

Bail Slip

That the Appellant/Accused Viz., Rukmani @ Maniamma was enlarged on bail made in CrI.M.P.No.4390/2016 in CrI.A.No.279/16 dated 15/04/2016.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:21.12.2020

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

CrI.A.No.279 of 2016

Rukmani @ Maniamma ... Appellant/Accused

Vs

Inspector of Police,
NIB CID,
Chennai.

(On the file of NIB CID, Chennai) ... Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374 (2) of Criminal Procedure Code praying to set aside the Judgment dated 06.04.2016 made in C.C.No.190 of 2005, on the file of the I Additional Special Court under NDPS Act, Chennai.

For Appellant : Mr.T.S.Sasikumar.

For Respondent : Mr.S.Karthikeyan,
Additional Public Prosecutor

J U D G M E N T
(through Video Conference)

The present Criminal Appeal has been filed to set aside the Judgment of conviction and sentence passed by the I Additional Special Judge, I Additional Special Court under NDPS Act, Chennai in C.C.No.190 of 2005 dated 06.04.2016.

2.The appellant is the sole accused. By Judgment dated 06.04.2016, the I Additional Special Judge, I Additional Special Court under NDPS Act, Chennai convicted the appellant under Section 8(c) r/w 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act and sentenced to undergo rigorous

imprisonment for a period of six months and to pay a fine of Rs.1,000/-, in default to undergo simple imprisonment for a period of one month.

3.Challenging the said conviction and sentence, the appellant / accused is before this Court by filing the present Criminal Appeal.

4.The case of the prosecution in nutshell is as follows:

(i)On 27.03.2005, PW2 Thananjayan, Head Constable of Narcotics Intelligence Bureau received a message at 10.00 a.m. from the informant stating that the accused was in possession of ganja to sell in retail and whole sale basis in the junction of the T.P.Chatram main road, 21st cross street, Chennai and if that place is monitored, ganja could be seized and he could identify the accused in person. After receiving the information, PW2 registered the same in writing under Ex.P.3. Further, he submitted the said written information before the Sub Inspector of Police and obtained order for further proceedings.

(ii)Subsequently, PW2 entered into the scene of occurrence along with PW3 Kesavaramachandran, Head Constable, PW4, N.Usha, Home Guard and with one Anaimalai. PW2 reached the scene of occurrence at 11.00 a.m. and was monitoring there. At 11.30 a.m., the accused came with white colour polythene bag in her right hand and was identified by the informer. PW2 introduced himself to the accused and enquired the age and address of the accused. He called one Subramani and Rani to be witnesses for recovering the contraband which was possessed by the accused. But they refused to stand as witnesses. Hence, PW3 is asked to stand as a witness for the proceedings. Before that PW2 explained the right having by the accused under Section 50 of Narcotic Drugs and Psychotropic Substances Act. In this regard, the accused told that she could be searched by PW2 itself. Therefore, the notice of search under Ex.P.4 signed by PW2 was served to accused and thereafter, search was made by PW2 with the assistance of PW4, home guard Usha.

(iii)The accused handed over the bag to PW2 and when the bag was opened, PW2 found that there was ganja inside the bag. PW2 weighed the ganja and the weight is 2.100 kilograms. PW2 took two samples of each 50 grams respectively. The samples and the bulk contraband were packed and sealed with NIB seal. The Label containing particulars were affixed in the sample packets and in the bulk quantity. Witnesses, PW2 and accused appended their signatures in Ex.P.5 Mahazar which was prepared by PW2 for the seizure of contraband. The accused gave voluntary statement at 12.30 hrs and the same was recorded by PW2 in the presence of

same witnesses. The accused was arrested at 13.00 hrs for possession of contraband without licence or permission. Arrest memo under Ex.P.6 was prepared by PW2 and served to the accused.

(iv)PW2 reached the NIB office at 14.00 hrs with the accused and with the case property. He registered the case against the appellant in Crime No.29 of 2005 under Section 8(c) r/w 20(b) (ii)(B) of the Narcotic Drugs and Psychotropic Substances Act. PW2 also gave telegram (Ex.P.8) to the daughter of the accused in respect to the arrest of her father. Further, he prepared a report under Section 57 of the NDPS Act (Ex.P.9) and handed over the same to the Sub Inspector of Police, Murugaian at 16.00 hrs. PW2 also produced the case property before the Court along with Form 95 (Ex.P.10).

(v)Upon the receipt of the case property as per the request made by the investigation officer, samples collected from the contraband was forwarded to the lab for chemical examination. In turn, PW1, Shankar kumar worked as Scientific Assistant in Tamil Nadu Forensic Science Department, Chennai on 07.04.2005 tested the sample and issued report stating that sample contains cannbinoid. After receiving the test report prepared by PW1 under Ex.P.2, one V.Ashok Kumar, Inspector of Police, filed final report alleging that the accused was illegally possessed with ganja.

5.Based on the above materials, the learned I Additional Special Judge, I Additional Special Court under NDPS Act, Chennai took cognizance in C.C.No.190 of 2005 and framed charges against the appellant for the offences under Section 8(c) r/w 20 (b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act. The accused denied the same and opted for trial. In order to prove their case, on the side of the prosecution, as many as four witnesses have been examined and ten documents were marked as Ex.P.1 to Ex.P.10, besides three material objects (M.O.1 to M.O.3).

6.Out of the said witnesses, PW1, M.Shankar Kumar, was worked as assistant in Tamil Nadu Forensic Science Department, Chennai. According to him, on 07.04.2005, he received sample and on examination, he found that the sample contains cannabinoid (ganja). In this regard, he issued report under Ex.P.2. Further, the proceedings issued by the Court for the examination of samples was marked as Ex.P.1.

7.PW2, Thananjayan, the then Head Constable of NIB CID, Chennai speaks about the information received in respect of the alleged occurrence and about the searching of the accused,

enquiry and the arrest of the accused.

8.PW3, Kesavaramachandran was working as a Head Constable, NIB CID, Chennai. He deposed about the securing of accused with contraband as stated by PW2. According to him, he was cited as witness in the seizure mahazar prepared by PW2 for recovering the contraband from the accused.

9.PW4, Usha, the then Home Guard has also stated that during the relevant point of time as per the request made by PW2, she searched the accused. According to her, there was no injury found in the body of the accused. In her presence, PW2 recovered contraband through seizure mahazar, in which she was cited as witness.

10.When the above incriminating evidence, were put to the appellant / accused under Section 313 of Criminal Procedure Code, she denied the same as false. However, she did not chose to examine any witnesses on her side and nor marked any documents.

11.Having considered all the material documents and on considering the arguments put forth by the learned Counsel on either sides, the learned trial Judge came to the conclusion that the appellant is found guilty for the offence under Section 8(c) r/w 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act and convicted the appellant as stated supra. Aggrieved by the said conviction and sentence, the accused is before this Court.

12.I have heard Mr.T.S.Sasikumar, learned Counsel appearing for the appellant and Mr.S.Karthikeyan, learned Additional Public Prosecutor appearing for the respondent and carefully perused the materials available on record.

13.The learned Counsel for the appellant would contend that the Court below without examining the person who registered the First Information Report and also without examining the person who filed a final report, had convicted the appellant which is erroneous in law. He would further contend that the accused is deprived of the opportunity to show the contradiction found in the evidence given by PW1 to PW4. He further added that the contraband alleged to have been recovered from the accused was sent to the Court after 15 days from the date of recovery. Moreover, for the delay in submitting the contraband before the Court, no explanation is offered on the side of the prosecution. Accordingly, due to the above lapses, it cannot be construed that the prosecution proved its case beyond reasonable doubt. Hence, ultimately, he prayed to allow the appeal by setting

aside the Judgment passed by the trial Court.

14.Per contra, the learned Additional Public Prosecutor appearing for the State would contend that the evidence given by PW1 to PW4 is sufficient to hold that at the time of occurrence, the accused herein illegally possessed with contraband. Further, he submits that the accused when at the time of giving confession statement before the police, has admitted the possession of contraband, and accordingly, he prayed to dismiss the appeal.

15.This Court has carefully considered the submissions made by either side Counsel.

16.As per the case of the prosecution, on 07.04.2005 itself, the alleged contraband has been recovered by PW2 from the accused. Further, in respect of the production of the same before the trial Court, the witnesses examined on the side of the prosecution did not say anything about the date and other particulars on which the said contraband has been produced before the trial Court. At this juncture, it is relevant to refer to the decision in State of Rajasthan Vs. Tara Singh, reported in 2011 (11) SCC 559 wherein, at paragraph No.5, our Hon'ble Apex Court has held as follows:

"We find, however, that the second aspect on which the High Court has opined calls for no interference. As per the prosecution story the samples had been removed from the Malkhana on the 26th of February, 1998, and should have been received in the laboratory the very next day. The High Court has, accordingly observed that the prosecution had not been able to show as to in whose possession the samples had remained from 26th February, 1998 to 9th March, 1998. The High Court has also disbelieved the evidence of P.W. 6 and P.W.9, the former being the Malkhana incharge and the latter being the Constable, who had taken the samples to the Laboratory to the effect that the samples had been taken out on the 9th of March, 1998 and not on the 26th February, 1998. The Court has also found that in the absence of any reliable evidence with regard to the authenticity of the letter dated 26th February, 1998 it had to be found that the samples had remained in some unknown custody from the 26th February, 1998 to 9th March, 1998."

17.Further, in the case of Valsala Vs. State of Kerala, reported in 1993 Supp (3) SCC 665, our Hon'ble Apex Court has held in paragraph No.4 as follows:

"4. We have seen the report of the Chemical Examiner and there no doubt it is mentioned that one

sealed parcel was received containing a powder and it was analysed to be Brown Sugar. But from the records it is clear and it is also noted by both the courts below that the seized article was produced in the court only on 14.1.88 i.e. after a period of more than three months and there is no evidence whatsoever at all to show with whom the seized article was lying and even assuming that it was in the custody of P.W.6, the Officer-in-charge of the Police Station who seized it, there is again nothing to show whether it was sealed and kept there. The learned Counsel for the State no doubt argued that the provisions of Section 55 of the Act are not mandatory but only directory. We need not go into this legal question in this case. Suffice it to say that the article seized appears to have been not kept in proper custody and proper form so that the court can be sure that what was seized only was sent to the Chemical Examiner. There is a big gap and an important missing link. In the mahazar Ex.P.2 which is immediately said to have been prepared, there is nothing mentioned as to under whose custody it was kept after seizure. Unfortunately for the prosecution even P.W.6 does not say that he continued to keep it in his custody under seal till it was produced in the court on 14.1.88. The evidence given by P.W.6 Police Sub-Inspector, who seized the article is absolutely silent as to what he did with the seized article till it was produced in the court. As a matter of fact he did not produce it in the court. P.W.3, A.S.I. is supposed to have produced the same in the court. But P.W.3 does not say anything about this. It is only P.W.7. the Circle Inspector who comes into the picture at a later date, who admitted in the cross-examination that the seized article was sent by P.W.3 (A.S.I.) to the court and P.W.7 in his cross-examination further admitted that he did not even see if the recovered material object was sealed but still he claims that he made the necessary application for sending the material object for chemical examination and it is only through P.W.7 that the Chemical Examiner's Report is marked. P.W.7 further admitted that he did not even know when it reached the court. We are constrained to say that the investigation in this case has been perfunctory and on important aspects the evidence of the concerned officers is highly discrepant and unconvincing and does not throw much light. Therefore the evidence adduced is wholly insufficient to conclude that what was seized from the appellant alone was sent to the Chemical Examiner. Though this is purely a question of fact but this is an important link. Both the courts below have not examined

this aspect in a proper perspective. No doubt the trafficking in narcotic drugs is a menace to the society but in the absence of satisfactory proof, the courts cannot convict."

Therefore, applying the ratio laid down in the above referred cases, it is the duty vested upon the prosecution to show, under whose custody the contraband was available, from the date of recovery to till the production of the same before the Court.

18. Since the present case has been registered under the provisions of NDPS Act, it is necessary to see the Judgment of the Hon'ble Apex Court in the case of "Karnail Singh -vs- State of Haryana", wherein our Hon'ble Apex Court has held as follows:

"2) The statement of objects and reasons of the NDPS Act makes it clear that to make the scheme of penalties sufficiently deterrent to meet the challenge of well organized gangs of smugglers, and to provide the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc. with the power of investigation of offences with regard to new drugs of addiction which have come to be known as psychotropic substances posing serious problems to national governments, this comprehensive law was enacted by Parliament enabling exercise of control over psychotropic substances in India in the manner as envisaged in the Convention on Psychotropic Substances, 1971 to which India has also acceded, consolidating and amending the then existing laws relating to narcotic drugs, strengthening the existing control over drug abuse, considerably enhancing the penalties particularly for trafficking offence, making provisions for exercising effective control over psychotropic substances and making provisions for the implementation of international conventions relating to narcotic drugs and psychotropic substances to which India has become a party.

3) Let us consider the Scheme of the NDPS Act and its relevant provisions. The 1985 Act came into force on 14.11.1985. Certain provisions were subsequently amended in 1989 and in 2001. Chapter IV deals with offences and penalties whereas Chapter V deals with procedure. Section 41 relates to power to issue warrant and authorization. Section 42 with which we are concerned relates to power of entry, search, seizure and arrest without warrant or authorization. Section 43 relates to power of

seizure and arrest in public place. Section 50 refers to conditions under which search of persons shall be conducted. The NDPS Act prescribes stringent punishment. Hence a balance must be struck between the need of the law and the enforcement of such law on the one hand and the protection of citizens from oppression and injustice on the other.

Applying the ratio laid down by the Hon'ble Apex Court in the above referred Judgment, herein also, since the case has been registered under the provisions of NDPS Act, and the punishment provided for the said offence is on the higher side, it is necessary for the prosecution to prove each and every stage of investigation before the trial Court without any omission and contradiction. Here, it is case that as already stated, witnesses examined on the side of the prosecution has not stated necessary particulars i.e., the date on which the contraband has been produced before the Court and further under whose custody the contraband was available in the interregnum period. On the other hand PW1 who is the Assistant examined the contraband gave evidence as he received the sample on 07.04.2005. Therefore, the samples have been produced before the Lab after 11 days. In this regard, no explanation is offered on the side of prosecution for the delay in producing the contraband.

19. Secondly, as per the evidence given by PW2, after registering the case, he handed over the accused along with the case properties, to one Murugaian, who is the Sub Inspector of Police working in the same Department for the purpose of registering the case. Further final report has been filed by one Inspector of Police who is also working in the same Branch. In respect of the same, the said Murugaian has not been examined as witness, further the statement under Section 161 of Criminal Procedure Code has also not been recorded from him. Moreover, during the time of trial, the trial Court without examining the said Sub Inspector of Police who has registered the First Information Report and the Inspector of Police who has filed the final report, has closed the prosecution evidence and posted the case for examination of the accused under Section 313 of Criminal Procedure Code. In this regard, the trial Court came to the conclusion that non examination of investigation officers is not fatal to the case of the prosecution.

20. Considering the same, in some of the cases, according to the facts and circumstances of the case, it may be concluded in favour of prosecution that the non examination of the investigation officers is not fatal to the prosecution. But here it is the case that either the said Murugaian or the person who has recorded statements from the witnesses under Section 161

of Criminal Procedure Code is not examined as a prosecution side witnesses. It is a proposition that under Section 145 of the Indian Evidence Act, the evidence of the investigation officer is necessary to elicit the contradictions which are all found in the evidence given by other witnesses. Accordingly, in this case complete liberty for placing his case, has not been given to the accused.

21.It is a settled proposition that depriving the opportunity to place the entire case of the accused before the Court is fatal to the prosecution. Therefore, without the evidence of the investigation officer who has recorded the 161 Cr.P.C. statements, this Court is not in a position to conclude the evidence given by PW2 to PW4 as genuine. The said lapses found in the prosecution case is nothing but fatal to the prosecution. Without appreciating the same, in the perspective manner, the trial Court has convicted the accused which is erroneous in law. Accordingly, I am of the considered opinion that prosecution has not proved their case beyond reasonable doubt.

22.In the result, the appeal is allowed and the conviction and sentence imposed upon the appellant/accused by the Trial court are set aside and she is acquitted of all the charges. Fine amount, if any, paid, shall be refunded to the appellant/accused.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1.Inspector of Police,
NIB CID,
Chennai.

2.The I Additional Special Judge,
I Additional Special Court under NDPS Act,
Chennai.

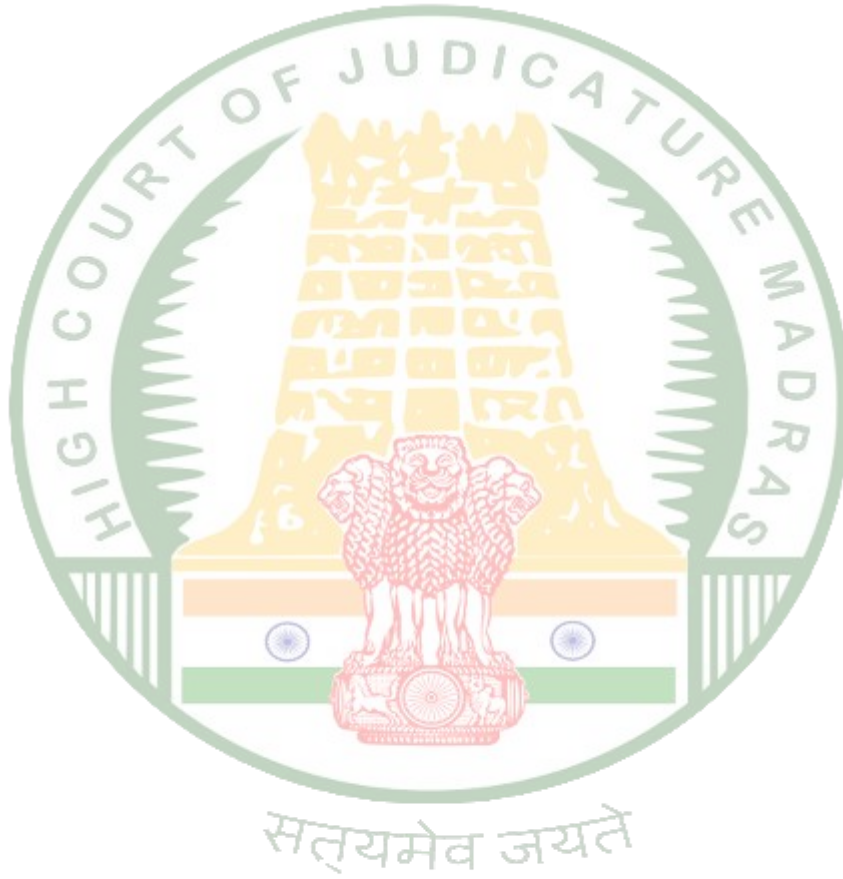
3.The Public Prosecutor,
High Court of Madras,
Chennai.

4.The Superintendet of Central Prison,
For Women Puzhal.

+1cc to Mr.T.S.Sasikumar, Advocate SR.42469

Crl.A.No.279 of 2016

SSD (CO)
CB (01/03/2021)



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