



Bail slip

The Appellant / Sole Accused N.Kennady, S/o.Nataraj was released on bail granted as per order dated 05.01.2009 made in MP No.1 of 2009 in CRL A (MD)No.295/2009.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 04.10.2019
PRONOUNCED ON : 03.01.2020

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.A(MD)No.295 of 2009

K.Kennady ... Appellant /sole accused

Vs.

State by Inspector of Police,
NIB -CID,
Theni District.
[Crime No.219 of 2004] ... Respondent/ Complainant

PRAYER: Appeal filed under Section 374(2) of the Code of Criminal Procedure, to call for the records relating to the judgment dated 15.09.2009 passed in C.C.No.223 of 2005 by the learned Special District and Sessions Judge for E.C Act and N.D.P.S.Act cases, Madurai and set aside the same.

For Appellant : Mr.T.S.Sugadev
for Mr.K.Anna
For Respondent : Mrs.S.Bharathi,
Government Advocate (crl side)

JUDGMENT

This appeal is filed as against the conviction and sentence imposed on the appellant by the learned Special District and Sessions Judge for E.C Act and NDPS Act cases, Madurai, in C.C.No.223 of 2005 dated 15.09.2009.



2. The appellant is the sole accused in C.C.No.223 of 2005, on the file of the learned Special District and Sessions Judge for E.C Act and NDPS Act cases, Madurai, and he was tried for the commission of the offence punishable under Section 8(c) r/w 20(b) (II)(B) of NDPS Act and the trial Court, in conclusion of the trial, found him guilty, convicted and sentenced him for the offence under Section 8(c) r/w 20(b)(II)(B) of NDPS Act to undergo rigorous imprisonment for three years with a fine of Rs.3,000/- and in default of payment of fine amount, rigorous imprisonment of one month was also ordered.

3. The prosecution case in a nutshell is that on 24.12.2004 at about 12.30 pm, Subramani [PW1], Head constable and Ponram [PW4] Inspector of Police, attached to NIB CID, Theni, received an information from the informant that a person known to him from Kerala is bringing Ganja for sale. PW4 received the information and recorded the same in Ex.P9 and intimated the same to his higher officials. Thereafter, he along with PW1 and informant went to Utthamparai on Mundhal - Kurangani road and conducted raid. On the instructions from the informant, they interrupted the accused, who was coming with a white plastic bag and on examination, he was found in possession of 10 Kgs of Ganja. They had taken two samples each weighing 50 gms (marked as S-1 and S-2) and the remaining Ganja was wrapped in the same plastic bag and recovered under cover of mahazar Ex.P3 and arrested the accused under Ex.P4 and prepared the inspection mahazar [Ex.P2]. Then they proceeded to the Police Station and registered the First Information Report [Ex.P11] and the arrest of the accused was intimated to his relative through arrest intimation [Ex.P5]. Thereafter, he sent the contraband through Form 95 to the concerned Judicial Magistrate along with requisition for sending the same for chemical analysis and the Scientific Assistant Grade-I [PW.3] issued a report in Ex.P8 that the samples sent for analysis contained cannabinoid. PW4 also recorded the statement of PW3 and filed a final report against this accused.

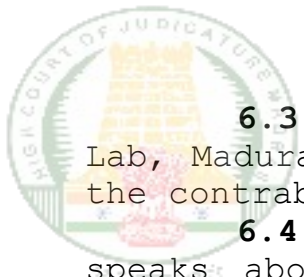
4. On the side of the prosecution 4 witnesses were examined, 12 documents were marked and three material objects were produced.

5. The incriminating materials were put to the accused under Section 313 Cr.P.C and the same was denied. No witness was examined and no document was marked on the side of the accused.

6. The available prosecution evidence are as follows:

6.1. PW1 is the Head Constable at NIB CID, Theni. He speaks about the secret information of selling of Ganja by the accused, examination of the accused, recovery of Ganja, preparation of mahazar and registration of the First Information Report.

6.2. PW2 is the Head Clerk of the Chief Judicial Magistrate, Madurai and she speaks about the sending of the contraband for chemical analysis and the chemical analysis report.



6.3. PW3 is the Scientific Assistant Gr.I at Forensic Science Lab, Madurai and he speaks about the presence of the cannabinoid in the contraband and issuance of chemical analysis report [Ex.P8].

6.4. PW4 is the Inspector of Police at NIB CID, Theni and he speaks about the secret information of selling of Ganja by the accused and he along with Police party went to the place of occurrence. He also speaks about the recovery of Ganja from the accused and conduct of investigation and filing of the charge sheet.

7. In conclusion of the trial, the trial Court found the appellant guilty and convicted and sentenced him as stated supra. As against the conviction and sentence imposed by the trial Court, the appellant has preferred the instant appeal.

8. Heard Mr.T.Sugadev, learned Counsel for the appellant and Mrs.S.Bharathi, learned Government Advocate (Crl Side) appearing for the State.

9. The learned Counsel for the appellant has made the following submissions:

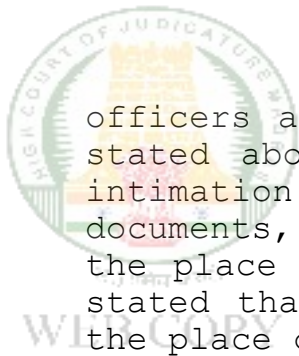
9.1. The Head Constable [PW1] stated that on receipt of information, he along with two Police Constables and the informant went to the place of occurrence and arrested the accused. But, contrary to the same, the Inspector of Police [PW4] stated that he only made the inspection along the informant and effected search. Therefore, the very inspection and the search itself is doubtful.

9.2. PW1 had stated that he had requested two persons to stand as witnesses, but they were not willing to stand as witnesses, whereas, PW4 stated that along with independent witnesses, he went to the place of occurrence. This contradiction shows that the case of the prosecution, as projected, is not true.

9.3. PW4 had stated that 50gms of Ganja samples were recovered and sent for chemical analysis. But PW3 / the Scientific Assistant had stated that 32 gms of Ganja was received. Therefore, it is clear that the recovered material was not sent for chemical analysis and the analysed materials is not the recovered one.

9.4. As required under Section 42(2) of the Act, the information has not been communicated to the higher officials. Therefore, it is violative of Section 42(2). Moreover, the complainant and the investigating officer is one and the same. Therefore, the prosecution has not proved its case beyond reasonable doubt and hence, prayed for allowing this criminal appeal.

10. Per contra the learned Government Advocate (Crl Side) appearing for the state would submit that PW4 / Inspector of Police received the information through an informant on 24.12.2004 at about 12.30 pm and he immediately informed the same to his superior



officers and the same is also marked as Ex.P9. Though PW1 has not stated about the presence of PW4 at the time of inspection, the intimation for search; the complaint; the mahazar and all other documents, as required under the Act, were prepared only by PW4 from the place of occurrence and PW4, in his evidence, has specifically stated that the search and other procedures were made by him from the place of occurrence.

11. The case of the prosecution cannot be doubted for the reason that there was no independent witness for the search and recovery, when PW4 has specifically stated in his evidence that he has requested two persons to stand as witnesses for the recovery, but they have refused and therefore, the recovery was made in the presence of official witnesses. She has also relied upon the judgment of the Hon'ble Supreme Court reported in **MANU/SC/0213/2018**, in the case of **State of Himachal Pradesh v. Pradeep Kumar and Others** and submitted that the examination of independent witnesses is not an indispensable requirement and such non examination is not necessarily fatal to the prosecution case.

12. She would further submit that admittedly, there is a difference in the weight of the samples recovered from the place of occurrence for analysis and the samples which were analysed by the analyst [PW3]. But the scales which were used in the place of occurrence is an ordinary one, whereas, in the laboratory, accurate scales are used and therefore, this small variation in the weight cannot be a ground to disbelieve the case of the prosecution. Therefore, the learned Government Advocate prays for dismissal.

13. This Court has paid it's anxious consideration to the rival submissions and also to the available records.

14. PW4 / the Inspector of Police, on 24.12.2004 at about 12.30 pm, received the information about the transportation of Ganja through his informer. When he was conducting raid on Mundhal - Kurangani road, near Utthamparai, the accused was found with a bag in his hand. PW4 enquired him before the witness and also complied with the requirement under Section 50 of NDPS Act. The accused volunteered to inspect the bag and also denied his right to be examined before the Magistrate or an Executive Officer. On inspection of the bag, PW4 found Ganja, weighing approximately 10 kgs and therefore, arrested the accused and seized the contraband.

15. PW4 also took samples from the seized materials and sealed the same with NIB seal and the remaining Ganja was packed in a separate bag and sealed separately with NIB seal. Since nobody was willing to be a witness for the recovery, the recovery mahazar was prepared in the presence of the Head Constables PW1 and another. The mahazar is marked as Ex.P3. On the complaint of PW4, a case was registered in Crime No.219 of 2004, for the offence under Section 20 (b) (11) B) of the NDPS Act.



16. The Inspector of Police [PW4] made a request to the Special District and Sessions Judge for E.C Act and NDPS Act Cases for sending the said samples for chemical analysis and accordingly, the same were sent for chemical analysis to the forensic lab. PW3, the Scientific Expert, on examination of the said samples, found the presence of cannabinoid. Her report is marked as Ex.P8.

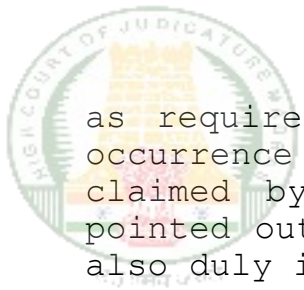
17. Based on the scientific analyst report and other materials, the final report was filed and on the side of the prosecution, Head Constable [HC1198] in whose presence the samples were recovered was examined as PW1; the scientific expert was examined as PW3; and the Inspector of Police was examined as PW4.

18. Perusal of record shows that the accused did not choose to cross examine PW1 as well as PW2. The scientific expert [PW3] was cross examined that the weighing machines used in their laboratory are accurate and the percentage of cannabinoid was not mentioned in the analyst report. In fact, PW4 was not cross examined when he was examined on 16.02.2008 and thereafter, on application, he was recalled on 20.08.2009 and cross examined. Even in this cross examination, the defence has failed to elicit any material against the prosecution. But, through this cross examination, it was elucidated that the samples were weighed in the place of occurrence through an ordinary scale and that the procedures under the NDPS Act has been complied with.

19. Therefore, this Court is of the view that the prosecution has established that all the requirements under the NDPS Act were strictly complied with. No doubt, there is a slight variation in the samples recovered from the place of occurrence and the samples which were analysed by the scientific expert in the laboratory. According to the recovery mahazar, approximately 50 gms of samples from the seized contraband were sent for chemical analysis, but, according to the scientific expert [PW3] the samples which were examined by them was of 32 gms and therefore, it is the contention of the learned Counsel for the appellant that it was not the sample recovered from the appellant.

20. This contention of the appellant could not be accepted for the reason that it was elucidated through the evidence that the samples recovered were weighed in an ordinary scale in the place of occurrence, whereas, the samples which were examined are of accurate measurements. Even in the recovery mahazar, it is mentioned as approximately 50 gms and not accurately 50 gms. Therefore, on this small variation in the quantity of the samples, which were recovered and sent for chemical analysis, the entire case of the prosecution cannot be found fault with.

21. PW4, in his evidence, has specifically stated about the presence of PW1 in the place of occurrence and the prescribed forms,



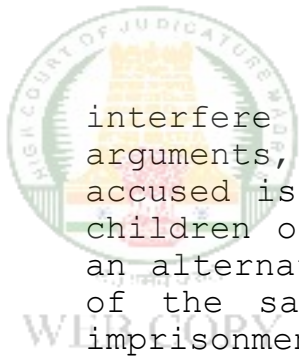
as required under the Act, were prepared by PW4 in the place of occurrence and therefore, his presence could not be doubted, as claimed by the learned Counsel for the appellant. Moreover, as pointed out by the learned Government Advocate, the information was also duly intimated by PW4 to his higher officials through Ex.P9.

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22. Insofar as the non-examination of independent witnesses is concerned, in the decision relied upon by the learned Government Advocate in **MANU/SC/0213/2018** (supra), the Hon'ble Supreme Court has held as follows:

"6. We have considered the matter and have heard the learned counsels for the parties. So far as examination of independent witnesses in support of the prosecution case is concerned all that would be necessary to say in this regard is that examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case. In the present case, according to the prosecution, independent witnesses were not available to witness the recovery of the contraband due to extreme cold. The fact that the incident took place at about 6.30 p.m. on 27-01-2009 and that too on the Manali-Kulu road may lend credence to the prosecution version of its inability to produce independent witnesses. In the absence of any animosity between the police party and the accused and having regard to the large quantity of contraband that was recovered (18.85 kgs.), we are of the view that it is unlikely that the contraband had been planted / foisted in the vehicle of the accused persons. In so far as the condition of the contraband parcel is concerned, the materials on record indicate that the said parcel was brought to the learned trial Court on 15-9-2009 in a torn condition. The prosecution witnesses examined in this regard had testified that the parcel was in a torn condition due to its bulky nature and also due to nails on the stool on which it was kept. In this regard, it may also be noted that the samples from the contraband parcel were sent to the Forensic Laboratory on 23.7.2010. No suggestion was given to the witnesses (PWs 12 and 13) who had taken the samples to the laboratory that the contraband parcel has been tampered with. PW-16, who had chemically examined the contraband samples, was fully cross-examined by the defence. There is nothing in his evidence to suggest that the sample (s) came to him in a torn or otherwise doubtful condition. In view of all the above, we are of the opinion that the grounds on which the High Court have reversed the findings of conviction of the accused-respondents ought not to be accepted."

23. In view of the foregoing discussions and the decision of the Hon'ble Supreme Court (supra), this Court is not inclined to



interfere with the impugned order. However, during the course of arguments, the learned Counsel for the appellant submitted that the accused is the only bread winner of his family and is having three children of tender age and his wife is also sick and therefore, as an alternate plea, prayed for modification of sentence. Taking note of the same, this Court is inclined to modify the sentence of imprisonment alone.

24. Accordingly, the conviction imposed by the learned Special District and Sessions Judge for E.C Act and NDPS Act cases, Madurai, in C.C.No.223 of 2005 dated 15.09.2009, stands confirmed, however, the sentence is modified to two years rigorous imprisonment, instead of three years. The fine amount as well as default clause remain unaltered. The trial Court is directed to secure the accused and commit him in prison to undergo the remaining period of sentence. Bail bonds, if any executed, shall stand terminated.

25. In fine, this criminal appeal is partly allowed.

Sd/-

Assistant Registrar

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/ /2020

Sub Assistant Registrar(CS)

To

1.The Special District and Sessions Judge
for E.C Act and N.D.P.S.Act cases,
Madurai.

2.The Inspector of Police,
NIB -CID, Theni District.

3.The Superintendent of Central Prison, Madurai.

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

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Criminal Section/Records,
Madurai Bench of Madras High Court, Madurai.

judgment made in

Crl.A(MD)No.295 of 2009

03.01.2020

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