



BAIL SLIP

The Appellant /Accused namely Murugesan was directed to be released on Bil vide order dated 31.08.2021 in Crl.MP.MD.No.223 of 2016 in Crl.A(MD)No.10 of 2016 on the file of the Madurai Bench of Madras High court.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 31.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Crl.A.(MD) No.10 of 2016

Murugesan

: Appellant/Accused

Vs.

The State

By the Inspector of Police,
Chathirapatti Police Station,
Dindigul District.

: Respondent/Complainant

PRAYER: The Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure, r/w section 36-B of NDPS Act to set aside the order of conviction and sentence, dated 18.12.2015 made in C.C.No.298 of 2007, on the file of the learned II Additional Special Court for NDPS Act Cases, Madurai.

For Appellant

: Mr.D.Venkatesh

For Respondent

: Mr.M.Muthumanikkam

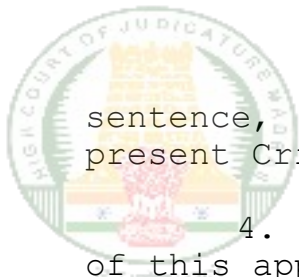
Government Advocate (Crl.side)

JUDGMENT

The present Criminal Appeal is directed against the conviction and sentence, dated 18.12.2015, made in C.C.No.298 of 2007, on the file of the II Additional Special Court for NDPS Act Cases, Madurai.

2. The appellant is the sole accused. He stood charged for the offences punishable under Sections 8(c) r/w 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as "NDPS Act").

3. After full-fledged trial, the learned II Additional Special Judge for NDPS Act Cases, Madurai, came to the conclusion that the appellant was guilty under Section 8(c) r/w 20(b)(ii)(B) of the NDPS Act and sentenced to undergo Rigorous Imprisonment for 18 months and to pay a fine of Rs.10,000/-, in default, to undergo Simple Imprisonment for 1 month. Challenging the said conviction and



sentence, the appellant is 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-Karuppaiah, the then Inspector of Police, Chathirapatti Police station, on 29.04.2006 around 12.15 p.m., while he was on patrolling duty in respect of identifying the prohibition offences, received an information and in turn, he reached Periya Odai, Mathulamparai Village, wherein, he secured the appellant/accused and informed about the rights having by him under Section 50 of NDPS Act. The accused did not give an option to exercise his rights. He permitted the police officials for conducting search.

(ii) On such occasion, he produced the bag, which containing 5 Kilograms of Ganja. After seeing the same, P.W.3 arrested the accused and recovered the contraband under the cover of Mahazar. In the said mahazar, P.W.2-the then Sub-Inspector signed as a witness. After recovering the contraband, P.W.3 took 50 grams of Ganja from the total contraband and afterwards, the same was packed and sealed for the purpose of chemical examination. On the same day, around 14.00 hours, P.W.3 returned to the police station along with accused and contraband, registered a case against the accused in Cr.No.88 of 2006 for the offences punishable under Sections 8(c) r/w 20(b)(ii)(B) of the NDPS Act. The printed FIR was marked as Ex.P5. He send the contraband to the Court and had given a requisition letter for sending the contraband to the chemical examination.

(iii) In turn, along with the proceedings issued by the Court, P.W.1-Meenakshi, Chemical Examiner in Forensic Department, Madurai, on 17.05.2006 received the contraband for chemical examination and after examination, she issued a report that the sample which have been received is a Cannibis. The requisition given by P.W.3, proceedings issued by the Court and the report received by the Chemical Examiner were marked as Ex.P.1 to Ex.P3 respectively.

(iv) In continuation of investigation, after receipt of the report from the Chemical Examiner, P.W.3 came to the positive conclusion that the appellant/accused is liable to be convicted under Sections 8(c) r/w 20(b)(ii)(B) of the NDPS Act and filed a final report against the accused, accordingly.

5. Based on the materials available, the trial Court framed the charges for the offences punishable under Sections 8(c) r/w 20(b)(ii)(B) of NDPS Act. The accused denied the charges and opted for trial. Therefore, the accused was put on trial.



6. During the course of trial proceedings, in order to prove the case of prosecution, as many as 3 witnesses i.e., P.W.1 to P.W.3 were examined on the side of the prosecution and 5 documents were exhibited as Ex.P1 to Ex.P5, besides two Materials Objects (M.O.1 & M.O.2).

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7. Out of the above said witnesses, P.W.1-Tmt.Meenakshi, who is the Chemical Examiner, speaks about the receipt of sample contraband and about the examination made on the said contraband. According to him, the contraband received by him is a Ganja.

(i) P.Ws.2 & 3 are the police officers speaks about the information received, arrest of the accused, recovery of contraband, registration of the case and about the filing of final report.

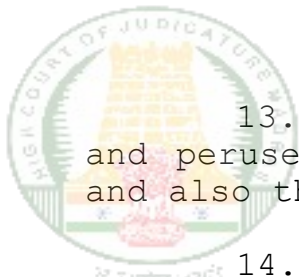
8. When the above incriminating materials were put to the accused under Section 313 of Cr.P.C., he denied the same as false. However, he did not chose to examine any witness or mark any document on his side.

9. Having considered the materials placed before the trial Court, the learned II Additional Special Judge for NDPS Act Cases, Madurai, came to the conclusion that the accused was found guilty for the offence punishable under Section 8(c) r/w 20(b)(ii)(B) of NDPS Act and sentenced him as stated above. Aggrieved by the said conviction and sentence, the appellant is before this Court with this appeal.

10. I have heard Mr.D.Venkatesh, learned counsel appearing for the appellant/accused and Mr.M.Muthumanikkam, learned Counsel for the Government of Tamil Nadu appearing for the State. I have also perused the records carefully.

11. It is the submission of the learned counsel appearing for the appellant that during the time of search and recovery, the police officers, who deal with the case, have not been followed the sections 42, 50, 52, 55 and 57 of the NDPS Act and therefore, the said violation is nothing but amounts to not proving the case of the prosecution. Accordingly, he prayed to allow the appeal by setting aside the conviction and sentence awarded by the trial Court.

12. Per contra, the learned Government Advocate (Crl.side) appearing for the respondent has drawn the attention of the evidence of P.W.3 would submit that Sections 42(2), 50 & 57 of the NDPS Act have been complied with and would further add that as per the judgments rendered by the Hon'ble Supreme Court, even in respect of Section 42(2) of the NDPS Act, substantial compliance is enough and invited the attention of this Court to the testimonies of P.Ws.2 & 3 and would submit that the mandatory duty cast upon the investigating agency has been complied with in letter and spirit.



13. This Court has carefully considered the rival submissions and perused the oral and documentary evidence and other materials and also the original records.

14. Initially, the submission made by the learned counsel appearing for the appellant is that in respect to the violation of Section 42 of NDPS Act, it is a case, the evidence given by P.Ws.2 & 3 reveals the fact that when at the time of receiving the information, they were out side the police station, particularly, while at the time they are in duty to identify the offence relating to the prohibition.

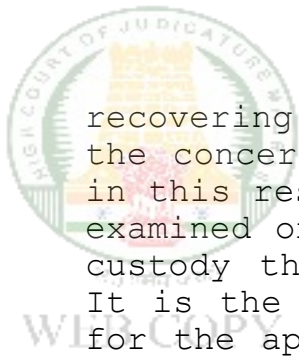
15. Section 42 of the NDPS Act will be invocable only if the search is made by the police officer or the concerned authority, upon the prior information, when such an information or intimation or knowledge comes to the notice of the Investigating Officer in course of the regular patrolling or an investigation of some other offence, it is not necessary to follow in all cases. In this aspect, it is necessary to extract the relevant portion of the judgment in **Sarju alias Ramu vs. State of Uttar Pradesh** reported in **(2009) 13 Supreme Court Cases 698:-**

*"22. We must, however, notice that recently a Constitution Bench of this Court in **Karnail Singh v. State of Haryana** in view of difference of opinion in **Abdul Rashid Ibrahim Mansuri vs. State of Gujarat** opining that **Sajan Abraham v. State of Kerala** holding the said principle to be directory."*

Therefore, herein it is a case, the facts and circumstances shown by the prosecution witnesses, P.W.3 in this case has not followed Section 42 of the NDPS Act.

16. Secondly, in respect to the violation of under Section 50 of the NDPS Act, it is not in dispute that the evidence given by P.Ws.2 & 3 discloses the fact that the contraband had been recovered from the bag, which possessed by the accused. In otherwise, during the time of recovering the same, there is no personal search is made. Therefore, in this aspect also, in view of the judgment rendered by our Hon'ble Apex Court in **State of H.P., vs. Pawan Kumar** reported in **2005(4) SCC 350**, it was held that section 50 would be applicable only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc., which he may be carrying. Now, on considering the said observations made in the judgment, I am of the view that, herein it is a case, the non following of the mandatory provisions under Section 50 of the NDPS Act is not at all having any force to assail the present case.

17. One another submission made by the learned counsel appearing for the appellant is that, in the present case, after



recovering the property on 29.04.2006, the same was produced before the concerned Court on 17.05.2006 with delay of 18 days. Further, in this respect, neither the Investigating Officer nor the witnesses examined on the side of the prosecution did not explain under whose custody the property was found available in the internum period. It is the further submission made by the learned counsel appearing for the appellant is that, in the present case, after registration of the case, the Investigating Officer by following the procedure narrated under Section 57 of the NDPS Act, did not sent any report to the superior officer as what had happened during the time of search and about the recovery of contraband. According to him, the non following the said procedure would vitiate the entire proceedings and thereby he prayed to allow this appeal.

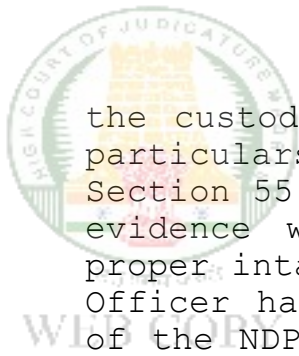
18. In this regard, the learned Government Advocate appearing for the respondent would contend that the provisions narrated under Section 52 & 57 of the NDPS Act are only directory in otherwise, non following the same with letter and spirit is no way would affect the case of the prosecution with entirety.

19. By considering the rival submission, In ***Gurbax Singh v. State of Haryana*** reported in ***2001 (3) Supreme Court Cases 28***, the scope of Sections 50, 52, 55 and 57 came up for consideration and it has been held that the provisions of Sections 52 and 57 are directory and the violation thereof would not ipso facto violate the trial or conviction and the Investigating Officer cannot totally ignore these provisions and failure on his part will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. It is relevant to extract paragraph 9 of the said decision, thus:-

"9. The learned counsel for the appellant next contended that from the evidence it is apparent that the IO has not followed the procedure prescribed under Sections 52, 55 and 57 of the NDPS Act. May be that the IO had no knowledge about the operation of the NDPS Act on the date of the incident as he recorded the FIR under Sections 9/1/78 of the Opium Act. In our view, there is much substance in this submission. It is true that provisions of Sections 52 and 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction."

Hence, in view of the above, the Investigating Officer cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article.

20. It is not in dispute that the property was kept with Investigating Officer for nearly 18 days. In this regard, he has admitted that there was no proof that the property was available in



the custody of the police. He had also admitted that there was no particulars to weight and sealing the property as required under Section 55 of the NDPS Act. Further, the prosecution has not led any evidence whether the chemical analyser received the sample with proper intact seals. Further, it is apparent that the Investigating Officer has not followed the procedure prescribed under Section 57 of the NDPS Act of making full report of all particulars of arrest and seizure to his immediate superior officer.

21. One another aspect in this appeal is that the Investigating Officer cannot tell as to the sample number of the sample contraband drawn immediately after the seizure, on the other hand, in Ex.P3-Chemical Analysis Report also, the seal number has not been mentioned. In the light of the said fact, the chemical analysis report marked as Ex.P3 is also of no use for the prosecution for the reason that unless a particular sample with seal number is relatable to the concerned accused, it cannot be said that the contraband carried by the accused was Ganja. Moreover, the bag, in which the alleged contraband has been recovered from the accused, has not been produced before the Court and marked as material object.

22. Therefore, in the considered opinion of this Court, the above said infirmities would definitely vitiate the case of the prosecution and hence, the appellant/accused is entitled to benefit of doubt. The trial Court has not properly appreciated the materials placed before it in proper perspective and therefore, the same warrants interference.

23. In the result, this Criminal Appeal is allowed and the judgment passed in C.C.No.298 of 2007, dated 18.12.2015 by the learned II Additional Special Judge for NDPS Act Cases, Madurai is set aside and the appellant is acquitted of the charges framed against him. The bail bonds executed by the appellant shall stand terminated. The fine amount, if any, paid by the appellant, is directed to be refunded to him.

Sd/-

Assistant Registrar (W)

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Sub Assistant Registrar(CS)

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To:-

1.The II Additional Special Judge for NDPS Act Cases,
Madurai.

<https://hcservices.ecourts.gov.in/hcservices/>



2.The Superintendent of Police,
Central Prison, Madurai.

3.The Inspector of Police,
Chathirapatti Police Station,
Dindigul District.

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

5.The Section Officer,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.D.VENKATESH, Advocate (SR-27787[F] dated 01/09/2021)

CrI.A(MD)No.10 of 2016
31.08.2021

RK (15.09.2021) 7P 8C