

BAIL SLIP

The Appellant/Accused namely O.Ramachandran S/o.Ondiveerapadevar was directed to be released on bail as per order of this Court dated 16/04/2014 in Crl.MP.No.01 of 2014 in Crl.A.No.209 of 2014 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 15.12.2020

Pronounced on : 08.01.2021

CORAM

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Crl.A.No.209 of 2014

O.Ramachandran ... Appellant/Accused No.I

Vs.

State Rep. By
The Inspector of Police,
NIBCID, Chennai. ...Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, against the judgment of conviction and sentence passed by the learned I Additional Special Judge for NDPS Cases, Chennai, in C.C.No.97 of 2007 dated 09.04.2014.

For Appellant : Mr.R.Rajan

For Respondent : Mr.S.Karthikeyan

Additional Public Prosecutor

J U D G M E N T

The present Criminal Appeal has been filed against the judgment of conviction and sentence dated 09.04.2014, passed in C.C.No.97 of 2007 on the file of the learned Special Judge, I Additional Special Court under NDPS Act, Chennai.

2. The appellant is arrayed as Accused No.1 in the above referred case. The case against the Accused No.2, was already split up and taken up on file separately in C.C.No.3 of 2014 vide order dated 21.01.2014.

3. By judgment dated 09.04.2014, the learned Special Judge, I Additional Special Court under NDPS Act, Chennai, found the accused guilty for the offence under Section 8(c) r/w 20(b) (ii) (B) of NDPS Act and accordingly, convicted and sentenced him to undergo three years of rigorous imprisonment and to pay a fine of Rs.10,000/-, in default to undergo rigorous imprisonment

for one month. The trial Court further ordered to set off the sentence already undergone by the accused, under Section 428 of Cr.P.C.

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

5. The case of the prosecution, in brief, is as follows:

(i) PW2-Thiru.K.S.Senthil, was working as a Sub-Inspector of Police in NIBCID. On 04.06.2007, at about 7.00pm, his informant contacted him over phone and informed that between 8.00 to 12.00pm, the present accused Ramachandran and one another [absconding] accused Chinna, would come near to Buhari Hotel, available on the Gandhi Irvin Road, Egmore, with some contraband. That intimation was reduced into writing and placed before PW5-Thiru.S.Murugaiyan, the Inspector of Police, NIBCID by 7.15pm.

(ii) After getting permission from the Inspector of Police, PW2 along with the police party consisting of Sub Inspector Thiru.A.Malaichamy, Head Constables viz., Thiru.Sridharan, Thiru.Arul Kumar, Thiru.Sakthivel and Thiru.Karthikeyan, left the police station by 7.30pm and reached the place informed by the informant at 8.00pm. They were keeping the place under surveillance. By 9.00pm, the accused herein with another accused Chinna, came there. The accused were identified by the informant.

(iii) Immediately, PW2, intercepted them, enquired them and ascertained that the said persons were the persons mentioned by the informant. Both accused were carrying a rexine suitcase and travel bags separately in their hands. PW2, informed to them about the right available to the accused in respect of search, under NDPS Act. Both accused declined the offer of conducting the search in the presence of Gazetted Officer or a Judicial Magistrate and prepared for search by the Sub Inspector of Police.

(iv) The bags carried by the accused were searched. Ganja was found in each bags. The ganja alone was weighed. The accused herein carried 18Kgs of ganja and another absconding accused Chinna carried 18Kgs of ganja. Samples were collected from each bulk quantity and packed separately. In the bags, labels were affixed and then sealed. A cash of Rs.2,500/- was recovered from the absconding accused Chinna. Both the accused were arrested for possessing ganja, without valid licence or permit. The ganja was seized and the accused were arrested.

(v) In continuation of investigation, on 05.06.2007, at about 00.30 hours, PW2, prepared a report under Section 57 of the NDPS Act and handed over the report along with the accused to PW5-Thiru.S.Murugaiyan, Inspector of Police. He has also produced the contraband to PW5.

(vi) Upon receipt of the same, PW5, registered a case in Cr.No.66 of 2007 under Section 8(c) r/w 20 (b)(ii)(C) and 29 of the NDPS Act. Further, he took steps to send the accused for remand and to send the samples for analysis through the Court. In this regard, he sent necessary application for chemical examination.

(vii) PW1- is the Scientific Assistant, who analysed the samples sent by the Court for analysis. According to her, she found that the samples found in the packet were ganja and therefore, she submitted a report to that effect.

(viii) In continuation of the investigation, PW5, after getting analysis report and after completing the investigation filed a final report against the accused.

6. Based on the above materials, the trial Court framed the charges under Section 8(c) r/w 20 (b)(ii)(C) and 29 of the NDPS 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 5 witnesses were examined and 12 documents were marked as Ex.P1 to Ex.P12, besides 13 Material Objects viz., M.O.1 to M.O.13.

(i) Out of the said witnesses, PW1-Tmt.Mariya Selvi Rosalin, is the Scientific Assistant, who examined the samples, forwarded by the Court, alleged to be recovered from the accused. According to her, the samples found in the sealed packet, is ganja.

(ii) PW2-Thiru.K.S.Senthil, is the then Sub Inspector of Police, NIBCID. He speaks about the receipt of information, arrest of accused and recovery of contraband.

(iii) PW3-Thiru.R.Arul Kumar and PW4-Thiru.A.Karthikeyan, are also the police officers, attached with NIBCID. They have spoken about the attestation made in the Mahazar, which was prepared by PW2 for the purpose of recovering the contraband. According to them, the samples were also taken by the PW2, in their presence.

(iv) PW5-Thiru.S.Murugaiyan, is the then Inspector of Police, NIBCID. He has deposed in respect to the receipt of information by PW2 and about the permission granted to PW2 for conducting search. He speaks about the filling of final report, after completing the investigation.

7. When the above incriminating materials were put to the accused, under Section 313 Cr.P.C., he denied the same as false. However, he did not chose to examine any witness on his side. But marked one document i.e.Ex.D1, Requisition Letter to Court, with regard to production of contraband.

8. Having considered the materials placed before him, and after considering the rival submissions made by the learned counsel appearing on either side, the learned Special Judge, I Additional Special Court under the NDPS Act, came to the conclusion that the accused is found guilty under Section 8(c) r/w 20(b) (ii)(B) of NDPS Act and sentenced the appellant/Accused No.1, as stated supra. Aggrieved over the said conviction and sentence, the appellant is before this Court, with this appeal.

9. Learned counsel appearing for the appellant/Accused No.1, would contend that the evidence given by the prosecution witnesses, in respect to the recovery of contraband, is having a lot of contradictions. In respect to the driver, who drove the vehicle for reaching the occurrence place, the evidence given by the prosecution witnesses, are contradictory in nature. Further, after recovering the contraband, the same has not been produced before the Court nearly for a period of 45 days, which is fatal to the case of the prosecution. According to him, the respondent police has foisted a false case against this appellant for statistical purpose. Therefore, he prayed to allow this appeal.

10. Per contra, Mr.S.Karthikeyan, learned Additional Public Prosecutor appearing for the State would contend that the contradictions now indicated by the counsel for the appellant/Accused No.1, are minor and further that they would not materially affect the case of the prosecution, in entirety. In view of Section 35 of the NDPS Act, the Court shall presume that, only the accused was possessed with the contraband and therefore, interference of this Court, is not necessary in the findings arrived at by the trial Court.

11. I have heard Mr.R.Rajan, the learned counsel appearing for the appellant/accused No.1 as well as Mr.S.Karthikeyan, learned Additional Public Prosecutor appearing for the State and perused the materials available on record.

12. In respect to the possession of contraband, it is admitted on either side that the alleged contraband has been recovered by the police officers on 04.06.2007, at about 9.00pm. Subsequently, the same has been handed over to the NDPS Court on 19.07.2007. In this regard, PW5, who is the investigating officer has stated in his cross examination that on 04.07.2007 itself the contraband was handed over to the learned XIV Metropolitan Magistrate and thereafter, only as per the direction given by the said Magistrate, the contraband was taken back by the police and produced before the NDPS Court on 19.07.2007, after receiving the case records from XIV Metropolitan Magistrate. PW5 has fairly admitted that no evidence has been adduced to show that the contraband was in whose custody during the period between 04.06.2007 and 19.07.2007.

13. At this juncture, it is relevant to see the judgment of our Hon'ble Apex Court, in State of Rajasthan Vs. Gurmail Singh reported in 2005 (3) SCC 59, wherein our Hon'ble Apex Court has held as follows:

"We have perused the judgment of the High Court. Apart from other reasons recorded by the High Court, we find that the link evidence adduced by the prosecution was not at all satisfactory. In the first instance, though the seized articles are said to have been kept in the malkhana on 20th May, 1995, the Malkhana register was not produced to prove that it was so kept in the malkhana till it was taken over by PW-6 on June 5, 1995. We further find that no sample of the seal was sent along with the sample to Excise Laboratory, Jodhpur for the purpose of comparing with the seal appearing on the sample bottles. Therefore, there is no evidence to prove satisfactorily that the seals found were in fact the same seals as were put on the sample bottles immediately after seizure of the contraband. These loopholes in the prosecution case have led the High Court to acquit the respondent"

14. Accordingly, it is the duty vested upon the prosecution to show satisfactory explanation, that the contraband was kept in the safe custody. But here, it is a case, the property was handed over to the NDPS Court after 45 days, from the date of recovery. But in this regard, the prosecution has not produced the records, which shows the date on which the property was received and the date on which the property was taken from the safe custody. Delay of 45 days in producing the property is nothing but fatal to prosecution.

15. Further, no explanation was offered on the side of the prosecution for the delay in producing the contraband before the Court. The articles seized appears to have been not kept in the 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.

16. Moreover, in order to show the direction given by the remanding Magistrate, i.e., for producing the contraband before the NDPS Court, no document has been produced on the side of the prosecution that on the date of remand itself the property was produced before the Magistrate. Before the trial Court, the Form-95 through which the contraband was recovered by PW2, is marked as Ex.P10. In the said document, no entry has been made by the Remanding Magistrate, in respect to the production of the contraband, at the time of remanding the accused on 04.06.2007.

17. So, without any iota of the document, this Court cannot uphold the contention raised by the State that only upon the direction given by the Remanding Magistrate, the contraband was kept in the police custody for a period of 45 days. Therefore, that alone is sufficient to hold that the prosecution fails in their attempt to prove their case.

18. Further, though the learned Additional Public Prosecutor contended that as per the judgment of our Hon'ble Apex Court in Hardip Singh Vs. State of Punjab, reported in 2008 (8) SCC 557, the delay in sending the contraband is not a fatal to the prosecution, herein it is a case, PW2 and PW5 have categorically stated that immediately after recovery of contraband, the same has been produced before the Remanding Magistrate along with the accused. But in order to show the same, the endorsement made by the Magistrate has not been marked either as exhibit or the same has been produced along with other records. In fact in Form-95, the initials of Magistrate is there. In the said situation, if the contraband is produced along with the accused, necessarily he would have made endorsement for production of the same before the Court concerned. But without any iota of evidence, making submission that only as per the direction of the remanding Magistrate, the contraband is kept in the safe custody, is unacceptable one.

19. Secondly, in respect to the search made by the PW2, he gave evidence as upon receipt of the information and after getting permission from PW5, he has gone to the occurrence place by using a Jeep. In this regard, he has specifically stated that only Head Constable Thiru.R.Arul Kumar was driving his Jeep. On the other hand, the said Thiru.Arul Kumar, who has been examined as PW3, has stated that he does not know where the Jeep

was parked by the driver. If the evidence of PW2, is found correct one, PW3, Thiru.R.Arul Kumar, being the driver definitely would have known the place, where the vehicle was parked. Further, PW2 has stated that the Jeep was parked near to the railway station. On the other hand, PW4-Thiru.A.Karthikeyan, who is one of the Special Sub Inspector, attested the Mahazar, has stated that the Jeep was parked in a bus stop near to Udipi Hotel. Therefore, in respect to the parking of vehicle, the witnesses examined on the side of the prosecution, has stated three different versions

20. In this regard, considering the fact that contraband was not seized in the presence of the independent witnesses, the above evidence given by the witnesses, creates a doubt whether PW3 and PW4 have accompanied the PW2, during the time of search. Therefore, assuming that if PW3 and PW4 have not accompanied PW2, the entire search, alleged to be stated by the PW2, goes away.

21. At this juncture, it is relevant to see the judgment of our Hon'ble Apex Court in State of HP Vs. Trilok Chand and another, reported in 2018 (2) SCC 342, wherein, in a similar situation, our Hon'ble Apex Court has held as follows:

"12. Going by the number of discrepancies in the prosecution case coupled with the contradictory statements by prosecution witnesses, the entire prosecution story vitiates and leads for discrediting its version. Contradictions in the statement of the witnesses are fatal for the case, though minor discrepancies or variance in their evidence will not disfavour [See: State of H.P. Vs. Lekh Raj (2000) 1 SCC 247]. Considering the circumstances of the case on hand, it can be said that the discrepancies are comparatively of a major character and go to the root of the prosecution story. We cannot therefore ignore them to give undue importance to the prosecution case. It is well settled that the Court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. The evidence is to be considered from the point of view of trustworthiness and once the same stands satisfied, it ought to inspire confidence in the mind of the Court to accept the stated evidence [see Sukhdev Yadav v. State of Bihar, (2001) 8 SCC 86]."

22. So, applying the ratio laid down in the above referred judgment herein also, since the presence of PW3 and PW4 becomes doubtful, it leads to a major contradiction and creates a doubt whether they were actually present during the time of recovering the contraband or not.

23. More than that, in respect to the weighing of the contraband, PW4 has stated that the contraband was weighed by using Spring Balance [tpy; juhR]. On the other hand, PW3, has stated that the contraband was weighed through the Electronic Weighing Machine. Therefore, the evidence given by PW3 and PW4, in respect to the 'weighing machine', used for weighing the contraband band, also is having contradiction, which also creates a doubt, whether they were present during the time of weighing the contraband or not.

24. Accordingly, in the light of the above discussion, this Court is of the view that the prosecution fails in their attempt to prove that the contraband was recovered only from the appellant/Accused No.1. The Court below without considering the same, has convicted the appellant/Accused No.1, which is erroneous in law.

25. In the result, the Criminal Appeal is allowed. The judgment of conviction and sentence imposed upon the appellant/accused No.1 by the learned Special Judge, I Additional Special Court under NDPS Act, Chennai, in C.C.No.97 of 2007 dated 09.04.2014, is set aside and he is acquitted of the charge. Fine amount, if any, paid, shall be refunded to the appellant/accused No.1. Bail bond, if any, executed by the appellant/accused No.1, shall stand cancelled.

-s/d-

Assistant Registrar

true Copy

Sub-Assistant Registrar

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To

1. The Special Judge,
I Additional Special Court under NDPS Act,
Chennai,
2. The Inspector of Police,
NIBCID,
Chennai.

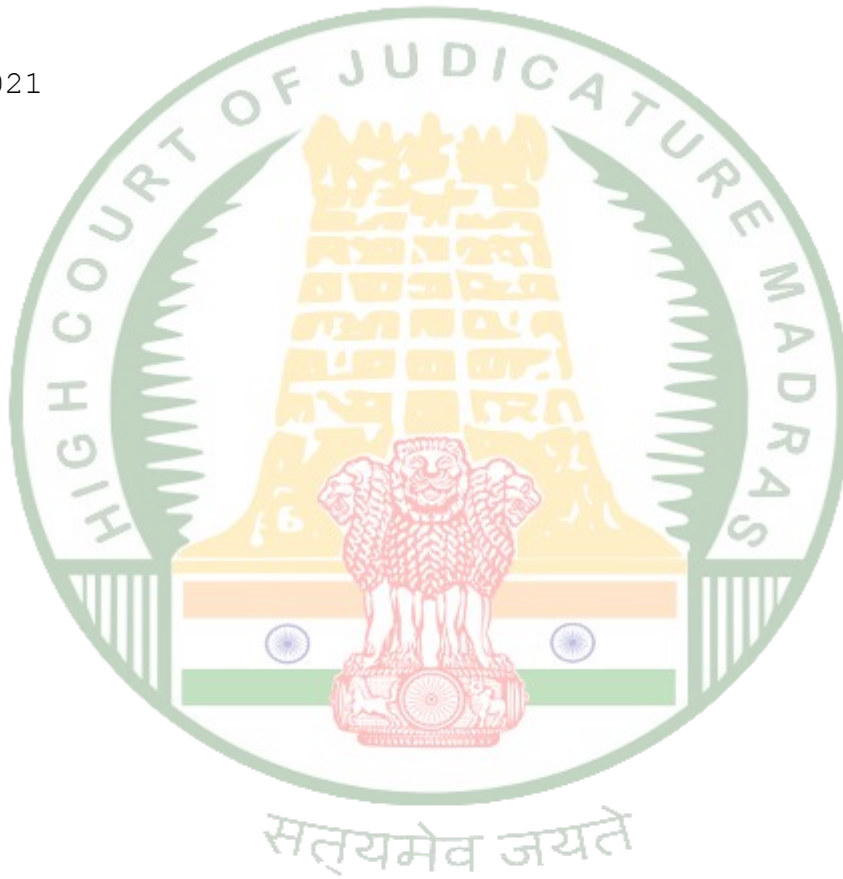
3.The Superintendent
Central Prison
Puzhal Chennai

4. The Public Prosecutor,
High Court, Madras.

Copy to
The Section Officer
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High Court, Madras-104

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