosecution case has to be rejected.

15.The learned Counsel also pointed out that the arrest was made on 31.07.2005 at about 11.30 am and the FIR was registered at 12.00 noon. Ex.P15 is the arrest intimation given to the accused, which contains the details of crime numbers and therefore, the arrest intimation as well as the First Information Report might have been prepared in the Police Station itself, even before effecting arrest and it is also violative of the provisions under the NDPS Act and on this ground also the prosecution case has to be thrown out.



16.It is further pointed that the samples have been taken from the contraband seized. According to PW4, the contraband was seized and weighed in the presence of the accused and 50 Gms from each bag has been taken as samples and those samples were sent for chemical analysis in RPR No.1148 of 2005 in Crime No.124 of 2005 and RPR No.1149 of 2005 in Crime No.125 of 2005, according to the report, they were 54 Gms and 60 Gms respectively. Hence, the samples analysed in the lab are not the samples taken at the time of search. Therefore, the trial Court has erred in accepting the lab reports for convicting the accused. He also pointed out that as per Sub Section 2 of Section 42, whenever the officer receives the information in writing under Sub Section 1 of Section 42, he shall intimate his immediate superior officer within 72 hours and only on their prior permission, he can proceed with the search and seizure. But in this case, no such procedure as contemplated under Sub Section 2 of Section 42 has been complied with and this failure on the part of the PW4 is also a material defect in the case of the prosecution.

17.Per contra, the learned Government Advocate (Crl Side) would contend that Section 50 of the NDPS Act is applicable only in cases, if any search is made on the person. But, in this case, contraband was found in the accused bags and the search was made only with the bags and this mandatory requirement as contemplated under Section 50 is not be applicable in this case. The learned Government Advocate has also relied upon the judgment of a Constitution Bench in the case of **State of Himachal Pradesh and Pawan Kumar**, reported in **[2005] 4 SCC 350** in this regard.

18.Insofar as the violation as stated by the learned Counsel for the appellants with regard to Sub Section 2 of Section 42 is concerned, it is only mandatory to intimate the superior officer about the intimation and there is no necessity for getting a prior permission to proceed for the search and further investigation. In this case, the intimation was received by PW4 and the intimation was also duly intimated to his superior and the same is also marked through Ex.P14. The contraband was seized on 31.07.2005 and on the same day itself the contraband reached the Court and so, there is no delay in the contraband reaching the Court. The variations pointed out by the learned for the appellant with regard to the weight of the samples, which have been taken and they were weighed by using ordinary scale in the open place, whereas, the the same was weighed at the lab in an advanced instrument inside the airtight room. However, the variations in weight are very minimal and these variations cannot affect the case of the prosecution.

19.According to the learned Government Advocate, the arrest card was also prepared after registration of the FIR and therefore, mentioning of the FIR in the arrest card is not a defect in the case



of the prosecution.

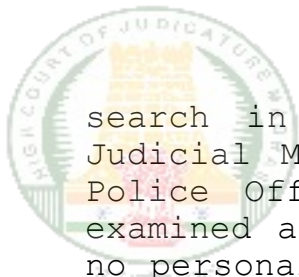
20. Heard the learned Counsel on either side and also perused the materials placed on record.

21. PW4 has received the intimation about the transport of contraband on 31.07.2005 at about 8.00 am and on receipt of the information, he informed the intimation to the higher official through Ex.P14 and thereafter, proceeded to the place namely, Annanji Vilakku on Theni - Periyakulam Road. Since no independent witness was willing to be a witness, he took the help of PW1 and PW2 for the same and in their presence, he examined the accused 1 to 3. The accused were informed about their right of search being made in the presence of an Executive Officer or before the Judicial Magistrate. However, the accused agreed to be examined by the Police Officials themselves and accordingly, PW4 examined the bags, which were carried by the accused and he found 9 Kgs of Ganja in each bag belonging to A1 and A2 and 7 Kgs of Ganja in the bag belonging to A3. He immediately weighed the contraband and also took samples of the said contraband, in the presence of PW1 and PW2 and took the accused and registered the case in Crime Nos.124 to 126 of 2005. The samples collected were also sent for chemical analysis and the Scientific Assistant, who analysed the recovered samples, by his reports Exs.P.7,10 and 13 has stated that the samples analysed contains cannabis.

22. Insofar as the ground raised by the appellants that the provision of Sub Section 2 of Section 42 was not complied with and based on the information, without obtaining any permission from the concerned authorities, PW4 proceeded with the investigation is concerned, it is to be noted what is contemplated under Sub Section 2 of Section 42 is only the intimation to be sent, about the information received by the concerned officer to the higher officials and in this case, such an intimation was also given by PW4 vide Ex.P14 and therefore, there is no violation of Section 42.

23. The learned Counsel for the appellants has also pointed out the violation under Section 50 (4) of the NDPS Act that female has to be searched only by a female officer. In this case the informant informed PW4 that two male persons and one female person came from Andhrapradesh. Even before search, PW4 was aware of the female accused, however, he did not take any steps to take a female officer for the search. This provision under Section 50(4) of NDPS Act cannot be made applicable to this case, since there is no personal search made and the bags alone were searched, as pointed by the learned Government Advocate, more over accused No.3 is not before this Court.

24. All the three accused were carrying bags and the contraband was found in the bags. There was no personal search made when they have been informed about their right of



search in the presence of the Executive Officer or before the Judicial Magistrate, they also volunteered for examination by the Police Officials themselves and therefore, their bags have been examined and from their bags, contraband was seized. When there is no personal search, the requirements under Section 50 will not come into play and therefore, it is not violative of provision under Section 50(4) as rightly pointed out by the learned Government Advocate. On this point, the learned Counsel for the appellants relied on the judgment of the Hon'ble Supreme in State of Rajasthan Vs Parmanand and another, reported in (2014) 5 SCC 345 and submits that breach of Section 51 NDPS Act would vitiate the search and therefore, the conviction of the respondent was illegal. In the said judgment relied on by the petitioner, the Hon'ble Supreme Court following the Judgment of the Constitution Bench in the case of State of Punjab Vs Baldev Singh reported in 1999 SCC (Cri) 1080, held as follows:

10. The conclusions drawn by the Constitution Bench, which are relevant for this case could be quoted: (*Baldev Singh case* [*State of Punjab v. Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] , SCC pp. 208-09, para 57)

"(1) That when an empowered officer or a duly authorised officer acting on prior information is about to *search a person*, it is *imperative* for him to *inform* the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to *inform* the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded *only* on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.



11. In the present case, the conviction is solely based on recovery of opium from the bag of Respondent 1 Parmanad. No Opium was found on his person. In Kalema Tumba Vs State of Maharashtra, this Court held that if a person is carrying a bag or some other article with him and narcotic drug is recovered from it, it cannot be said that it was found from him and therefore, it is not necessary to make an offence for search in the presence of a gazetted officer or a Magistrate in compliance with Section 50 of the NDPS Act.

25. In the case referred it was the respondent/accused informed the officers that they would like to be searched before PW5 J.S.Negi by PW10 and therefore, the Court held that it was breach of Section 51 of NDPS Act.

26. But, in this case, as rightly pointed out by the learned Government Advocate, the accused have been informed about their right to of search in the presence of an Executive Officer or before the Judicial Magistrate, but, they volunteered for examination by the Police Officers themselves and therefore, their bags have been examined. There is no personal search in this case and the contraband was recovered from the bags of the accused and therefore, it cannot be termed as violative of provisions under Section 50 of the Act.

27. It is also contended by the learned Counsel for the appellants that there is no independent witness and the records have been prepared even before the arrest. It is seen from records that PW4 has given explanation that they have asked some of the persons for being witnesses, but no was prepared to be a witness and therefore, he took the assistance of PW1 and PW2 for the search and seizure. The arrest intimation was also prepared by the officer after the registration of FIR and therefore, mentioning of Crime Numbers in the arrest intimation is not a material defect that the arrest intimation was made before registration of FIR.

28. The grounds raised by the petitioner that it was only a common search and no individual search was made, will not apply to this case, since no personal search was effected in this case, what searched are only the bags therefore, the provisions under Section 50 will not be applicable.

29. In view of the discussion, the criminal appeal lacks merits and is liable to be dismissed.

30. In the result, the Criminal Appeal is dismissed and the order dated 21.08.2009 passed in CC.No.366 of 2005 by the Special District and Sessions Court, for EC Act and NDPS Act Cases, Madurai is upheld. Since the appellants are on bail, the learned Trial Judge



is directed to secure the appellants and confine them, in accordance with law.

Sd/-

Assistant Registrar (AD-I)

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/ /2020

Sub Assistant Registrar(CS)

dsk

To

1)The Special District and Sessions Judge
for EC Act and NDPS Act Cases,
Madurai,

2)The Inspector of Police,
Prohibition Enforcement Wing,
Theni District.

3)The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Copy to:

The Section Officer, Criminal Section, (2 Copies)
Madurai Bench of Madras High Court,
Madurai.

Crl.A(MD)No.235 of 2009

16.09.2019

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