



BAIL SLIP

1.Tmt.Saraswathi W/o.Ravi @ Ravichandran, 2.Ayyammal W/o.Thangaraj, Petitioners/Appellants Accused No.1 & 2 were released on bail vide Hon'ble High Court Order dated 08/03/2016 made in M.P (MD)No.1 of 2015 in Crl.A(MD)No.227 of 2015

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

JUDGMENT RESERVED ON : 16.08.2021

JUDGMENT DELEVERED ON : 31.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE **R.PONGIAPPAN**

Crl.A.No. (MD)No.227 of 2015

1.Saraswathi

2.Ayyammal

: Appellants/Accused Nos.1 & 2

Vs.

The State represented by,

The Inspector of Police,

N.I.B.C.I.D.,

Theni District.

(Crime No.120,121 of 2005)

: Respondent/Complainant

PRAYER: The Criminal Appeal is filed under Section 374 of the Code of Criminal Procedure, to call for the records and set aside the order of conviction and sentence, dated 24.08.2015 made in C.C.No.363 of 2006, on the file of the II Additional Principal Special Court EC & NDPS Act, Cases, Madurai and allow the Criminal Appeal.

For Appellants

: Mr.M.Pitchai Muthu

For Respondent

: Mr.M.Muthumanikkam

Government Advocate (Crl.side)

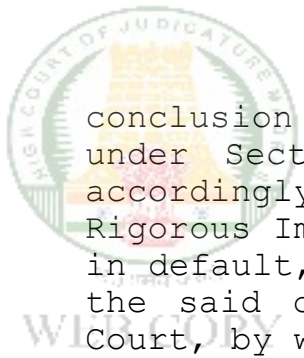
JUDGMENT

The present Criminal Appeal is directed against the conviction and sentence, dated 24.08.2015, made in C.C.No.363 of 2006, on the file of the II Additional Principal Special Court EC & NDPS Act, Cases, Madurai.

2.The appellants are arrayed as accused Nos.1 & 2 in the above referred case. They stood charged for the offences punishable under Sections 8(c) r/w 20(b) (2) (b) of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as "NDPS Act"). The accused denied the charges as false and opted for trial. Therefore, they were put on trial on the charges.

3.After full-fledged trial, the learned II Additional Principal Special Judge EC & NDPS Act Cases, Madurai, came to the

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conclusion that the appellants were found guilty for the offences under Sections 8(c) r/w 20(b) (2) (b) of NDPS Act, 1985 and accordingly, convicted and sentenced the appellants to undergo Rigorous Imprisonment for 5 years and to pay a fine of Rs.20,000/-, in default, to undergo Simple Imprisonment for 6 months. Challenging the said conviction and sentence, the appellants are before this Court, by way of filing the present Criminal Appeal.

4.The relevant facts of the case, which gave rise to filing of this appeal are necessary to be recapitulated for the disposal of this appeal:-

(i)P.W.3-Thiru.Marirajan while he was in Special Investigation Team, which formed to find out a Narcotic Substances, on 13.09.2005 around 06.00 a.m., received the information as in Theni District, Kamatchipuram, Patrakaliamman Kovil Street, there was a team consisting of one male and two female sold the Ganja. The said information was submitted before the Deputy Superintendent of Police and thereafter, after obtaining the orders from him, around 6.30 a.m., he along with his team travelled to Theni and around 8.30 a.m., when at the time they reached the Patrakaliamman Kovil Street, the suspected male accused after seeing the Police ran away from the place of occurrence.

(ii)However, after securing the present appellants, P.W.3 informed to them in respect of the rights having by them under Section 50 of NDPS Act. Both the accused did not give an option to exercise their rights. They permitted the police officials for conducting search. Since the public are refused to stand as a witness, in the presence of P.W.1, P.W.3 conducted a search and found the first accused Saraswathi has possessed with 17 Kgs of Ganja and Rs.3,300/-. It was seen that the second accused Ayyammal was possessed with 16 Kgs of Ganja and Rs.2,700/-, which is the sale proceedings. After seeing the contraband as above, from the total contraband, P.W.3 took 50 grams of Ganja each and afterwards after sealing the same assigned with serial numbers as S3 and S4. The remaining contraband were assigned with serial Nos. B1 & B2. Similarly, the contraband which is kept by the absconding accused also recovered. In the mahazar prepared by P.W.3 in respect of recovery of contraband, P.W.1 was stand as a witness and signed in the recovery mahazar. After recovering as above, around 15.30 hours, P.W.3 reached the Office of the NIBCID along with arrested accused and recovered contraband. In this regard, he submitted a special report to P.W.4 under Ex.P15.

(iii)Upon receipt of the same, P.W.4-Thambidurai, the then Inspector of Police registered a case against the each appellants in separate Cr.Nos.120 to 122 of 2005 under Sections 8(c) r/w 20(b) (2)(b) of NDPS Act and took up the same for investigation. During the time of investigation, P.W.4 had forwarded the contraband to



application for sending the same for chemical examination. Thereafter, on seeing the requisition given by P.W.4, the learned Magistrate has sent the proceedings to the Forensic Science Department, Madurai for the purpose of examining the recovered contraband and the same was exhibited as Ex.P12.

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(iv) Upon receipt of the said proceedings, P.W.2-Baskaran, who is the Officer of the Forensic Science Department, after the receipt of the contraband along with the requisition given by P.W.4, examined the same, found that the recovered contraband are Cannabis. In this regard, he issued a separate report under Ex.P13.

(v) In continuation of investigation, P.W.4 examined the Scientific Officer and recorded the statement. After concluding the investigation, he came to the positive conclusion that the appellants/accused are liable to be convicted under Sections 8 (c) r/w 20(b) (2)(b) of NDPS Act and accordingly, he filed a final report.

5. Based on the above materials, the trial Court framed the charges against the accused for the offences under Sections 8 (c) r/w 20(b) (2)(b) of NDPS Act. The accused denied the charges and opted for trial. Therefore, the accused were put on trial.

6. During the course of trial proceedings, in order to prove their case, on the side of the prosecution, 4 witnesses have been examined as PW1 to PW4 and 19 documents were exhibited as Ex.P1 to Ex.P19, besides, 7 Material Objects [M.O.1 to M.O.7].

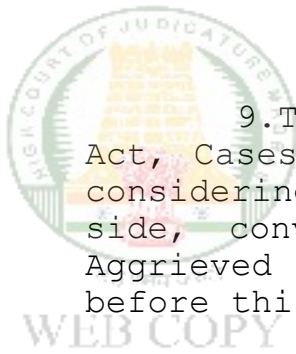
7. Out of the above said witnesses, PW1-Periyakaruppan, the then Special Sub-Inspector of Police speaks about the formation of team and about the search conducted on the accused.

(i) P.W.2-Thiru.Baskaran is the Scientific Assistant, attached with Forensic Science Department, Madurai, gave evidence as a sample contraband which have been received by him is nothing but a Cannabis.

(ii) P.W.3-Thiru.Marirajan, the then Special Sub-Inspector of Police speaks about the information received by him and about the recovery of contraband from the accused.

(iii) P.W.4-Thiru.Thambidurai, the then Deputy Superintendent of Police, speaks about the Special Report received from P.W.3, registration of the case, examination of contraband and about the filing of final report.

8. When the above incriminating materials were put to the accused under Section 313 Cr.P.C. the accused denied the same as false. However, 5 documents were marked on the side of the accused



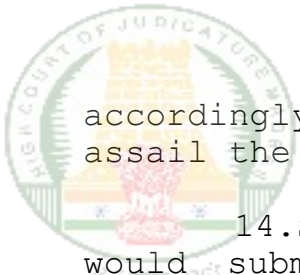
9.The learned II Additional Principal Special Judge EC & NDPS Act, Cases, Madurai, after perusing all the above materials and on considering the arguments advanced by the learned counsel on either side, convicted and sentenced the appellants as stated supra. Aggrieved by the said conviction and sentence, the appellants are before this Court with this appeal.

10.I have heard Mr.M.Pitchai Muthu, learned counsel appearing for the appellants/accused and Mr.M.Muthumanikkam, learned Government Advocate (Crl.side) appearing for the State. I have also perused the records carefully.

11.The first and foremost submission made by the learned counsel appearing for the appellants is that in respect of the Special Report given before P.W.4, P.Ws.1 & 3 gave contradictory evidence in respect to the time on which the same was given to P.W.4 and the said contradiction is sufficient to hold that the case of the prosecution is a false one.

12.Now on considering the said submission with relevant records, it is true that, P.W.1 in his Chief-examination has narrated the incident as on the day, on which, the alleged contraband was secured i.e. 13.09.2005 around 10.30 am., after recovering the contraband, he and his team including P.W.3 reached the NIBCID Office and after producing the accused, P.W.3 had given a Special Report to P.W.4. In this regard, P.W.3 had stated in his evidence as on the same day around 15.30 hours, he has produced the accused before P.W.4 along with Special Report. Therefore, it is apparent that in respect of the time on which, the contraband and the accused produced before P.W.4, P.Ws.1 & 3 had given contradictory evidence.

13.In the said circumstances, on go through the entire case of the prosecution, the evidence given by P.Ws.3 & 4 reveals the fact that on day on which, the present accused were secured, some other accused has also been secured by P.W.3 and in respect of those persons, separate cases were registered. In otherwise, in respect of recovery of the contraband and in respect of the search conducted, the evidence given by P.W.3 is in correspondence with the evidence of P.W.1. Further, it is a settled law that before taking decision over the evidence of particular person, it should be necessary to go through the whole evidence given by him. In the same line, herein, it is a case has already observed, the whole evidence given by P.Ws.1 & 3 reveals the fact that only in the evening hours both the accused and contraband were produced before P.W.4, further on go through Ex.B15 which is the report given by P.W.3 under Section 57 of the NDPS Act, it seems that the same has been received by P.W.4 only at 15.30 hours. Therefore, in respect to the time on which the special report was given to P.W.4, the evidence given by P.Ws.1,3 & 4 was found against the entries made in the said contradiction cannot be taken into account and



accordingly, the said submission is not having any much force to assail the case of the prosecution.

14.Secondly, the learned counsel appearing for the appellants would submit that as per the case of the prosecution, after completing the process of recovery the sample contraband was sealed and assigned with serial Nos.S1 to S4 and then only, the same has been produced before P.W.4. In the said circumstances, there is no opportunity to P.W.4 to sign in those sealed cover. But, on go through the sealed covers, which were marked as M.O.1 to M.O.6, the signature of P.W.4 was found available and therefore, the said situation created suspicious circumstances over the case of the prosecution.

15.Now, on considering the said submission with relevant records, it is true that while at the time of giving evidence as P.W.3 the person who recovered the contraband from the accused gave evidence as follows:-

“சா.பொ.1 முதல் 6 வரையானவைகளில் ஒட்டப்பட்ட சிலிப்புகளில் தேனி என்.ஐ.பி.சி.ஐ.டி ஆய்வாளர் திரு.தம்பிதுறை என்பவரின் கையொப்பம் உள்ளது என்றால் சரிதான். மேற்படி ஆய்வாளர் எங்களுடன் சம்பவத்தன்று வரவில்லை என்றால் சரிதான் .

16.Now on considering the said evidence given by P.W.3 with the story put forth by the prosecution the same create a suspicious circumstances in respect of sealing the contraband. In otherwise, the entire evidence given by P.Ws.3 & 4 narrates the fact that after handing over the contrabands, the same was is in the custody of P.W.4. Therefore, I am of the view that due to the reason that the signature of P.W.4 found available in the sealed contraband that alone would not be sufficient to hold that the entire prosecution case is false one.

17.The learned counsel for the appellants would further contend that after recovering the contraband on 14.09.2005, the same has been produced before the Court only on 30.09.2005, in this regard, in respect of possession of the contraband between 14.09.2005 to 30.09.2005, no documents have been produced on the said of the prosecution to show that the contraband was found available in the custody of the particular person in the said period and therefore, after made recovery the non-production of contraband immediately before the Court is fatal to the case of the prosecution.

18.In reply to the said submission, the learned Government Advocate (Crl.side) appearing for the respondent, by relying the judgment in **Hardip Singh Vs. State of Punjab** reported in **2008 (8) Supreme Court Cases 557**, would contend that the delay in sending the samples to the Forensic Lab is not fatal to the case of the prosecution. In this regard, the judgment relied on by him, our



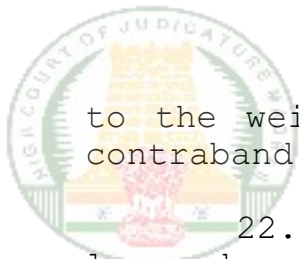
Hon'ble Apex Court has held as follows:-

"Delay in sending samples of seized opium to Forensic Science Laboratory (FSL), the same has no consequence for the fact that the recovery of the said sample from the possession of the appellant stands proved and established by cogent and reliable evidence led in the trial. P.W.5 has categorically stated and asserted about the recovery of opium from the possession of the appellant, which fact is also corroborated by a higher officer, namely, Dy.Superintendent of Police who was also examined at length during the trial. The said recovery was effected in the presence of Dy.Superintendent of Police, as senior police officer, who also put his seal on the said parcels of opium. Besides, it has also come on evidence that till the date the parcels of sample were received by chemical examiner, the seal put on the said parcels was intact. That itself proves and establishes that there was no tampering with the aforesaid seal in the sample at any stage and the sample received by the analyst for chemical examination contained the same opium which was recovered from the possession of the appellant. In that view of the matter, delay of about 40 days in sending the samples did not and could not have caused any prejudice to the appellant."

19.Now, applying the said principles narrated in the above referred judgment with the case in hand, herein also, after made recovery, the contraband is found available with the higher police officials viz., Deputy Superintendent of Police and therefore, I am of the opinion that merely because of the reason that the recovered contraband was not immediately sent to the Forensic Science Department alone is not sufficient to hold the entire story put forth by the prosecution is false one.

20.However, the important aspect, which is necessary to decide in this case is that as per the evidence of P.W.3, after recovering the total contraband he took 50 grams of Ganja from the total contraband and the same has been sealed for the purpose of chemical examination.

21.In this regard, P.W.2, the Scientific Assistant, has stated in his evidence as while at the time of receiving the sample contraband, the same has been weighed about 77 grams and 65 grams. Now, on considering the said evidence with relevant records, after sealing 50 grams of contraband as a sample contraband, raising the quantity in the sample pockets creates a doubt whether the sample contraband was sealed in terms of evidence given by P.Ws.1 & 3. The conjoint reading of the evidence given by P.W.3 and P.W.4 in respect to sending the samples, with the evidence given by P.W.2 in respect



to the weight of the samples it would create a doubt whether the contraband has been recovered as stated by P.W.1 and P.W.3.

22.Further, in respect of the search made on the accused, the learned counsel appearing for the appellants would contend that while at the time of making search, the appellants being a female they have to be searched only by women officers. But, in this case, the evidence given by P.Ws.1,3 & 4 reveals the fact that during the time of occurrence none of the women police officers accompanied along with P.W.3 and therefore, the said violation committed by P.W.3 is amounts to violating Section 50(4) of NDPS Act and therefore, due to the said mistake the entire prosecution case is vitiated.

23.In this regard, the learned counsel appearing for the appellants relied on the judgment in ***State of Punjab vs. Baldev Singh*** reported in ***1999 (6) Supreme Court Cases 172***.

24.Now on considering the said submission, it is true, in a situation when the officer authorised under Section 42 of the NDPS Act is intended to search a female, it would necessary that search should be made by female officer only. But, here it is a case, the evidence given by P.Ws.1 & 3 narrates the fact that while at the time of searching the accused in their team no women officers were present. However, on go through the whole case projected by the prosecution, it appears that during the time of search, only the bag which found possession of the contrabands had been searched. In this occasion, in the judgment of ***State of Himachal Pradesh v. Pawan Kumar*** reported in ***(2005) 4 SCC 350***, it was held that in respect to search of the bag it is not compulsory on the side of the prosecution that the search should be conducted only by female officers. Accordingly, the said submission made by the learned counsel for the appellant also not having any significant factor.

25.Now, on going through the other factors, before the trial Court, (i) the consent letter given by the accused (ii) the option letter given by P.W.3 to the accused expressing the rights having by the accused in terms of Section 50 of NDPS Act and the arrest intimation prepared by P.W.4 was marked as Ex.B1 to Ex.B3 respectively. Now, on go through the said documents, the same were prepared jointly in respect of both accused/appellants. Further, in the said documents, both the accused affixed their signatures one by one. Now, on considering the said aspect with the contents of the FIR prepared by P.W.4 it appears that separate cases has been registered against the appellants in separate Crime Numbers ie., 120 & 121 of 2005.

26. In this occasion, it would relevant to see the judgment of this Court, dated 18.09.2009 in Crl.A(MD)No.20, 28, 29 & 31 of 2017 Thangapandi vs. The State, wherein, it was observed as



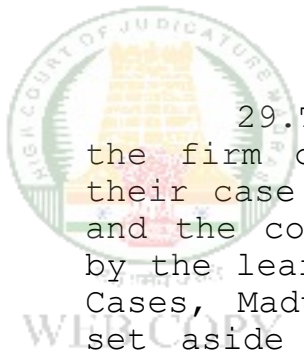
follows:-

"10. In this case, consent letter for personal search has been obtained from A.1 and A.2 jointly and same is marked as Ex.P.7. Similar joint consent letter is obtained from A.3 and A.4 and marked as Ex.P.9. In State of Rajasthan v. Parmanand and others reported in (2014) 5 SCC 335, the Hon'ble Supreme Court has held as follows:

"17. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before the nearest gazetted officer or before a nearest Magistrate....."

27. Applying the said principles, herein also, it is not in dispute that Ex.P1 to Ex.P3 were commonly prepared and after showing the same, the police officers obtained the signature from both accused. Therefore, the said procedure adopted by the police officers is nothing but violative of Section 50(1) of NDPS Act and thereby, the entire prosecution story vitiates and needs of discrepancies by its version.

28. Ultimately, I am of the opinion that the evidence given by P.W.2 in respect of the weight of sample contraband, obtaining the signature from the appellant jointly in Ex.P1 to P3 are the factors found available against the case of the prosecution. Hence, in view of the above, I am of the opinion that the prosecution has not able to prove the search and recovery of contraband made from the appellants was in accordance with the procedure under Section 50 of NDPS Act.



29. Therefore, in the light of the above discussion, I am of the firm opinion that the prosecution fails an attempt to prove their case beyond reasonable doubt. The Criminal Appeal is allowed and the conviction and sentence imposed on the appellants/accused, by the learned II Additional Principal Special Court EC & NDPS Act, Cases, Madurai, made in C.C.No.363 of 2006, dated 24.08.2015, is set aside and the appellants/accused are acquitted from all the charges. The fine amount, if any, paid by him, shall be refunded to him. Bail bond, if any, executed by the appellants shall stand cancelled.

Sd/-

Assistant Registrar (CS I)

// True Copy //

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Sub Assistant Registrar(CS)

To:-

1. The II Additional Principal Special Court EC & NDPS Act, Cases, Madurai.
2. -DO-THROUGH The Principal Sessions Judge, Madurai.
3. The Inspector of Police, N.I.B.C.I.D., Theni District.
4. The Superintendent, Special Prison for women, Trichy.
5. The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai.

Copy to:-

The Section Officer,
Criminal Section (Records),
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

**Judgment made in
Crl.A(MD)No.227 of 2015
31.08.2021**

RS (21.09.2021) 9P 8C

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