



IN THE HIGH COURT OF JUDICATURE AT MADRAS

[JUDGMENT RESERVED ON : 30.09.2021]

[JUDGMENT PRONOUNCED ON : 29.11.2021]

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

CRL.A.NO.155 OF 2015

AND

CRL.A.NO.213 OF 2016 AND

CRL.M.P.NO.3229 OF 2016

Rajapandi

... Appellant in Crl.A.No.155 of 2015

Sekar

... Appellant in Crl.A.No.213 of 2016

.. Vs ..

State rep.by
The Inspector of Police,
NIB CID,
Chennai - 39.
(Crime No.91/12)

...Respondent in both Crl.As.

COMMON PRAYER: Petitions filed under Section 374 (2) of Cr.P.C, to set aside the judgment passed in C.C.No.46 of 2012 dated 21.07.2014 on the file of the Principal Special Judge, First Additional Special Court, (FAC) NDPS Act, Chennai - 104.

For Petitioner	:	Mr.Mohamed Hashim For Mr.N.Mohideen Basha in Crl.A.No.155 of 2015
	:	Mr.S.Kishore Kumar For Mr.T.Rajkumar, Legal-Aid-Counsel in Crl.A.No.213 of 2016
For Respondent	:	Mr.S.Vinoth Kumar, Public Prosecutor (Crl.Side) (in both cases)



COMMON JUDGMENT

The convicted A1 is the appellant in Crl.A.No.213 of 2016 herein., While A2 is the appellant in Crl.A.No.155 of 2015.

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2. These Criminal Appeals are filed against the judgment pronounced by the learned Principal Special Judge, First Additional Special Court, (FAC), NDPS Act, Chennai - 104 in C.C.No.46/2012 dated 21.07.2014, convicting A2 for the offences under Section 8(c) read with 20(b)(ii) (C) of NDPS Act, 1985, as amended by Act, 9/01 and sentenced him to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.1,00,000/-, in default, to undergo 1 year Rigorous Imprisonment. A1 was convicted under Section 8(c) read with 20(b)(ii)(c) of NDPS Act and sentenced to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.2 lakhs, in default, to undergo 2 years Rigorous Imprisonment A3 was acquitted of charges. As against A4, separate trial was conducted in C.C.No.69/2013).

3.The respondent/Police filed charge sheet alleging that after completion of thorough and detailed investigation and based on the statements of the witnesses and confession statement of the accused, the then Deputy Superintendent of Police has laid the charge sheet against the accused (A1 to A3) in Chennai NIB C11) Crime No.91/2012 under Sections 8(c) read with 20(b)(ii)(c) of NDPS Act and the same was submitted before the learned Principal Special Judge, First Additional Special Court, [FAC] NDPS Act, Chennai - 104 and the same was taken on file vide C.C.No.46 of 2012, dated 07.12.2012.

4. Though the order of conviction was passed on 21.07.2014 appeals have been preferred from custody with a delay and after condoning the delay in filing the appeals, the appeals have been taken on file and assigned the number as stated supra.

5. A1 and A2 were convicted as stated supra and separate appeals have been filed by them.

6. The case of the prosecution is that, based on the source of secret information and after getting the permission from the higher officials, on 20.08.2012, the then Inspector of Police has conducted the vehicle check-up near 100 feet road, Vadapalani, Chennai and at that time, one White colour Innova car bearing Registration No.TN 58 U 0820 came to the spot from Andhra Pradesh along with the accused persons, by name, 1)Sekar [A1] and 2)Rajapondi [A2] and it was found that 300 kilos dry Ganja was smuggled by them for Ganesan @ Kundu Ganesan [A3] and Selvam @ Thavakkalai Selvam [A4] from Madurai District.



7. The accused [A1 to A3] were arrested by the then Deputy Superintendent of Police and brought to the Police Station and their confession statement was recorded, wherein they have stated that A3 & A4 have given an amount of Rs.80,000/- and Rs.25,000/- respectively to get the 'Ganja', and they have purchased 300kgs of Ganja from Andhra Pradesh and transported the same by Innova Car.

8. As per the special report of the then Inspector of Police, a case was registered in Chennai NIB CID Crime No.91 of 2012 under Section 8(c) read with 20(b)(ii)(c) of the NDPS Act,1985.

9. During the course of the investigation, then then Deputy Superintendent of Police has examined 8 witnesses and recorded their statements.

10. After completion of trial, the learned Principal Special Judge, First Additional Special Court, (FAC), NDPS Act, Chennai - 104 convicted the accused and sentenced them as follows on 21.07.2014:-

A-1	8(c) r/w 20 (b) (ii) (c) of NDPS Act	10 years Rigorous Imprisonment and to pay a fine of Rs.2,00,000/- in default to undergo 2 years simple imprisonment
A-2	8(c) r/w 20 (b) (ii) (c) of NDPS Act	10 years Rigorous Imprisonment and to pay a fine Rs.1,00,000/- in default to undergo one year simple imprisonment

11. Record reveals that, to prove the case, prosecution has examined 5 witnesses, marked 14 Exhibits and 65 material objects and the defence has examined one witness and no exhibits and no material objects were marked on their side before the trial Court.

12 (a). The sum and substance of the prosecution witnesses in brief is that, according to the prosecution, on 20.08.2012 at about 6.00P.M., P.W.1 had received information from his Informer that between 8.30a.m and 1.00 P.M, A1 and A2 in this case were transporting 'Ganja' in a white colour Innova Car bearing registration No.TN 59 U 0820 passing through Arcot Road - 100 feet road signal at Vadapalani, which information was recorded by P.W.1 and the said information was intimated to his superior officer P.W.5 the Deputy Superintendent of Police at 6.30 a.m and after his permission along with his team, including P.W.2 and P.W.3, they had gone to the spot at 7.00 a.m and were under



surveillance from 7.30 a.m and at about 8.30 a.m, they spotted the vehicle as told by the Informer, driven by A2 herein and intercepted the vehicle and approached the public for being a witness and since the public refused, engaged P.W.2 and P.W.3 as witnesses and informed the accused about their right to be searched before the Gazetted Officer or a Judicial Magistrate, which the accused refused and consented P.W.1 to proceed.

(b) According to P.W.1, he recorded the same and served on the accused and that, on search, they found 21 Polythene bags totally weighing 300 kgs in back seat and took 50gms of two samples from each 21 bags, totaling 42 samples and marked them as S1 and S42 and seized them under the cover of mahazar at 10.30 a.m and obtained confession statements from each of the accused and arrested them and came to station and prepared report under Section 57 of the NDPS Act and submitted to P.W.5. Thereafter, P.W.5 took over the investigation and had sent the contraband for chemical analysis through Court and after investigation, final report was filed under Section 8(c) read with 20(b)(ii)(c) of NDPS Act, 1985, as amended by Act 9/01.

13. From the evidence of P.W.1 Inspector of Police, it is seen that he had received the secret information from the Informer and report Ex.P1 and went to the spot and conducted the vehicle check up and arrested the accused. The samples were taken from 21 bags, each containing 50 grams from the white colour Innova car and also produced A1 and A2 before the Superintendent of Police along with Special Report and seized items. The Magazar witnesses P.W.2 and P.W.3 have duly corroborated the evidence of P.W.1.

14. P.W.14 is the Deputy Director to the Forensic Department who had analysed the samples of the materials seized and examined and issued chemical analysis report/Ex.P10.

15. Under Ex.P10, P.W.4 stated that he has found out in all 21 samples recovered by the Police as found to have as S1, S3, S5, S7, S9 S11, S13, S15, S17, S19, S21, S23, S25, S27, S29, S31, S33, S35, S37, S39 and S41, stating "என குறியிடப்பட்டிருந்த அனைத்து இருபத்தியொரு (21) மாதிரிகளிலும் கெனபினாய்டுகள் இருப்பது கண்டறியப்பட்டது."

S1, S3, S5, S7, S9, S11, S13, S15, S17, S19, S21, S23, S25, S27, S29, S31, S33, S35, S37, S39 மற்றும் S41 stating "என குறியிடப்பட்டிருந்த அனைத்து இருபத்தியொரு (21) மாதிரிகளும் கஞ்சா."

16. Hence, the trial Court has rightly come to the conclusion that what was seized by the Police and produced for the chemical analysis, is Ganja, which is a contraband.



17. It is the specific evidence of P.W.5 Investigation Officer that he has given permission to P.W.1 Inspector of Police to conduct the vehicle check up and accused were produced before him by P.W.1 along with Special Report and seized items. Based upon Special Report P.W.1 had registered F.I.R in Ex.P11 and laid the charge sheet as stated above under NDPS Act.

18. According to the learned counsel for the appellants, the prosecution has failed to comply with the mandatory provisions of Sections 42(1), 42(2), 50(1) and 57 of the NDPS Act and hence, he seeks for setting aside the conviction and sentence and prayed for acquittal.

19. Heard the learned counsel for the respondent/Police.

20. Non-examination of independent witnesses during the search and seizure of the items, has been projected. It is a specific version of P.W.1 that he has requested two persons who are independent persons available near the scene of the crime, however they have refused to stand as a witness.

21. On a perusal of the evidence of P.W.1, cross examination of P.W.1 to P.W.3 and also the answer given by the accused under Section 313 of the Cr.P.C., no suggestions or the official prosecution witnesses were confronted as to the non-examination of independent witnesses due to which the seizure is vitiated, nor it is believed that has been raised against them and since, no independent witnesses were examined the alleged seizure is bad-in-law.

22. Taking into consideration the fact that it is a special criminal appeal and also the version of P.W.1 as to the fact that two of the persons in the locality, have not come forward to stand as a witness for the seizure and the said version, remained unchallenged in the cross examination, I find that mere non examination of independent witnesses, is not fatal to the prosecution.

23. On perusing the oral evidence of P.W.1., coupled with the report filed under Section 42(1) of the NDPS Act, I find that the Informer has given the details of the transportation of the contraband and the same was reduced into writing and thereafter, based upon the same, he has prepared the report under Section 57 of the NDPS Act.

24. The aid of the statement though not required in entirety by word by word, as clearly spoken to by the prosecution witness about the information that was received from the Informer, the same was reduced in the full form as far as possible and hence,



I find that there is no violation of the mandatory provisions as stated by the learned counsel for the appellant.

25. From the evidence of P.W.2 and P.W.3, this Court finds that the second accused was driving the white Innova car. On the date of the seizure, the car was produced before the jurisdictional 17th Metropolitan Magistrate, Chennai and both the first and second accused were travelling and the contraband was seized, while they were travelling in the said vehicle. The evidence of P.W.1, P.W.2 and P.W.3 is that the second accused alone was driving the vehicle, and it remained unchallenged in the cross-examination and hence, on combined reading of the cross-examination of P.W.1 and P.W.3, I find that both these accused/appellants have not challenged the manner of the arrest and seizure and hence, in the absence of any challenge as to the version pleaded and averred by P.W.1, the same is held to be proved in the manner known to law. Accordingly, I find that the arrest and seizure of the materials from the white Innova car, had been proved in the manner known to law.

26. On a perusal of Ex.P7 Inspection Memo regarding the arrest and Ex.P6 report under Section 57 of the NDPS Act and Exs.P4 to P8, I find that the prosecution has let in positive evidence to show the manner of arrest and the accused were travelling in the seized vehicle and the accused as well as the seized vehicle had been produced before the learned Magistrate on the very same day also, and it lends credence to the case of the prosecution.

27. The learned counsel for both the appellants contended that Ex.P2 is a joint information notice and however the accused are entitled for individual and separate notice and he relied upon the decisions of the Supreme Court in (2014) 5 SCC 345=(2014) 2 MLJ (Cr1) 245 (SC) [State of Rajasthan Vs.Parmanand and Ors]

28. The Hon'ble Supreme Court in (2014) 5 SCC 345=(2014) 2 MLJ (Cr1) 245 (SC) [State of Rajasthan Vs.Parmanand and Ors] has held in the decisions reported in (2014) 2 MLJ (Cr1) 245 (SC) [State of Rajasthan V.Parmanand and others] as follows:-

"12. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched.



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From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application."

29. In this case, the evidence of P.W.1 seizure officer and P.W.2 and P.W.3 attester of the seizure mahazar, could go to show that what was searched is white Innova car and hence, when there is no search of the person of the accused, I find that the notice under Section 50(i) of the NDPS Act has no application and therefore on the factual position, I hold that Ex.P2 does not invalid the seizure proceedings.

30. The contents of Ex.P2 notice goes to show that nowhere it was whispered or mentioned that the accused A1 and A2 are going to be searched in person (physically). In respect of transportation of Ganja, they were like to carry out the inspection and the rights of the accused under Section 51 of the NDPS Act has been given notice. What was searched is the vehicle in which the accused A1 and A2 travelled and not person and hence, I find that Section 50 of the NDPS Act has been duly complied with. A similar finding rendered by the learned Special Judge for NDPS Court, does not suffer from any illegality or irregularity warranting interference by this Court.

31. P.W.1 is the officer who had seized the property from the custody of the accused in the Innova vehicle and as per Ex.P3 seizure Mahazar dated 20.08.2012, they have found 21 sealed pockets containing 50 grams each and the same was found to be Ganja as per Ex.P10 chemical examiner's report. The same is produced before the jurisdictional Magistrate under 'Form 95', which is marked Ex.P12. Before the learned Magistrate, the property had been produced and he directed to produce the same before the concerned Court, namely Special Court for NDPS, as could be seen from the endorsement thereon. The date of production of the sealed item in the above said manner, has been duly laid by the learned Magistrate, as could be seen from the description in the property. The seized property was produced for remand before the Magistrate on 20.08.2018. As per Ex.P12 and Ex.P13, the accused A1, A2 along with seized property, were remanded.

32. On 28.08.2012, the same was returned and produced before the learned Session Judge on 31.08.2012 and the same was taken delivery by the Head Constable V.Sridhar on 31.08.2012.

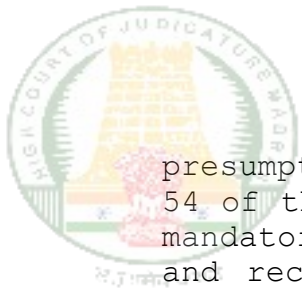


33. Though the learned counsel for the appellants contended that the sealed items were properly affixed with label containing computer print out and also hand print out.

34. After perusing the documents and also the samples thereon, I do not find that this minor discrepancy seal destroy from seizure.

35. In this regard, an explanation has been offered by the seizure officer P.W.1 that the labels affixed to the samples have been described with the Crime Number under the concerned provision of law. In respect of other details it is computer print out. I find that this computer print out had been affixed by the Court so that the seized properties received in this case, is not mixed up with the other properties to cause confusion and furthermore, a similar finding has been rendered by the learned Sessions Judge that what was written in the font by the prosecution and the computer print out labels with the crime number, were affixed in the Court. Thus, the case properties in the NDPS cases are kept separately before being forwarded to the Forensic Department and hence, an explanation offered by the seizing officer P.W.1 and the observation made by the learned Session Judge, makes the position very clear and hence, the said contention of the learned counsel for the appellant, stands negatived.

36. Hence, based upon the seizure mahazar Ex.P3, Ex.P6 to Ex.P7 arrest report given by P.W.1 and Exs.P4 and P5 and necessary endorsement made therein, I find that the seizure and arrest of accused produced before the learned Magistrate was on the very same day and as per the orders of the learned Magistrate, the property was taken and received by the concerned Head Constable and produced before the concerned Special Judge within a period of 8 days and hence, I find that the short delay has been properly explained by P.W.5 and hence the finding rendered by the trial Court that the mandatory provisions contemplated under Sections 42 (i) 42(ii) 50(1) and 57 of the NDPS Act are found to be just and proper and it does not suffer from any illegality or irregularity warranting interference at this appellate stage. Consequently, in view of the fact that both these appellants/accused were found to be in conscious possession of contraband which is found to be an Ganja, as per the evidence of P.W.4 chemical examination and hence, I find that the prosecution is entitled for presumption under Sections 35 and 54 of the NDPS Act. However, as stated supra, the versions of the prosecution witnesses remained unchallenged in the cross-examination, nor that a false case has been foisted case that for statistical purpose and hence I hold that, in the absence probablization of the defence case, after statutory



presumption in favour of the prosecution, under Sections 35 and 54 of the Act, I find that the prosecution has complied with the mandatory provisions under Sections 42 and 57 of the NDPS Act and recovery from the vehicle has been made, besides, to that effect the arrest report, the arrest of accused and the seizure of contraband had been found to be proper. Accordingly, I find that as the culpable mental state and conscious possession of the contraband by the accused is proved by the prosecution in the manner known to law and the conviction laid by the learned Sessions Judge is hereby confirmed.

37. On the quantum of sentence, respective counsels are heard.

38. According to the counsel, the accused was remanded to Judicial custody from 20.08.2012. The statutory prescription is of minimum sentence of 10 years and the same is awarded by the learned Sessions Judge. Since it is minimum sentence, this Court finds that the sentence awarded by the trial Court/Special Judge cannot be termed as excessive and the same is hereby confirmed.

39. In view of the decision of the Supreme Court reported in CDJ 2012 8C 701 [Shahejadjkhan Mahebubkhan Pathan Vs.State of Gujarat] has held as follows:-

"12. It is clear and reiterated that the term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstances, we are of the view that it is the duty of the Court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of



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fine. The provisions of Sections 63 to 70 of I.P.C make it clear that an amount of fine should not be harsh or excessive. We also reiterate that where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases. "

40. Taking into consideration the period of conviction and the sentence awarded in the preceding paragraphs, the default sentence has granted by the learned Sessions judge, is reduced to one month Rigorous Imprisonment in default of payment of fine.

41. In fine, the conviction and sentence passed against the both the accused/the appellants are hereby confirmed and the sentence awarded thereon is also confirmed and in default of payment of fine, the period of sentence of Rigorous Imprisonment alone is reduced to one month.

42. These Criminal Appeals are partly-allowed to the limited extent of reducing the default sentence period alone. Since the appellants/accused are in jail, they shall undergo the remaining sentence, if any to be undergone by them. The period of sentence already undergone by them shall be set off under Section 428 Cr.P.C. Consequently, connected Crl.M.P is closed.

Sd/-

Deputy Registrar (CS)

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Sub Assistant Registrar

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To

1. The Principal Special Judge,
First Additional Special Court, (FAC) NDPS Act,
Chennai - 104.
2. The Director General of Police,
Mylapore, Chennai - 600 004.
3. The Inspector of Police,
NIB CID, Chennai - 39.
4. The Public Prosecutor (NDPS),
High Court, Madras.



5. The Superintendent of Central Prison,
Puzhal, Chennai.

6. The Section Officer,
Criminal Section Records,
High Court, Madras.

Crl.A.No.155 of 2015 and
Crl.A.No.213 of 2016 and
Crl.M.P.No.3229 of 2016

BR(CO)
RLP(07/12/2021)