

BAIL SLIP

Kasinathan Male/aged 46 years/2009, S/o.Mokkaiah,
Appellant/Sole Accused was released on bail of this Court order
dated 04.06.2009 made in MP(MD)No.1/2009 in CRL.A.(MD)No.76/2009.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 19.10.2019

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRL. A.(MD) No. 76 of 2009

Kasinathan .. Appellant/Sole Accused

-Vs-

State by Inspector of Police,
NIB CID, Theni,
(In Cr.No.124 of 2003) .. Respondent/Complainant

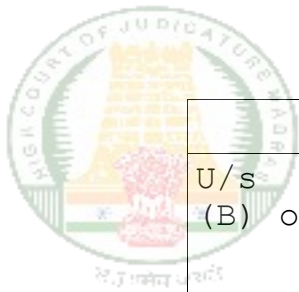
Criminal Appeal filed under Section 374 of the Criminal Procedure Code, praying to set aside the order passed by the learned Special District and Sessions Judge (For NDPS Act Cases), Madurai, in C.C.No.410 of 2004 by the judgment, dated 13.03.2009, convicting the Appellant under Section 8(C) r/w 20(b)(ii)(B) of NDPS Act and sentenced him to undergo 3 years rigorous imprisonment and to pay a fine of Rs.5,000/-, in default of payment of fine to undergo three months simple imprisonment.

For Appellant : M/s.M.Maria Vinola, Legal Aid Counsel
Mr.B.Viswanathan

For Respondent : Mr.K.K.Ramakrishnan,
Additional Public Prosecutor

JUDGMENT

The appellant/Sole Accused was charged and tried before the learned Special District and Sessions Judge (For NDPS Act Cases), Madurai, in C.C.No.410 of 2004, for the offence under Section 8(C) r/w 20(b)(ii)(B) of NDPS Act and on being found guilty, was convicted and sentenced as under :-



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Section	Sentence
U/s 8(C) r/w 20(b)(ii) (B) of NDPS Act	Undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.5,000/-, in default to undergo rigorous imprisonment for a period of three months.

Aggrieved by the said conviction and sentence, the present appeal has been preferred by the appellant/Sole accused.

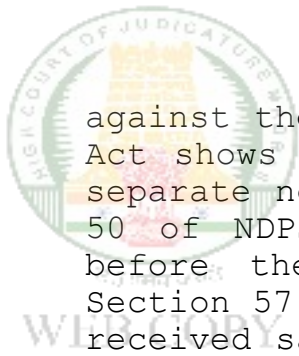
2.The respondent police registered the case against the appellant for the offence under Section 8(C) r/w 20(b)(ii)(B) of NDPS Act in Crime No.124 of 2003. After the investigation, he laid the charge sheet before the Special District and Sessions Judge, (For NDPS Act), Madurai. The learned Special Judge taking cognizance of the complaint and after completing the formalities, framed the charge against the appellant for the offence punishable under Section 8(C) r/w 20(b)(ii)(B) of NDPS Act.

3. In order to prove the case of the prosecution before the trial Court, on the side of the prosecution, as many as five witnesses have been examined as PW1 to PW5 and 11 documents were marked as Exs.P1 to P11. Besides, three material objects also were marked as M.O.1 to M.O.3.

4. After completing the prosecution witnesses, when the accused was questioned u/s 313 Cr.P.C. about the incriminating circumstances appearing against him, he denied the same. On the side of the defence, no witness was examined and no document was marked.

5. The learned Special District and Sessions Judge, after completing the trial and hearing the arguments advanced on either side, convicted the appellant for the offence under Section 8(C) r/w 20(b)(ii)(B) of NDPS Act and sentenced him to undergo Rigorous imprisonment for a period of three years and imposed fine of Rs.5,000/-, in default to undergo simple imprisonment for a period of three months. Challenging the said judgment of the learned Special District Judge, the appellant has filed the present appeal before this court.

6. The learned counsel for the appellant would submit that the prosecution has not followed Section 42 of the NDPS Act. He further submitted that the arrest and seizure is illegal. The respondent police did not follow the procedure contemplated under the law. The appellant/accused was not duly intimated about his right to be searched in the presence of Gazetted Officer or Magistrate as contemplated under Section 50 of the NDPS Act. The learned counsel further submitted that along with the appellant/accused one more accused person was also arrested and separate case was registered



against them, whereas notice issued under Section 50(1) of the NDPS Act shows that common notice was given to both the accused and no separate notice was given. Therefore, there is violation of Section 50 of NDPS Act. The report submitted by the Searching Officer before the Investigating Officer is not as contemplated under Section 57 of the NDPS Act. PW1 - Scientific Officer stated that he received sample Ganja contained only 41 grams, whereas the Recovery Officer has stated that he collected 50 grams of Ganja for sample. Therefore, this difference creates a doubt as to whether the actual sample material collected from the accused were sent to the Court for test. The learned Special Judge failed to consider all these mandatory provisions as contemplated under the NDPS Act and wrongly convicted him.

7. The learned counsel for the appellant relying upon the Judgment of the Honourable Supreme Court passed in the case of **Vijaysinh Chandubha Jadeja Vs. State of Gujarat** reported in **(2011) 1 Supreme Court Cases 609**, submitted that if more than one accused involved in a case, the notice is to be given to the accused individually before making search. But, in this case, without issuing such notice individually, common notice have been issued. As there is procedural lapses, the conviction and sentence imposed on the appellant/accused are liable to be set aside. Thus, he prayed to allow this appeal.

8. The learned Additional Public Prosecutor would submit that in this case, the occurrence took place on 13.06.2003. P.W.4 - Sub Inspector of Police received the information from the informant, who appeared before the Police Station personally and informed about smuggling of contraband. After receiving the information, he obtained an instruction from his Higher officials and proceeded with the Head Constable and Police Constables to the spot viz., Vikramangalam - Madurai Road, Kodikulam and two persons came there in suspicious manner. When they enquired, they voluntarily said to inspect them and they admitted that they have Ganja with them. The appellant had 10 Kilograms of Ganja and other accused had 5 kilograms of Ganja. The Police seized the same by following the provision of Section 50 of the Act. Though the Police called two persons to stand as witnesses, they did not accept the same stating that they have urgent work. Therefore, the Police, left with no other option, went to the place of occurrence and intercepted the accused. Even after giving due notice under Section 50 of the Act, since the appellant/accused did not opt to be produced before either Magistrate or the Gazatted Officer, the Recovery Officer himself had made search, but nothing was recovered from his body. However, the accused himself voluntarily surrendered the plastic carry bag which was in his hand. After recovery of contraband from the accused and taken the samples weighing about 50 grams in two bags and sealed the same in accordance with law and also arrested him and subsequently produced him before the Investigating Officer with report under Section 57 of the NDPS Act.



9. He would further submit that the Investigating Officer, thereafter, had registered a case and produced the accused before the Judicial Magistrate on the same day with the accused and the material objects. The Judicial Magistrate also in turn has made endorsement and directed to be produced before the concerned Court and therefore, he subsequently produced the accused before the Special Court. The Special Court, after completing the formalities, had taken the case on file. After the completion of trial, the trial Court came to the conclusion that the appellant/accused has committed the offence under Section 8(C) r/w 20(b)(ii)(B) of NDPS Act. In this case all the mandatory provisions of the NDPS Act has been meticulously followed and there is no violation of the mandatory provisions. Further, he would submit that Section 50 of the Act is not applicable to the present case on hand, since no contraband was recovered from the body of the person. No prejudice would be caused to the appellant/accused, since common notice was given under Section 50 of the Act. The appellant voluntarily surrendered the carry bag to the Recovery Officer and the Recovery Officer found that there was Ganja in the bag. Thereafter, they collected the sample for chemical analysis and completed the formalities. Therefore, there is no violation of the mandatory provisions. The discrepancies pointed out by the learned counsel for the appellant are only material contradictions and the same will not go to the root of the case. The learned Additional Public Prosecutor for the State further submits that the learned trial Judge elaborately discussed all the points and also given answer to the queries raised by the defence and therefore, there is no merit in the appeal.

10. Heard both sides. Perused the records carefully.

11. The case of the prosecution is that on 13.06.2003, when P.W.4 was on duty in his office at about 5.00 a.m., he received secret information from the informant. The informant, who had appeared in the Station, gave the information that some persons are in possession of Ganja and after recording the same in writing in the General Case Diary maintained in the Police Station, the same was placed before the Inspector of Police and after obtaining the directions from the Inspector of Police, P.W.4, along with his team of constables, went to the place where the informant informed. According to PW4, when they went to the Vikramangalam - Madurai Main Road, Kodikulam, two persons were appeared in suspicious manner and therefore, the Police caught hold of them and they had an enquiry with the accused persons and also informed the right of them to be searched before the nearby Judicial Magistrate or any other Gazetted Officer. But, the accused person consented to make the search by PW4 himself. Hence, after serving notice under NDPS Act, search was made by PW4, but nothing was recovered from the body of the accused. Further, the appellant/accused voluntarily surrendered the carry bag in his hands. PW4 found 10 kilograms of Ganja in the

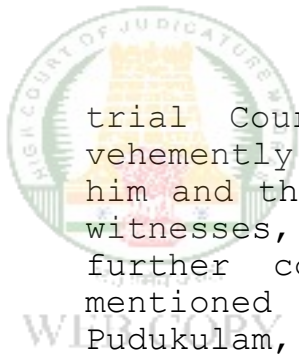


bags. Thereafter, they took 50 grams of sample and sealed the same as contemplated under the Act. Since no independent witness came forwarded to stand as a witness, they arrested the accused. Subsequently, the arrest was intimated to their relatives and after preparing report under Section 57 of the Act produced the same before PW5 - Inspector of Police. PW5, after completing the formalities, registered the FIR and sent to the Court on the same day along with the accused and recovered contraband with sample bags. After the formalities, the Special Court also took cognizance of the offence and after trial, convicted the appellant/accused.

12. In this case, the Officer, who had tested the sample bag was examined as PW1 and he clearly narrated about the sample received from the Court. He has also stated that the seal was intact and after testing the samples, he found that the same are substances of Ganja and sent a report with remaining sample to the Special Court. During the trial, the report submitted by PW1 was marked as Ex.P3. The Head Constable, who accompanied with PW4 - Recovery Officer was examined as PW3. PW3 narrated the fact that the Recovery Officer, who received the information from the informant, recorded the same in writing under Section 42 of the NDPS Act. He has narrated that after recording the information, he went to the spot after obtaining direction from the Inspector of Police along with the team of constables. He has also spoken about information given to the accused about his right under Section 50 of the Act; recovery of the contraband; preparation of Mahazar; taking samples; arrest of the accused and filing of report under Section 57 of the Act.

13. From the complete reading of the evidences PW1 to PW5, it could be seen that the prosecution has established that the appellant / accused was having Ganja weighing about 10 Kilograms without any licence or the permission from the competent authority and thereby he has committed the offence under Section 8(C) r/w 20 (b)(ii)(B) of NDPS Act. Therefore, the recovery of the Ganja from the appellant was established and once the possession and recover of the Ganja from the appellant is established, it is for the defence to establish that he was not having the contraband or he was having the contraband with valid licence or permission from the competent authority. Thus, the prosecution has proved the guilt of the accused.

14. On reading of the entire evidence of the prosecution and also oral and documentary evidences produced before the Special Court and the Judgment of the Special Court, this Court is of the view that the trial Court has rightly appreciated the evidence and given the finding that the appellant has committed the offence under section 8(C) r/w 20(b)(ii)(B) of NDPS Act and on reading of the materials and also the judgment, this Court does not find any perversity in appreciation of the evidence by the trial Court and

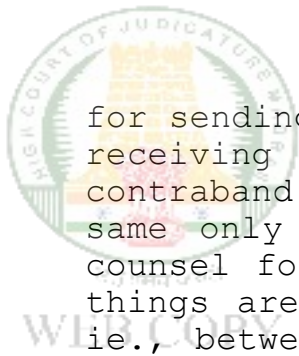


trial Court. However, the learned counsel for the appellant vehemently contended that the false case has been foisted against him and that there are material differences between the prosecution witnesses, which creates suspicion on the prosecution case. He further contended that the place of occurrence in one place mentioned as Kodikulam and in another place it is mentioned as Pudukulam, which itself creates suspicion. Therefore, the prosecution has not established the actual place of the occurrence as to where they recovered the contraband from the appellant. Further, he contended that though the appellant was arrested along with other accused, common notice was given in violation of Section 50 of the NPDS Act. He further contended that there is a contradiction in sample weight. According to PW4, he has taken 50 grams of sample and as per the evidence of PW1, at the time of receiving the same, it was weighing about only 41 grams.

15. As far as the place of occurrence is concerned, in all the documents, it is very clearly stated that place of occurrence is only Vikramangalam - Madurai Main Road, near Kodikulam. Hence, it is not the reason to disbelieve the evidence of prosecution, when all the documents clearly stated that it is nearby Kodikulam. Therefore, the objection raised by the learned counsel for the appellant in respect of place of occurrence is not acceptable and the trial Court has also rightly given the reason for rejection of this defence.

16. As far as notice issued to the appellant along with the accused in the other case under Section 50 is concerned, as per the Judgment of Full Bench of this Court, Section 50 have no effect, when there is no contraband is recovered from the body of the persons while searching. In this case, nothing has been recovered from the body of the accused person and it is also established that while intercepting the accused/appellant, the appellant himself voluntarily surrendered the carry bag which was in his hand. Further Ex.P5 - Consent letter for search itself shows that the appellant has clearly understood his rights and signed in the Consent Letter. Therefore, no prejudice would be caused to the appellant, since common notice was given to both the accused. Further, the appellant has faced the separate case and separate trial. Reading of Ex.P5 further shows that PW4 made the appellant to understand the rights contemplated under Section 50 of the Act and the appellant also understood the same and subsequently, he has not raised any objections, even at the time of his production before the Court for remand. Therefore, such objection raised at the time of trial cannot be given much weight. Therefore, under these circumstances, the defence taken by the appellant in this regard cannot be sustained and hence, the same is rejected.

17. Regarding the difference in weigh of sample is concerned, it is no doubt that PW4 has clearly stated that he has taken 100 grams of sample and put it in two bags and produced before the Court

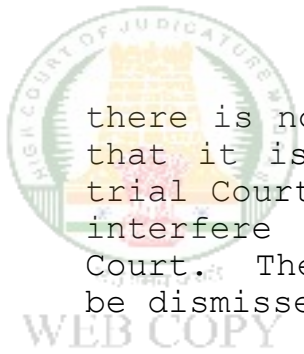


for sending the sample bags for test. PW1 stated that at the time of receiving the sample, it was weighing only about 41 grams. The contraband was admittedly recovered on 13.06.2003 and PW1 tested the same only on 15.07.2003. As rightly pointed out by the learned counsel for the State, with regard to the weighing of samples, two things are possible. One thing is that in the intervening period i.e., between the period of taking sample and testing the sample, the wet in Ganja may be dried and another thing is that weighing machine might have shown the variations. The Recovery Officer - PW4 weighed the sample by one machine, whereas PW1 weighed the same by another machine in the Lab. Therefore, there is a possibility of difference in weight. Therefore, mere difference in weight may not be the reason for disbelieving the case of the prosecution.

18. This Court is not convincing with the reasons stated by the learned counsel for the appellant as the defence has not established that the seal which was put by the officers and the Court subsequently tampered. At least, if the Lab found that the seal was tampered, then the submission of the appellant can be taken into account. But admittedly, in this case, the chance of tampering of the seal of the sample bag has not been proved. Therefore, the contention raised by the learned counsel for the appellant is not acceptable and hence, it is rejected.

19. As far as the report under Section 57 of the Act and the contraband produced before the Magistrate under Form 95 is concerned, as rightly stated by the trial Court, Sections 55 to 57 are not the mandatory provisions. However, in this case, PW4 has clearly stated that after completing the formalities, he submitted the entire materials and the accused before PW5. PW5 also stated that he received the report submitted by PW4 and subsequently, registered the case. The learned counsel for the appellant stated that during the cross examination, PW5 has stated that he has not acknowledged the report. This Court is of the view that it will not be the sole ground to disbelieve the case of the prosecution. Further, the endorsement made by the Magistrate which itself clearly shows that on 13.06.2003 itself the FIR, contraband and accused were produced before the Magistrate. The Magistrate made an endorsement that the same may be produced before the competent Court and he returned the contraband. The same was subsequently produced before the Special Court. Therefore, at the time of appearing before the Special Court in the first instance the appellant has not raised such a defence that the contraband was not produced before the Magistrate and the Police kept the contraband till it was produced before the Special Court. Therefore, such defence cannot be taken at the time of trial.

20. This Court does not find any reason to accept the various defence taken by the appellant at the time of trial and the trial Court also appreciated all the oral and documentary evidences and



there is no perversity in the appeal. Further, this Court has found that it is a case with cogent and convincing evidence before the trial Court. This Court does not find any sound ground and reason to interfere with the well founded judgment of the learned Special Court. There is no merit in this appeal. This appeal is liable to be dismissed.

21. In view of the above, this criminal appeal is dismissed and the conviction passed by the learned Special District and Sessions Judge (For NDPS Act Cases), Madurai, in C.C.No.410 of 2004 by the judgment, dated 13.03.2009 is confirmed. However, considering the facts and circumstances of the case and the year of the occurrence and also considering the fact that the appellant has no bad antecedent, this Court is of the view that ends of justice would be met if the sentence of imprisonment alone is reduced to two years rigorous imprisonment, instead 3 years imprisonment. Accordingly, the sentence of imprisonment passed by the trial Court is reduced to two years of rigorous imprisonment instead 3 years of imprisonment. The sentence already undergone by the appellant shall be given set off.

22. With the above modification, this Criminal Appeal is dismissed.

23. Since it is informed by the learned Additional Public Prosecutor that the appellant/accused was already secured and he is undergoing sentence, there is no separate order necessary regarding the securing of accused.

24. This Court place on record its appreciation for an elaborate arguments advanced by the learned counsel engaged by the Legal Aid Authority. The Legal Aid Authority shall pay fees to the learned counsel as per the rules.

Sd/-
Assistant Registrar

/True Copy/

Sub Assistant Registrar

To

1. The Special District and Sessions Judge
(For NDPS Act Cases), Madurai.
2. The Superintendent of Prison,
Central Prison, Madurai.



3. The Inspector of Police, NIB CID, Theni,
4. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.
5. The Section Officer, Criminal Records,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1 CC to M/s.M.MARIA VINOLA, Advocate (SR-93842[F] dated 23/10/2019)

TM

TE/JC/SAR-II : 17/02/2020 : 9P/8C

CRL.A (MD) No.76 of 2009
19.10.2019