



Bail Slip

1.The 1st Appellant/Accused No.1 namely, Sekar, Male, Aged 45 years Son of Chinna Muthu, East Street, Gokilapuram, Uthamapalayam, Theni District, was directed to be released on bail vide order of this Court dated 27.10.2009 in MP(MD)No.3 of 2009 in Crl.A(MD) No.63 of 2009

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2.The 2nd Appellant/Accused No.2 namely Thangamalai, S/o.Ammavasai Thevar, was directed to be released on bail as per direction of this Court dt.04.06.2009 in MP(MD).2/2009 in Crl.A(MD)No.63 of 2009

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.09.2019

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.(MD) No.63 of 2009

1.Sekar

2.Thangamalai

... Appellants/Accused Nos.1 and 2

vs.

The State Rep. by,
The Sub Inspector of Police,
NIBCID, Theni, Theni District.
(Crime No.10&12 of 2004)

... Respondent /Complainant

PRAYER:- Criminal Appeal filed under Section 374 of the Code of Criminal Procedure, against the judgment and conviction rendered by the learned Special District and Sessions Judge(NDPS Act Cases), Madurai, in C.C.No.241 of 2004 vide his judgment dated 03.02.2009 by convicting the first appellant under Section 8(c) read with 20(b) (ii) (C) of the N.D.P.S Act and sentenced him to under go 10 years R.I and to pay a fine of Rs.1,00,000/- in default to undergo 3 months S.I and by convicting the second appellant under Section 8(c) read with 20 (b) (ii) (B) of the N.D.P.S Act and sentenced him to under go 3 years R.I and to pay a fine of Rs.5,000/-in default to undergo one moth S.I.

For A2 : Mr.R.Anand

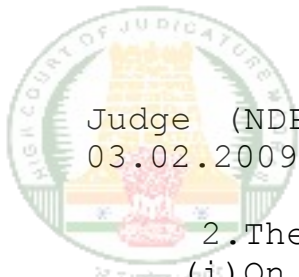
For A1 : Mr.R.Senthilkumar

For Respondent : Mr.K.K.Ramakrishnan

Additional Public Prosecutor

JUDGMENT

This criminal appeal has been filed against the conviction and sentence imposed by the learned Special District and Sessions Judge, Madurai.



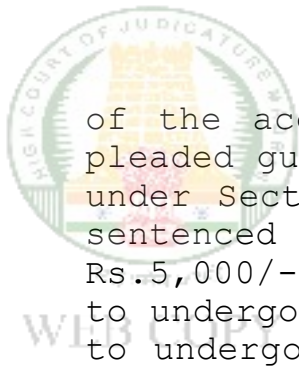
Judge (NDPS Act Cases), Madurai, in C.C.No.241 of 2004 , dated 03.02.2009.

2.The case of the prosecution in brief is as follows:-

(i)On 18.01.2004, while P.W.3/Sub Inspector of Police and P.W.5/Head Constable were on duty at about 4.00 a.m., one informant came in person and had informed that some persons were selling Ganja in Theni to Periyakulam Road, near Annanchi Villakku, Varattaru bridge and if the police officials would come to that place immediately, he would identify the accused. P.W.3/Sub Inspector of Police reduced the same (Ex.P.9) in writing and placed before the Superior Officers. After obtaining directions from superiors, the police officials went to the spot at 06.00 a.m, where, the informer identified the persons, who were coming with a white polythene cover in a suspicious manner. P.W.3, P.W.5 and other police officials interrogated the suspected persons about the name and address. The Sub Inspector of Police has given the reason as to why the appellants were searched and then, the police officials explained the mandatory provision contemplated under Section 50 of the NDPS Act, to be searched before the Judicial Magistrate or a Gazetted Officer and the appellants given their consent to conduct search by P.W.3/Sub inspector of Police. The police called two independent witnesses. Since they did not come forward to stand as witness, they decided to search themselves. After obtaining the letter, they searched in the presence of the team of officers and recovered the contraband from A-1 weighed as 21 kg, A-2 and A-3 weighed as 5 kg each and A-4 weighed as 2 kg. Then, they had taken eight samples of weighing 50 grams each from the recovered contraband and the samples were marked as S1 to S8. The remaining ganja was also packed and labelled and marked as P.1 to P.4. P.W.3 has seized all the above material objects under a recovery mahazar.

(ii)The appellants were not having valid license for selling ganja. Thereafter, P.W.3 has prepared arrest memo (Ex.P.12), which was served to the appellants. After the procedural formalities, the respondent police registered a case in Crime Nos.10 to 13 of 2004, against the appellants and other two accused for the offence punishable under Section 8(c) r/w 20(b) (ii)(B)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act') and the said FIR was marked as Ex.P.14. The arrest of the appellants was informed to their relatives. After completing the investigation, the respondent police has laid a charge sheet before the learned Special District and Sessions Judge (NDPS), Madurai and the learned Judge has taken cognizance for the offence under Section 8 (c) r/w 20(b) (ii)(B)(C) of NDPS Act.

3. After framing the charges, at the time of questioning, two



of the accused namely A-2 and A-4 admitted the guilty and also pleaded guilty. Based on the plea, the Trial Court convicted them under Section 8 (c) r/w 20(b) (ii) (B) of the NDPS Act and A2 is sentenced to undergo five weeks R.I and to pay a fine of Rs.5,000/- in default to undergo one year R.I and A4 is sentenced to undergo 10 weeks R.I and to pay a fine of Rs.1,000/- in default to undergo six months R.I. The accused A1 and A2 have contested the case, since they denied the offence and laid the charge.

4.In order to prove the case of the prosecution, on the side of the prosecution as many as 6 witnesses were examined as P.W.1 to P.W.6, 16 documents were marked as Ex.P.1 to Ex.P.16 and six material objects were marked as M.O.1 to M.O.6. After completing the prosecution side evidence, when incriminating circumstances were put to the appellants / accused, they have denied the oral evidence and documents produced by the prosecution as false. However, they did not choose to examine any witness and mark any document on their side. Their defence is a total denial of the prosecution case.

5.Having considered all the above, the learned trial Judge convicted the first appellant for the offence under Section 8 (c) r/w 20(b) (ii) (C) of the NDPS Act and sentenced him to undergo 10 years R.I and to pay a fine of Rs.1,00,000/- in default to undergo 3 months S.I and also convicted the second appellant under Section 8 (c) r/w 20(b) (ii) (B) of the NDPS Act and sentenced him to undergo 3 years R.I and to pay a fine of Rs.5,000/- in default to undergo one month S.I. Challenging the conviction and sentence, the appellants are before this Court with the present criminal appeal.

6.The learned counsel appearing for the appellants would submit that the mandatory provision of Section 50 of the NDPS Act has not been complied with. He would further submit that the notice or summon was not given independently and that only a common notice and only a single mahazar was prepared and there was no individual mahazar, which is fatal to the case of the prosecution. He would further submit that four persons were involved in the offence and for all, common notice was given and common examination was conducted, which is also fatal to the case of the prosecution and also the appellants were much prejudice on the common notice. He would also submit that the relatives of the appellants have not been informed, though the police officials have stated that one Ravi was informed as the relative of the appellants, but they were not stated in what way, he is relative to the appellants. Therefore, the arrest of the appellants have not been informed at the time of arrest and soon after, the arrest of the accused has not duly informed with the relatives. Therefore, they have not complied with the mandatory provision and



also the various directions given by the Hon'ble Apex Court in various decisions.

7.He would further submit that the recovery has not been made before the independent witnesses and also it is recovered by the team of the police officials, who have not supported the case of the prosecution. P.W.4 in his cross examination has stated that he has not seen at the time of recovery what was recovered from the accused. Therefore, the recovery was not proved. He would further submit that Section 57 of the NDPS Act has also not been complied with, since soon after the recovery of the contraband and arrest of the accused, which was not duly intimated to the superiors. Therefore, it is also fatal to the case of the prosecution. In support of his contentions, the learned counsel placed reliance on the judgment of this Court reported in **2018 (1) L.W (Crl) 353** in the case of **Tamilvel and others Vs. State rep by the Inspector of Police**.

8.The learned Additional Public Prosecutor appearing for the respondent would submit that after completing all the formalities, when the charges were framed against the four persons, out of which, two of them admitted guilty and based on the plea of guilty, the Trial Court convicted them under Section 8 (c) r/w 20 (b) (ii) (B) of the NDPS Act and the third accused was sentenced to under go five weeks R.I and to pay a fine of Rs.5,000/- in default to undergo one year R.I and the fourth accused was sentenced to 10 weeks and to pay a fine of Rs.1,000/- in default to undergo six months R.I. These appellants only have contested the case, since they denied the offence and hence, charges were framed. He would further submit that after completing the procedure, the police officials have also submitted the report to P.W.6, the immediate superior under Section 57 of the NDPS Act. Therefore, the submission made by the learned counsel appearing for the appellants is not acceptable.

9.He would further submit that the occurrence have been taken place on 18.01.2004 whereas P.W.4 was examined before the Court in the year 2007, which was after a lapse of three years. Due to the same, he would have forgot. Therefore, mere some contradictions may not be sole ground to disbelieve the evidence of prosecution. He would also submit that the judgment relied on by the learned counsel for the appellants is not applicable to the present case on hand, since in this case, the contraband has not been recovered from the body of the accused and the appellants have voluntarily handed over the bags of Ganja. Two of the accused also admitted guilty. Therefore, Section 50 of the NDPS Act is not strictly applicable to the present case on hand. Therefore, there is no violation of mandatory provision and the recovery of ganja is proved beyond all



reasonable doubts. Hence, there is no reason to interfere with the judgment passed by the trial Court.

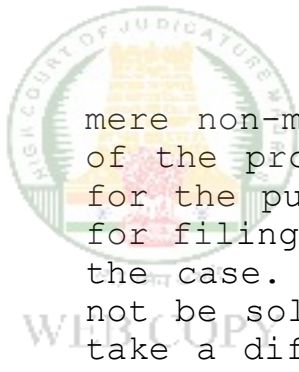
10. Heard the learned counsel appearing for the appellants and the learned Additional Public Prosecutor appearing for the State and also perused the materials available on record.

11. On a perusal of the entire material records, it reveals that based on the source information and identification of the informer, P.W.3 interrogated the appellants and complied with the statutory formalities. P.W.3, served search notice on the appellants in the presence of police officials. Then, mahazar was also prepared by P.W.3 and recovery also made in the presence of official witnesses. The Sub Inspector of Police has given the reason as to why the appellants were searched, recovered the contraband and arrested the accused in the presence of Police officials. P.W.3/Sub-Inspector of Police, arrested the accused and also intimated to the relatives of accused and a case was registered against the appellants. All the samples and other remaining contraband were seized with seizure mahazar and placed before superior. After complying with all the statutory formalities, the samples of the seized ganja were sent to Forensic Department for analysis and report. A perusal of Analysis report, revealed that the samples of ganja contains the chemical element of cannabinoid.

12. Even though the learned counsel for the appellants would submit that the common notice is not permissible under Section 50 of the NDPS Act and also rely on the judgment of the ***Tamilvel and others Vs. State rep. by The Inspector of Police*** reported in ***2018 (1) L.W. (Cr1) 353***, this Court on carefully reading the notice, found that the name of the persons have been separately mentioned and in the mahazar the quantity of the contraband has also been separately intimated and the same were recovered and all the accused have signed separately in that.

13. A perusal of the records reveals that the appellants have understood their rights and also they handed over the Ganja separately and also the same were recovered under the mahazar. Though P.W.3 called the independent witnesses, none of them came forward to stand as independent witnesses. Therefore, in the presence of the P.W.4, recovered it and also collected the samples of ganja and sealed it in accordance with the provisions of the rule as contemplated under the NDPS Act.

14. Though the learned counsel for the appellants would submit that the relative has not been duly intimated and the person who was said to have stated, as the relative, has also not been

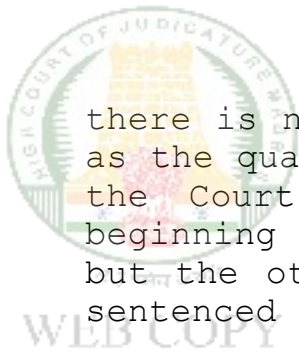


mere non-mentioning of the relative may not be fatal to the case of the prosecution. The arrest of the accused was intimated only for the purpose that they have the right to move before the Court for filing bail applications and also engaging a counsel to defend the case. Therefore, the mere non-mentioning of the relative may not be sole ground to disbelieve the case of the prosecution and take a different view. Only the Court has to see in what way the accused has been prejudice in giving a joint notice and also non mentioning of the relatives. This defence has not been taken in the earlier occasion, when they were produced before the Magistrate. But this defence is taken only in the belated stage at the time of the argument before this Court. Therefore, it is not sole ground may not give support to disbelieve the case of the prosecution.

15.On a reading of the entire evidence, it reveals that Section 42 of the NDPS Act has been complied with. Since there is no recovery from the body of the persons and there is no search on the personal body of the persons, the non compliance of Section 50 is also not fatal to the case of the prosecution. Therefore, Section 50 is also complied with. Though the right of the parties has been intimated to the accused, they have opted that not to take them either before the Magistrate or before the Gazetted Officer, but they opted to search the recovery officer themselves. Therefore this Court has not found any violation of the Section 50 of the NDPS Act.

16.So far as Section 57 of the NDPS of Act is concerned, soon after completing all the formalities, the recovery officer produced the report before the superior officer. Therefore, this Court does not find any violation of Section 57 of the NDPS Act. Out of four accused, two accused already admitted the case and pleaded guilty. The admission of the two accused doesn't mean that the other accused also has committed the offence, but whereas, in this case, the prosecution has proved that based on the secret information, they went to the spot and recovered the contraband and thereafter, arrested the accused and also taken the samples and the samples of the seized ganja were sent to Forensic Department for analysis and report was received and expert was examined and opinion was also marked in this case and found that the seized contraband is having substance of ganja.

17.The learned counsel for the second appellant pointed out that two accused (A2 and A3) having equal quantity of ganja and one was convicted only for 5 weeks and other person was convicted for three years. So far as, the sentence is concerned, it is purely discretionary power of the Court. However, the sentence of imprisonment should not exceed the maximum sentence of imprisonment imposed in the provisions. Therefore, in this case,



there is no violation within the four corners of the law. So far as the quantum is concerned, only it is the discretionary power of the Court. Since one of the accused (A2) has admitted in beginning itself and pleaded guilty, he was given only five weeks, but the other person (A3) only contested the case, hence, he was sentenced to undergo three years imprisonment.

18.On reading of the entire materials, this Court as an appellate Court independently re-appreciate the entire evidence and finds that the appellants have committed the offence under Section 20(b)(ii)(B)(C) of NDPS Act and the first appellant is found guilty under Section 20(b)(ii)(C) of NDPS Act and the second appellant is found guilty under Section 20(b)(ii)(B) of NDPS Act. As far as the sentence is concerned, it is purely a discretionary power of the trial Court. As far as the first appellant is concerned, it falls under commercial quantity and the minimum sentence of 10 years and minimum fine of rupees one lakh was imposed on him. Therefore, there is no reason to interfere with the judgment of conviction and sentence passed by the learned Sessions Judge, insofar as the first appellant is concerned. So far as the second appellant is concerned, the sentence of three years is modified into 14 months rigorous imprisonment and the fine amount is unaltered.

19.With the above modification, this criminal appeal is dismissed. Bail bond, if any, executed by the appellants shall stand cancelled. The trial Court is directed to secure the appellants and commit them in prison to undergo the remaining period of sentence if any.

Sd/-

Assistant Registrar (CS-I)

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Sub Assistant Registrar(CS)

cp

To

1.The Special District and Sessions Judge
(NDPS Act cases), Madurai

2.The Superintendent, Central Prison, Madurai

<https://hcservices.ecourt.gov.in/hcservices/>
3.The Superintendent of Police, Theni District.



4.The Sub Inspector of Police,
NIBCID, Theni, Theni District.

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

Copy to
The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.R.SENTHILKUMAR, Advocate (SR-90307[F] dated
30/09/2019)

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28.09.2019

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