



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

JUDGMENT RESERVED ON : 20.01.2020

JUDGMENT DELIVERED ON : 30.01.2020

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CORAM:

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR
Crl.A.(MD)No.358 of 2009

T.Murugan

.. Appellant / A2

Vs.

State by
The Inspector of Police,
NIB CID,
Tuticorin
(in crime No.20 of 2001)

... Respondent/complainant

PRAYER: Petition filed under Section 374 of Criminal Procedure Code, against the judgment and conviction passed by the Special District and Sessions Judge, for NDPS Act Cases, Madurai in C.C.No.560 of 2002 dated 22.10.2009.

For Appellant : Mr.C.Muthu Saravanan
For Mr.M.Jegadeesh Pandian

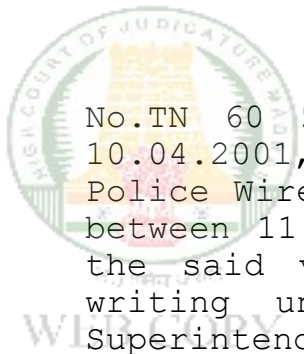
For Respondent : Mr.M.Chandrasekaran, APP

JUDGMENT

This Criminal Appeal is arising out of the judgment and conviction passed by the learned Special District and Sessions Judge, for NDPS Act Cases, Madurai in C.C.No.560 of 2002, dated 22.10.2009, whereby, the appellant was found guilty for the offence under Section 8(C) r/w 20(b)(i) of NDPS Act and sentenced him to undergo 10 years RI and to pay a fine of Rs.1 lakh, in default, to undergo six months SI. It is represented that the appellant is in custody.

2. The brief facts of the case, as projected by the prosecution, are as follows:

(i) On 10.04.2001, . at about 09.30 a.m., while P.W.5 Krishnan, Sub Inspector was on duty at NIB, CID Unit, Tuticorin, received information about the illicit transportation of ganja by appellant from Mannarkadu District Kerala to Tuticorin District through Manjoor (Ooty District) by an Ambassador Car bearing registration



No.TN 60 Z 4299 and the said vehicle would reach Tuticorin on 10.04.2001, at about 12.45 p.m. and the said vehicle may cross the Police Wireless Station, situated at Madurai - Tuticorin Main Road, between 11.30 a.m. and 12.30 a.m. and the informant would identify the said vehicle. P.W.5 reduced the above said information in writing under Ex.P.11 and submitted the same to the Deputy Superintendent of Police, NIB Wing, Chennai Camp at Tuticorin, P.W.5 proceeded to the spot along with P.W.3 Soundararajan, Sub Inspector of Police and police party.

(ii) They reached the spot at 11.00 hours, mounted surveillance over the place. At about 12.00 hours, the informant identified the Ambassador Car, bearing Registration No.TN-60-Z-4299, which was coming from North to South, the police team intercepted the vehicle. The car was driven by one Pitchaimuthu (A1). The appellant (A2) was sitting in the front seat. P.W.5 explained about the search, the appellant gave consent for search vide Ex.P6. On the basis of Ex.P6, the police party searched the car and found two packs in the dicky and three packs concealed in the back seat of the car, each contains 20 kgs of ganga, totally 100 kgs.

(iii) Out of the said quantity, from each bag, two samples of each 50 grams were taken and packed into two separate brown covers and sealed with NIB Seal as S1 to S10, which was later marked as M.Os.6 to 10. The remaining contraband, after taking samples weighing 19 Kgs 900 grams was packed and assigned as P1 to P5, which were later marked as M.O.11 to 15. They prepared Ex.P8 Mahazar; seized the Ambassador Car under Ex.P7 Mahazar; arrested the accused under Ex.P9 arrest memo and prepared Ex.P10 observation mahazer and Ex.P12 rough sketch. Thereafter, returned to the police station, registered a case in Crime No.20 of 2001, for the offence under Sections 20(b)(i) and 25 of NDPS Act. Ex.P13 is the FIR. He forwarded the file to P.W.6, Inspector of Police for further investigation.

(iv) P.W.6, Raja Mohammed, Inspector of Police took up the case for investigation. Ex.P1 is the request to send the samples of ganja for chemical analysis. P.W.2, Head Clerk of the Court sent the same under Ex.P2 for chemical analysis. P.W.1, Chemical Analyst received the samples and after analysis, found the contraband is ganja and issued Ex.P3 chemical analyst report. The sample contraband, which were subjected to chemical analysis are marked as M.Os.1 to 5. Thereafter, P.W.6 examined the witnesses, recorded their statements and after completion of investigation, filed the charge sheet against the appellant/accused.

3. In order to prove the case, the prosecution examined P.W.1 to P.W.6 and marked Ex.P.1 to Ex.P.14 and produced M.O.1 to M.O.15. When the accused was questioned about the incriminating circumstances appeared against him under Section 313 of Cr.P.C., he denied the charges, however, he did not lead any evidence. After



considering the evidence adduced by the prosecution and also hearing either side, the trial Court convicted the accused, as stated above. As against which, the present appeal has been filed.

4.The learned counsel for the appellant submitted that the finding of the lower court is perverse and contrary to the law; that Section 50 of NDPS Act was not followed by the prosecution, which is mandatory; that the prosecution failed to produce the materials to show the information and as reduced into writing, it is violative of Section 42 of the Act; that the arrest and seizure are illegal. P.W.1 did not give opinion on what basis, he arrived at the conclusion that the contraband is ganja. He further submitted that no independent witness was examined by the prosecution, though the search was made in the public place. The presence of P.W.3 in the scene of occurrence is highly doubtful. The requisition Ex.P1 was given by Deputy Superintendent of Police, NIB CID, Ex.P11 information was submitted to Deputy Superintendent of Police and not to the immediate superior of P.W.5. Further, the said DSP has not been examined in the case, which is fatal to the case of prosecution. It was further submitted that in Ex.P12, Rough Sketch, crime number is found. Though the contraband were produced before Judicial Magistrate on 11.04.2001, the same came to be produced before the Special Court only on 17.04.2001; the safe custody of contraband during this period has not been explained. The serial number of samples taken and sent to laboratory does not tally and seal was not found. Therefore, the recovery becomes doubtful and the benefit of doubt ensues in favour of the accused. In support of his contention, the learned counsel relied on the following decisions:

(i). The Hon'ble Supreme Court in the Judgment in ***Vijay Pandey V. State of Uttar Pradesh***, reported in ***(2019 (10) SCALE 129)*** in para 5, has held as follows:

"5.We have considered the respective submissions. The seizure was at 06.40 AM at the door step of the appellant. We find it difficult to believe that in a rural residential locality, the police were unable to find a single independent witness. No name of any person has been mentioned who may have declined to be a witness. The High Court, despite noticing the absence of any recovery memo prepared at the time of search and seizure under Section 50 of the NDPS Act, opined that the deposition of the police witness to that effect was sufficient compliance. Though the Laboratory Report was obtained, but the identity of the sample stated to have been seized from the appellant was not conclusively established by the prosecution."

(ii). In the Judgment reported in ***(2019) 3 Supreme Court Cases (Cri) 167 - State of Uttar Pradesh Vs. Hansraj Alias Hansu***, the Hon'ble Supreme Court has held in para 7 as follows:

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"7.The High Court has also pointed out that it was incumbent on the part of the prosecution to lead the evidence to show as to how and in what conditions the articles were preserved at the Police Station and how safely they were taken from there to the respective chemical examiners by its carriers. Learned counsel for the State has submitted that the investigating officer in this particular case has passed away and, therefore, the prosecution was handicapped in adducing the necessary evidence. Notwithstanding the death of the Investigating Officer, nothing prevented the prosecution from examining any other witness who was associated with the investigation and adducing necessary evidence to prove as to how and in what conditions the articles were preserved at the Police Station/Police Station Godown."

(iii). The unreported Judgment of this Court made in **Crl.A.No.81 of 2003 - Ashok Vs. State** dated **07.01.2010** , it has been held as follows:-

"There is a bog gap and an important missing Line. In the mahazar Ex.P2 which is immediately said to have been prepared, there is nothing mentioned as to under whose custody, it was kept after seizure."

(iv). Yet another unreported Judgment of this Court dated **12.03.2019** made in **Crl.A.No.687 of 2012 - K.Kalyani V. State**, this Court, in Para 13 and 14 has held as follows:

"13. In this case, the presence of crime number in the arrest memo is admittedly prepared in the spot of arrest and prior to registration of the case. This initially creates doubt about the manner in which the seizure and arrest was done. This doubt gets enlarged by the fact that out of three witnesses for the prosecution PW.2, PW.3 and PW.4 who were all allegedly to be present at the time of intercepting the accused to seizure and arrest, they are not certain about the scribe of the documents Ex.P.4, Ex.P.5 and Ex.P.6 which were suppose to be prepare on the spot. All the three witnesses uniformly say that it was not written by them. The only person left in the riding team is Kesavaramachandran who was not examined. Murugaiyan (PW.2) and Rani (PW.3) would say mahazar (Ex.P.5) was written by Kesavaramachandran. The hand writing of all the three documents are not one and the same. This throws further doubt in the case of the prosecution.

14. Now coming to the reference of crime number in the label affixed on the contraband, when a specific question was put to Murugaiyan (PW.2) regarding the crime number found on the label, he admits that the details



found in the label was prepared on the spot. He admits the crime number also written on the label but, he has not come forward to give explanation how and when the crime number was written on the label. As a Police Officer who has headed the riding team and effected seizure, he is suppose to explain the details found on the label including the crime number which is written on the label. Now in the course of argument, the learned Government Advocate (Crl.Side) would submit that the crime number on the label will be normally written while submitting the contraband to the safe custody of the Court. This explanation is supposed to be given by the witness during trial and not at the stage of appeal by the Government Advocate. Having failed to give proper explanation regarding the crime number written on the label, all the other three factors referred above cumulatively leads to the inference that the seizure and the arrest was not done in the spot as mentioned in the exhibit or in the manner spoken by PW.2 to PW.4. When the seizure itself becomes doubtful, as pointed out earlier, the appellant has to be extended the benefit of doubt."

5. Thus, the learned counsel for the appellant prayed for acquittal of the appellant from the charges.

6.Per contra, the learned Additional Public Prosecutor submitted that Section 50 of NDPS Act has been complied with, when the accused offered to search before the Gazetted Officer or before the Magistrate, which was declined by the accused and wanted to be searched by P.W.5. Therefore, the search was made and it is only directory in nature as such no violation in complying the procedure lay down under Section 50 of NDPS Act. He further submitted that on information received from the informant, P.W.5 vide Ex.P11 intimated to the higher official and as per the information, he went to the spot along with the police party and intercepted the car, in which, the contraband was illegally transported and after search and seizure, they collected samples and sent the same for chemical analysis and after obtaining report, they filed charge sheet as against the appellant(A1) and another (A2) and the evidence of the witnesses corroborated each other and accordingly, the prosecution proved the case beyond all reasonable doubts and the trial Court rightly convicted the appellant and the impugned judgment is liable to be confirmed. Therefore, he prayed for dismissal of this appeal. In support of his contention, he relied upon the decision of the Hon'ble Supreme Court in **Surinder Kumar Vs. State of Punjab**, reported in (1999 Crl LJ 267 (SC) has held as follows:-

"14. Further, it is contended by learned senior counsel appearing for the appellant that no independent witness was examined, despite the fact they were available. In this regard, it is to be noticed from the

depositions of Devi Lal, Head Constable (PW-1), during



the course of cross examination, has stated that efforts were made to Crl.Appeal No.512 of 2009 11 join independent witnesses, but none were available. The mere fact that the case of the prosecution is based on the evidence of official witnesses, does not mean that same should not be believed. 15. The judgment in the case of Jarnail Singh v. State of Punjab⁴, relied on by the counsel for the respondent-State also supports the case of the prosecution. In the aforesaid judgment, this Court has held that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that accused was falsely implicated. The evidence of official witnesses cannot be distrusted and disbelieved, merely on account of their official status. In the case of State, Govt. of NCT of Delhi v. Sunil & Anr.⁶ it was held as under: "It is an archaic notion that actions of the Police Officer, should be approached with initial distrust. It is time now to start placing at least initial trust on the actions and the documents made by the Police. At any rate, the Courts cannot start with the presumption that the police records are untrustworthy. AS a presumption of law, the presumption would be the other way 6 (2001)1 SCC 652 Crl.Appeal No.512 of 2009 12 round. The official acts of the Police have been regularly performed is a wise principle of presumption and recognized even by the Legislature". "

7. Heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the State and perused the materials available on records._

8. In this case, P.Ws.3 and 5 are the witnesses to the occurrence, search, seizure and arrest. P.W.3 is the Sub-Inspector of Police, attached to NIB CID, Tuticorin, who, on instruction of his superior, had gone to Thoothukudi and was present along with P.W.5 and other police party. Police party were keeping a watch, at that time, as identified by the informant, an Ambassador Car, bearing Registration No.TN-60-Z-4299 came, intercepted the Ambassador car between 12.00 to 12.30 a.m., which was driven by Pitchai Muthu (A1) and the appellant Murugan (A2) sitting in the front seat.

9. Ex.P6 is in compliance of Section 50(1) of NDPS Act, before search in which, the appellant / accused had signed. Thereafter, search has been conducted from the dicky of the car, 2 bags containing 20 Kgs Ganja each and from the back seat of the car, 3 bags of Ganja concealed under it of 20 Kgs each totally, 100 kgs of Ganja was recovered and were assigned as P1 to P5. Thereafter, two samples from each bag were drawn and S1 to S10 were



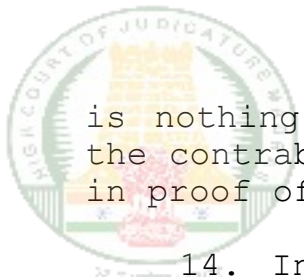
assigned. The vehicle was seized under Ex.P7 / Mahazar and the contraband were seized through Ex.P8 / Mahazar. The accused were arrested as per Section 52 of the Act. In Ex.P9, the appellant had signed the same. Thereafter, observation mahazar were prepared in the scene of occurrence. It is pertinent to note that when Exs.P1 to P10, were prepared in the scene of occurrence, there is no mention of the Crime Number.

10. Thereafter, the accused and the contraband were taken to the Police Station and Ex.P13 / FIR was registered against them in Crime No.20 of 2001, for the offence under Sections 20(b)(1) and 25 of NDPS Act., at about 7.15 p.m., Earlier to this, on receipt of secret information about the accused smuggling the contraband in the Ambassador car by P.W.5, he had recorded the same under Section 42 (2) and forwarded the information to the Deputy Superintendent of Police, who was camping at Thoothukudi. It is seen that during the period, the Inspector of Police, NIB CID Thoothukudi was vacant and the Inspector of Police, NIB CID, Ramanathapuram, was holding additional charge and he was at a far away place. Hence, information was sent to the superior officer, the Deputy Superintendent of Police, who was available at Thoothukudi.

11. P.W.4 is the Head Constable of NIB CID, who was entrusted with the samples of contraband to be produced before the Forensic Laboratory. His name and identity number had been mentioned in Ex.P2. P.W.2 is the Head clerk of the Special Court, who received the Form-95, contraband and the seized car on 17.04.2001, from the Magistrate Court, which was produced there on 11.04.2001, thereafter, as per Ex.P1 request, the Court had forwarded the samples through P.W.4 for Forensic study, examination was conducted by P.W.1, who had given report Ex.P3.

12. P.W.5 is the Sub Inspector of Police NIB CID, Thoothukudi, who along with P.W.3 and other Police party had lead the team, intercepted the vehicle, enquired the accused, seized the contraband of 100 Kgs of Ganja from the car, his evidence is corroborated with the evidence of P.W.3. It is to be seen that the appellant had made general denial on the arrest and seizure, the genuineness of Exs.P6 to P10 are not questioned and denied.

13. Further, it could be seen that Exs.P4 to P12 had reached the Court along with the accused during remand as well, the Form-95 produced along with properties. In Ex.P4 there is clear mention about the seizure and production of Ganja assigning as P1 to P5 and taking of samples and assigning as S1 to S10. Likewise, for seizure and production of the Ambassador Car and contraband, which are in confirmative to Exs.P7 and P8. All these documents had reached the Court on 11.04.2001. Further Ex.P11 the information report had also reached the Court on 11.04.2001. Ex.P13 FIR and Ex.P7 Report had also reached the Court on 11.04.2001. Thus, all the documents had



is nothing to doubt the genuineness of these documents. Further, the contraband had been produced and the Court endorsement are found in proof of the same.

14. In Ex.P14, 57 Report it has been categorically mentioned about the seizure. Report under Section 57 of NDPS Act, is a comprehensive one wherein, receipt of secret information, police party present in the road check, interception of the vehicle, search and seizure of contraband, arrest of accused, drawing and sealing of samples and contraband, produced before the Magistrate Court all are recorded and the same have been sent to the Court on 11.04.2001. Hence, there have been no delay in these aspects.

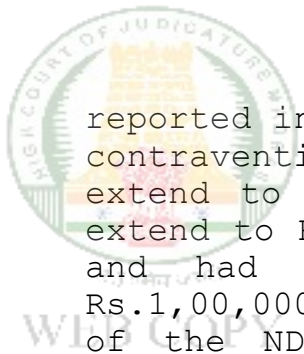
15. With regard to the sample being forwarded to the Chemical Analysis Ex.P1 is the letter addressed by the Investigating Agency to the Court wherein arrest, recovery and seizure are mentioned. Thereafter, the Court had forwarded the samples viz., S1, S3, S5, S7 and S9 along with the seal of the respondent, as could be seen from Exs.P2. Ex.P3 is the report of P.W.1, who found the samples as Cannabis / Ganja. Hence, the prosecution had clearly proved that the seized contraband were Cannabis / Ganja.

16. P.W.6 is the Inspector of Police NIB CID Ramanathapuram, who was holding additional charge of Thoothukudi Unit, took up the investigation on 15.08.2001, thereafter, conducted investigation, examined witnesses and filed the charge sheet in this case. This witness was questioned with regard to Crime Number found in Ex.P12, which is said to have been prepared in the scene of occurrence. Ex.P12 was prepared by P.W.5. Strangely, no question has been put to P.W.5 with regard to Ex.P12, who could have been the right person to give the reason. This Court finds that it only a genuine mistake and by no stretch it would cause prejudice or affect the case in any manner. Thus, on the available evidence, this Court finds that the prosecution had proved its case beyond reasonable doubt.

17. At this juncture, the counsel for the appellant submitted that the amendment to Section 20 was by Act 9 of 2001, which came into effect on 02.10.2001. The offence in this case is said to have taken place on 10.04.2001, before the amendment was brought in. He further submitted that, as per Article 20(1) of the Constitution, *"no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."* On the date of commission of the offence, the amendment had not come into force.

18. In support of the same, he relied upon the Judgment of High Court of Patna in **Tribhuvan Prasad Jaiswal Vs. State of Bihar**

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reported in **(2007 Cr1 L.J. 3037)** Hence, prior to the amendment, the contravention relating to the knowledge the maximum imprisonment extend to the period of five years and liable to fine which may extend to Rs.50,000/-. The trial Court failed to consider the same and had imposed the sentence of 10 years and a fine of Rs.1,00,000/-. For the sake of clarity, Section 20 (i) and (ii) of the NDPS Act, substituted by Act 9 of 2001, prior to the substitution, is extracted below:-

20(i) : where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extent to five years and shall also be liable to fine which may extend to fifty thousand rupees;

(ii) where such contravention relates to cannabis other than ganja, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees and whichy may extend to two lakh rupees;

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

19. Considering the above facts and circumstances of the case, the sentence imposed on the appellant, by the the learned Special District and Sessions Judge, for NDPS Act Cases, Madurai in C.C.No.560 of 2002, dated 22.10.2009, is modified to five years and a fine of Rs.50,000/- is imposed on the appellant, in default, to under go six months simple imprisonment.

20. With the above modification, the Criminal Appeal is Partly-allowed.

Sd/-

Assistant Registrar (RECORDS)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

**MPK
To**

1.The Special District and Sessions Judge
for NDPS Act Cases,

Madurai

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2.The Inspector of Police,
NIB CID,
Tuticorin

3.The Superintendent, Central Prison, Madurai.

4. The Record Clerk,-2 copies
Criminal Section,
Madurai Bench of Madras High Court,
Madurai

+1 CC to Mr.M.JEGADEESH PANDIAN, Advocate (SR-4225[F] dated
31/01/2020)

JUDGMENT MADE IN
Crl.A. (MD) No.358 of 2009
30.01.2020

KM/ (07.02.2020) 10P 7C