

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.12.2020

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.M.P.No.5452 of 2020

in C.A.No.362 of 2020

Kumar

... Petitioner

Versus

State Rep. By:

The Inspector of Police,
NIB CID,
Salem,
Crime No.148/2016.

... Respondent

PRAYER: Criminal Miscellaneous Petition filed under Section 389(1) of the Code of Criminal Procedure, to suspend the substantive sentence of 10 years passed by the Special Judge for EC/NDPS Act Cases (FAC) III Additional District Judge, Salem by order dated 31.01.2020 in C.C.No.19 of 2017 till disposal of the appeal and enlarge the petitioner/accused on bail.

For Petitioner : Mr.K.Kannan

For Respondent : Mr.C.Iyyappa Raj
Additional Public Prosecutor

ORDER

This Criminal Miscellaneous Petition to suspend the sentence imposed on the petitioner in judgment dated 31.01.2020, in C.C.No.19 of 2017, by the learned Special Judge for EC/NDPS Act Cases (FAC), III Additional District Judge, Salem.

2.The petitioner was convicted for offence under Sections 8(c) r/w 20(b)(ii)(b) NDPS Act and sentenced to undergo ten years Rigorous Imprisonment and to pay a fine of Rs.1,00,000/-, in default to undergo tow years Rigorous Imprisonment.

3.The facts of the case is that on 12.12.2016 at about 10.00 a.m., PW1, Sub Inspector attached to the respondent Police received secret information through informer that a person aged about 35 years was carrying Ganja near Salem Railway Junction for sale. PW1 recorded the same in General Diary, got permission from

PW6/Inspector. PW1 along with PW2/Special Sub Inspector and PW3 to PW5/Head Constables proceeded in their official vehicle to Salem Railway Junction and were keeping surveillance, at about 11.30 a.m., a person with identification as informed by the informer was found, the informer identified the person and moved away. PW1 enquired the person, who disclosed that his name as Kumar/petitioner, son of Krishnan and he is residing at Kailasam Palayama, Namakkal District.

4.PW1 informed the petitioner that information has been received that he possess Ganja and whether he is willing to be taken before the learned Judicial Magistrate or Gazetted officer to conduct search as him. The petitioner has consented to PW1 to conduct search and same was recorded in Ex.P2. In presence of PW2 and PW3, the bag of the petitioner was opened, in which, contraband Ganja was found, which was weighed in a weighing balance, and found that the petitioner was carrying 1.3 kg of Ganja. PW1 took two samples each 2.5 grams, one to be retained in Court and another one for chemical analysis. Thereafter, PW1 packed the remaining Ganja and affixed the seal of NIB. The samples were marked as S1 and S2 and the bag was assigned as P1. In the scene of occurrence, the labels were prepared and stitched over the samples, in which PW1, petitioner and witnesses signed. PW1 prepared Recovery Mahazar [Ex.P3], recorded the statement of the petitioner in presence of witnesses, arrested the petitioner. The arrest memo was marked as Ex.P8.

5.PW1 returned to the Police Station at about 02.15 p.m., along with the seized articles. Thereafter, a case in Crime No.148 of 2016 [Ex.P5], for offence under Section 8(c) r/w 20(b)(ii)(b) NDPS Act was registered. PW5 submitted a detailed report [Ex.P6] under Section 57 of the NDPS Act to his superior. Thereafter, the investigation was handed over by PW1 to PW6. PW1 sent the contraband to the Court along with FIR [Ex.P5]. PW6, the Inspector of Police went to the scene of occurrence along with PW1, prepared Observation Mahazar [Ex.P8], Rough Sketch [Ex.P9] in the presence of the police witnesses PW1 and PW3. The intimation received by PW1 is Ex.P1. The seized Ganja are MO1 to MO3. PW4 is the other Head Constable, who produced the samples for chemical examination to the Regional Forensic Lab, Salem. PW6 recorded the statement of witnesses and after obtaining the analysis report from the Forensic department [Ex.P11], examined the scientific officer Jaganathan and on completion of investigation, filed the charge sheet in this case.

6.Before trial Court, prosecution examined 6 witnesses and marked 11 exhibits and 3 materials objects. On completion of trial, the petitioner was convicted as stated above.

7.The learned counsel for the petitioner submitted that PW1 is the author of the FIR, who is said to have received the information by 10.00 a.m., on 12.12.2016 through informer. PW1

reached the place of occurrence by 11.00 a.m on the same day along with four police personnels viz., PW2 to PW5. All the witnesses in this case are official witnesses. The learned counsel further submitted that the alleged occurrence is said to have taken place near the Salem Railway Junction, which is a busy and active through out the day. More particularly, the alleged occurrence is said to have taken place at about 11.00 a.m. PW6, the Investigating Officer admitted that near the scene of occurrence, there is a Time Keeper Office and a lot of peoples were present. Ex.P9 Rough Sketch shows the same as well in the Observation Mahazar [Ex.P8]. The reason given by the prosecution is that none of the public witnesses present nearby, came forward to be a witness, is a got-up story. No members of the persons, who called as witness are refused for the same has been mentioned. The learned counsel further submitted that there is no compliance of Section 50, which is a fundamental right. Ex.P2 is a consent letter under Section 50. Admittedly, in this case, PW1 to PW5 had gone to the scene of occurrence.

8.It is admitted fact that in this case PW1 to PW5 are not gazetted officers and giving an option of being searched before the gazetted officers does not arise. No steps were taken to produce the petitioner before the gazetted officers or before the Magistrate. The signature obtained in Ex.P2 was on a blank paper in the police station which is evident. Ex.P3 Recovery Mahazar is in printed format which has been followed up. PW2 and PW3 are the Police personnels, who are the witnesses to Ex.P3 Mahazar. The said mahazar is also prepared in the police station. The arrest of the petitioner was not informed to the family members. From the arrest intimation, it is seen that the arrest intimation has been shown to be served to the petitioner and no family members have signed the same. Ex.P1 is the intimation which is said to have been recorded from the informer and the same has been intimated to PW6. Further submitted that in this case, no independent witnesses were examined, PW1 is the Sub Inspector of Police along with PW2 to PW5 had formed a team and gone to the scene of occurrence. PW4 is the silent about he being a part of raiding the team. PW6 stated that PW4 had formed part and the raiding team. In this case, Jaganathan, Scientific Officer, Forensic Department not examined. The Forensic Report is marked as Ex.P11 through Investigating Officer/PW6. In view of the same, the prosecution cannot be said to be proved the contraband is Ganja.

9.The learned counsel for the petitioner further submitted that the petitioner is in confinement right from 19.06.2017 and he had been produced before the trial Court in person or through video conference on the hearing dates. No advocate had represented the petitioner during the trial and the none of the witnesses were cross examined in this case. A petition under Section 311 Cr.P.C., was filed to recall the witness also dismissed citing Vinoth Sharma case, this case pertains to offence under Section Prevention of Corruption Act. In that case, the petitioner was on bail. In this case, the petitioner was in confinement through out the trial when the witnesses were examined.

Hence, the petitioner, who was already in jail, have no reason to drag the proceedings and further, all the witnesses are police personnels and official witnesses gaining over the witnesses does not arise. Since this Court in Crl.O.P.No.16151 & 16178 of 2018 by dated 01.07.2018 directed the trial Court to complete the proceedings in the above case within a period of three months. The trial Court without giving sufficient opportunity and without witnesses being cross examined, convicted the petitioner to maximum sentence of ten years. The petitioner is in confinement right from the year 2016 and as got one son Ramesh Kumar and three daughters Nisha, Swapna and Thenmozhi who are studying 7th, 6th, 4th and 1st std respectively. The petitioner had undergone the sentence in some cases and in other cases he is on bail.

10.The learned Additional Public Prosecutor appearing for the respondent filed his counter and submitted that in this case on 12.12.2016 at about 10.00 a.m., PW1, Sub Inspector attached to the respondent Police received a secret information through informer that a person aged about 35 years was carrying Ganja near Salem Railway Junction for sale. PW1 recorded the same in General Diary and got permission from PW6/Inspector. PW1 along with PW2/Special Sub Inspector and PW3 to PW5/Head Constables were proceeded through the official vehicle to Salem Railway Junction and were keeping a surveillance, at about 11.30 a.m., a person having identification as informed by the informer was found, the informer identified the person and moved away from there. PW1 enquired the person, who informed that his name is Kumar/petitioner, son of Krishnan and he is residing at Kailasam Palayama, Namakkal District.

11.PW1 informed the petitioner that information has been received that he possess Ganja and he shall be taken before the learned Judicial Magistrate or Gazetted officer to conduct personal search in their presence. The petitioner gave consent to PW1 to conduct search and same was recorded in Ex.P2. In presence of PW2 and PW3, the bag of the petitioner opened, in which, the contraband Ganja was found, which weighed in a weighing balance and was found that the petitioner was carrying 1.3 kg of Ganja. PW1 took two samples each 2.5 grams, one to be retained in Court and another for chemical analysis. Thereafter, PW1 packed the remaining Ganja, affixed the seal of NIB. The samples were marked as S1 and S2 and the bag was assigned as P1. In the scene of occurrence, the labels were prepared and stitched the samples, in which PW1, petitioner and witnesses signed. PW1 prepared Recovery Mahazar [Ex.P3], recorded the statement of the petitioner in presence of witnesses, arrested the petitioner. The arrest memo was marked as Ex.P8.

12.PW1 returned to the Police Station at about 02.15 p.m., along with the recovered articles. Thereafter, a case in Crime No.148 of 2016 [Ex.P5], for offence under Section 8(c) r/w 20 (b) (ii) (b) NDPS Act was registered. PW5 submitted a detailed report [Ex.P6] under Section 57 of the NDPS Act. Thereafter, the investigation was handed over by PW1 to PW6. PW1 sent the

contraband to the Court along with FIR [Ex.P5]. PW6, the Inspector of Police went to the scene of occurrence along with PW1, prepared Observation Mahazar [Ex.P8] and Rough Sketch [Ex.P9] in the presence of the police witnesses PW1 and PW3. The intimation received by PW1 is Ex.P1. The recovered Ganja are MO1 to MO3. PW4 is the other Head Constable, who produced the samples for chemical examination before the Regional Forensic Lab, Salem. PW6 recorded the statement of witnesses and after obtaining the report from the Forensic Department [Ex.P11], examined the scientific officer Jaganathan and on completion of investigation, filed the charge sheet in this case.

13.The learned Additional Public Prosecutor further submitted that since no individual came forward to be witness, the police personnels only arrayed as witness. The same has been recorded in all document and the contraband are sent to the Court without any delay. The trial Court on examination of witnesses and materials had rightly convicted the petitioner. The petitioner is also involved in offences of similar in nature. He further submitted that the petitioner is a regular offender and History Sheeter and involved in eight cases from the year 2013, in one case, he was acquitted and in other case, the trial is pending and in other 6 cases, he was convicted. Hence, he opposed the petition.

14.On considering the rival submissions and on perusal of the materials, it is seen that in this case, all the witnesses are all police officials and they were not cross examined. Further, none of the independent witnesses were examined. The petitioner is in confinement from 19.06.2017. During that period, the witnesses were examined and the Advocate, who leading the case during trial, failed to cross examine the witnesses. For non cross examination of witnesses by Advocate, the petitioner cannot be made a victim. Further, the Forensic Report Ex.P11, has been marked through the Investigating Officer and not through the concerned witness. There are some violations in the statutory conditions, which has not been properly explained.

15.Finding infirmities in the prosecution case and arguable points involved in the appeal, considering the period of incarceration and the appeal is not likely to be taken up for final hearing in the near future, hence, this Court is of the considered view that the petitioner herein is entitled to the relief of grant of suspension of sentence.

16.Accordingly, the substantive sentence of imprisonment alone is suspended and the petitioner is directed to be enlarged on bail on condition that the petitioner shall execute a bond for a sum of Rs.10,000/- (Rupees Ten Thousand only) with two sureties each for a like sum to the satisfaction of the learned Special Judge for EC/NDPS Act Cases (FAC), III Additional District Judge, Salem, within a period of 15 days from the date of receipt of a copy of this order and on further condition that the petitioner

shall appear before the said Court on every English Calender Month at 10.30 a.m., till the disposal of the appeal. The petition is ordered.

-sd/-

18/12/2020

This order, on being produced, be punctually observed and carried into execution by all concerned

TRUE COPY

Sub-Assistant Registrar (Statistics/C.S.)
High Court, Madras - 600 104.

TO

1 THE SPECIAL JUDGE FOR EC/NDPS
ACT CASES (FAC), III ADDITIONAL DISTRICT
JUDGE, SALEM.

2 THE SUPERINTENDENT,
CENTRAL PRISON, COIMBATORE.

3 THE PUBLIC PROSECUTOR
HIGH COURT, MADRAS.

4 THE INSPECTOR OF POLICE,
NIB CID, SALEM.

+1 C.C. to M/S.K.KANNAN Advocate on payment of necessary
charges SR NO. 8421

सत्यमेव जयते

Order

in
CRL MP.5452/2020

in
CRL A.362/2020

Date :18/12/2020

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MN-21/01/2021

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