

Bail Slip

Sugumar, S/o. Murugesan : Appellant/ Sole Accused was directed to be released on bail as per order of this Court dated 12.08.2016 made in CrI.MP(MD).6364 of 2016 in CRL.A.(MD)No.279 of 2016 on the file of this Court.

WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 20.07.2021

DELIVERED ON : 26.11.2021

CORAM

HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

CRL.A.(MD)No.279 of 2016

Sugumar
S/o. Murugesan : Appellant/Sole Accused

Vs.

State Represented by
Inspector of Police,
NIB CID Police Station,
Dindugul District.
(Crime No.61 of 2005) : Respondent/ Complainant

PRAYER: Criminal Revision filed under Section 374 (2) of Criminal Procedure Code, against the Judgment dated 26.07.2016 made in C.C.No.131 of 2009 on the file of the learned Second Additional District Special Judge for NDPS Cases, Madurai and set aside the conviction and sentence imposed against the appellant/accused and allow above appeal by acquitting the accused.

For Appellant : Mr.R.Gandhi

For Respondent : Mr.T.Senthil Kumar
Government Advocate (Crl.side)

JUDGMENT

This Criminal Appeal has been filed against the judgment of conviction recorded by the learned II Additional District Special Judge, Madurai in C.C.No.131 of 2009, dated 26.07.2016.

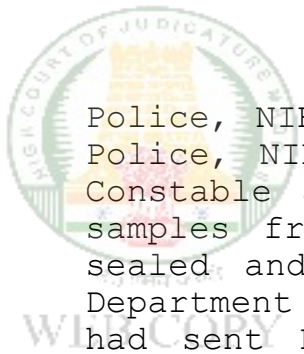
2. The brief facts which are relevant for consideration in this appeal, the case of the Prosecution in short are as follows:

2.1. On 20.04.2005 at around 12.00 hrs, the Accused had stored

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



5 Kg of Ganja in the place opposite to Aruna Clinic at Natham-Senthurai Road, Dindigul District. Mr.Nagaraj- Head Constable of NIBCID attached to Dindigul Unit, on receipt of information regarding the possession of Narcotic Drugs and Narcotic Substances, proceeded to the place where the Accused had stored 5 Kg of Ganja. Before proceeding to the place, where the Ganja was stored by the Accused, the Head Constable of NIBCID had informed the same to his superior Officer-Sub Inspector of Police, NIB CID, Dindigul Unit. Accordingly, Head Constable with Grade-I Constables viz., Parthiban and Lakshmanan had gone to the said place with the informant to identify the Accused. Accordingly, near the Aruna Clinic at Natham Road, the informant identified the Accused, on which, the Head Constable and Grade-I Constables had restrained the Accused and had conducted the search on the Accused. On search, it was found that the Accused was carrying in a white polythene bag weighing 5 Kg of Ganja. The Head Constable had disclosed his identity to the Accused and enquired whether the search is to be conducted in the presence of any independent witnesses and whether he is inclined to give a statement (Confession Statement) to the Head Constable, NIB CID in the presence of any gazetted Officers. The Accused had stated to the Head Constable, NIB CID that he himself can record the statement without the presence of any witnesses and accordingly he had given confession statement which was recorded by the Head Constable, NIB CID and accordingly, notice of search was issued by the Head Constable under Ex.P-1 and the consent letter by the Accused to the Head Constable under Ex.P-2 was obtained for which the Grade-I Police Constable had affixed his signature as a witness to the same. He had seized 5 Kg of Ganja from the possession of the Accused, who then informed the Head Constable that he did not have any prior permission from the State Government or Central Government or any other Authorities under the Narcotic Drugs and Psychotropic Substances Act for storing of Ganja. On opening the plastic packet, they found dry powder of 5 Kg of Ganja which was weighed and found to be weighing 5 Kg from that they had taken two packets each containing 50 gms and it was packed neatly and seized in the presence of Accused and Grade-I Constables and the seal of the NIB CID was affixed on two sample packets each containing 50 gms to be forwarded to the Forensic Department for Forensic analysis. Thereafter, the Head Constable, NIB CID had registered the case and seized the 5 Kg of Ganja under Seizure Mahazar under Ex.P-3 in which the signature of the Accused and the Grade-I Constables were obtained. On enquiry by the raiding party consisting of Head Constable and Grade-I Constables, the Accused stated that he had obtained Ganja from one Stephen at Dindigul and the Accused was arrested and produced before the Superior Officers of NIB CID, Dindigul. The arrest of the Accused was intimated to the relative of the Accused whose address and details were furnished by the Accused. By 14.45 hrs, the case was registered against the Accused in Cr.No.61 of 2005 under Sections 8 (c) r/w. 20 (b) (ii) (C) of NDPS Act. The Accused was produced before the learned Judicial Magistrate at Dindigul along with remand request from the Inspector of



Police, NIB CID. Accordingly, he was remanded. The Inspector of Police, NIB CID obtained the statement of witnesses i.e., Head Constable and Grade-I Constables and also he had sent seized two samples from the seized Ganja containing 50 gm each which was sealed and neatly packed with seal of NIB CID to the Forensic Department for Forensic Analysis. On analysis, Forensic Department had sent Forensic Analysis report under Ex.P-7 to the Court of learned Judicial Magistrate from whom investigation Officer, (i.e.,) the Inspector of Police, NIB CID had obtained the report. On completion of the investigation, the Investigation Officer had laid final report of the investigation under Section 173 of Cr.P.C., before the Court of the learned Judicial Magistrate. The learned Judicial Magistrate sent records to the learned Special Judge.

2.2. The learned Special Judge under NDPS Act had taken cognizance of the offence under Sections 8 (c) r/w. 20 (b) (ii) (C) of NDPS Act and took the final report on file in C.C.No.131 of 2009 and he had issued summons to the Accused.

2.3. On appearance of the Accused, the learned Special Judge under NDPS Act had furnished copies to the Accused under Section 207 of Cr.P.C., and the charges were framed, after hearing the arguments of Prosecution and Defence. The Accused denied the charges and claimed to be tried. Therefore, the learned Special Judge under NDPS Act had ordered trial.

2.4. During trial, the Prosecution had examined the witnesses P.W-1 to P.W-4 and marked documents under Ex.P-1 to Ex.P-10 and material objects under M.O-1 to M.O-3.

2.5. On closing of Prosecution evidences, the Accused was examined under Section 313 of Cr.P.C., by the learned Special Judge under NDPS Act regarding the incriminating evidence available against him from the deposition of P.W-1 to P.W-4 and from the documents under Ex.P-1 to Ex.P-10 and material objects under M.O-1 to M.O-3, the Accused denied the same.

2.6. After examination of the Accused under Section 313 Cr.P.C., the learned Sessions Judge had heard the arguments of the Prosecution and the argument of the learned counsel for the Defence. On proper appreciation of evidence available before the Court, the learned Special Judge had arrived at a conclusion that the Accused has committed the offence attracting the provisions of NDPS Act. Accordingly, the learned Special Judge, Special Court under NDPS Act by his judgment dated 26.07.2016, convicted the Accused for the offence under Section 8 (c) r/w. 20 (b) (ii) (C) of NDPS Act and sentenced him to undergo 2 ½ years of Rigorous Imprisonment and to pay a fine of Rs.10,000/- in default to undergo Simple Imprisonment for one month. The period of detention already undergone from 21.04.2005 to 30.06.2005 by the Accused was set off under Section

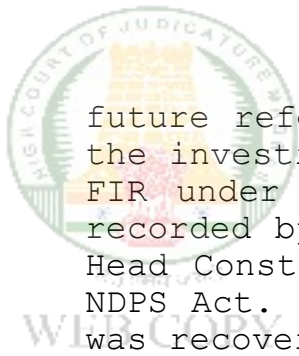


3. Aggrieved by the judgment of conviction and sentence of imprisonment recorded by the learned II Additional District and Special Judge, Special Court under NDPS Act, Madurai, the Accused had preferred this appeal before this Court.

WEB COPY

4. During arguments, the learned counsel for the Accused/appellant submitted that the Head Constable who had conducted the search and seizure had not sent mandatory report as per Section 54 of NDPS Act to his Superior Officer. Therefore, the investigation itself is not conducted as per the provision of NDPS Act. The judgment of conviction recorded by the learned trial Judge is not legal as per the provision of NDPS Act. Further search has to be conducted in the presence of independent witnesses and the right of the Accused to record confession statement in the presence of Gazetted Officer were not followed by the raiding party of the NIB CID. Therefore, there is violation of the guaranteed rights of the Accused as per the provision of NDPS Act. The conviction recorded by the learned Special Judge is perverse and illegal. Therefore, the same has to be set aside.

5. The learned Government Advocate (Crl. Side) had furnished his written arguments. As per his arguments, P.W-1-Parthiban is the Head Constable who had accompanied Grade-I Constables. P.W-2-Mani is the Chemical Examiner of the Forensic Laboratory who had deposed regarding the chemical analysis report which had been marked as Ex.P-5 to Ex.P-7. Ex.P-5 is the requisition letter of the Inspector of Police, Ex.P-6- requisition letter of the Court of learned Judicial Magistrate for chemical analysis of the seized Ganja on the basis of requisition letter of the Inspector of Police. Ex.P-7 is the chemical analysis report. P.W-1 had spoken about the receipt of secret information, based on which, the Head Constable had proceeded along with Grade-I Constables on Natham Dindigul Road near Aruna Clinic along with the informant and the informant had identified the Accused and the raiding parties had disclosed their identity as NIB Officials and informed the Accused as to the right of the Accused and enquired as to whether search to be conducted in the presence of independent witnesses and confession to be recorded in the presence of Gazetted Officer and the Accused declined to the same. Accordingly, the letter was obtained from the Accused which was duly attested by the Grade-I Constables which are marked as Ex.P-1 to Ex.P-4. Ex.P-1 is the notice for search, Ex.P-2 is the consent letter from the Accused, Ex.P-3 is the seizure Mahazar regarding seizure of Ganja from the Accused. Ex.P-4 is the arrest memo executed by the Head Constable. On the date of trial, the Head Constable was not alive. Therefore, Grade - I Constable who had accompanied the Head Constable was examined as P.W-1 and Ex.P-1 to Ex.P-4 executed by Nagaraj-Head Constable were marked through him. P.W-2- Mani is the Forensic Chemical Analyst who analysed Ganja Samples taken from the seized Ganja. Only one packet was sent for

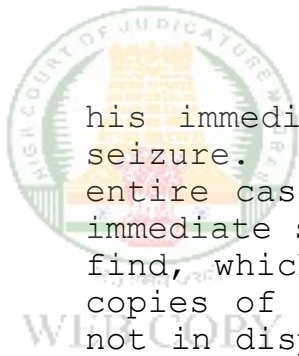


future reference. P.W-3-Inspector of Police, NIB CID had conducted the investigation. P.W-4-Sub Inspector of Police had registered the FIR under Ex.P-10 based on the information received under Ex.P-8, recorded by the Sub Inspector of Police based on the information of Head Constable, Nagaraj. Ex.P-9 is the report under Section 57 of NDPS Act. M.O-1 Ganja Sample was sent to the Lab for testing which was recovered from the Accused. M.O-2 is the Ganja Sample which was not sent to the laboratory and M.O-3 remaining contraband seized from the Accused.

5.1. He further submitted that the respondent police had not followed the mandatory provisions as per Section 42 (2) of NDPS Act is not sustainable. After receipt of secret information, they had immediately reduced the same in writing and sent it to the immediate Superior Officer and obtained the order from the immediate Superior Officer and they had proceeded the investigation. Section 42 of NDPS Act has applied only when the authorized officer has reason to believe that. As such, when the raid has taken place in the public place Section 43 would be applied and Section 42 would be inconsequential. He relied on the Ruling of the Hon'ble Supreme Court reported in **(2008) 11 SCC 363 in the case of K.Chithayan Vs. State of Tamil Nadu** in which it is stated that the appellant was found standing near a bus stop with a bag. It was conveyed to him that he was entitled for the conduct of the search before a Gazetted Officer or a Judicial Magistrate. The Accused, however, gave consent to be searched by the police officer himself. It was contended on behalf of the appellant that there was non-compliance of the mandatory provisions of Sections 42 (2) and 50 of the NDPS Act. Rejecting the contention, it was contended that Section 42 of the Act will not apply since the search was made in a public place. It was further submitted that Section 50 of the NDPS Act also did not apply since the search was of the bag carried by the appellant and there was no personal search. (In this case Page 21 Ex.P-2-nrhjid rk;kj fojk; - signed by the Accused and gave his consent for search). Therefore, there was no necessity for the presence of independent witness.

5.2. He had relied on the reported ruling of the Hon'ble Supreme Court in **1988 Supp SCC 686 in the case of State of U.P Vs. Anil Singh** wherein this Court took note of the fact that generally the public at large are reluctant to come forward to depose before the court and therefore, the Prosecution case cannot be doubted for non-examining the independent witness.

5.3. He relied on the reported ruling of the Hon'ble Supreme Court in **2001-6-SCC-692 in the case of Sajan Abraham Vs. State of Kerala**, wherein it has been held that the last submission of the appellant is, there is non-compliance of Section 57 of the Act. As per the above section, an obligation is cast on the Prosecution while making an arrest or seizure, the Officer should make full report of all particulars of such arrest or seizure and send it to



his immediate superior officer within 48 hours of such arrest or seizure. The submission is, this has not been done. Hence the entire case is vitiated. It is true that the communication to the immediate superior has not been made in the form of a report, but we find, which is also recorded by the High Court that P.W-5 has sent copies of FIR and other documents to his superior officer which is not in dispute. Ex.P-9 shows that the copies of the FIR along with other records regarding the arrest of the appellant and seizure of the contraband articles were sent by P.W-5 to his superior officer immediately after registering the said case. So all the necessary information to be submitted has been sent. This constitutes substantial compliance and mere absence of any such report cannot be said that it has prejudiced the Accused. This section is not mandatory in nature. When substantial compliance has been made, as in the present case it would not vitiate the Prosecution case. In the present case, we find P.W-5 sent all the relevant materials to his superior officer immediately. Thus, we do not find any violation of Section 57 of the Act.

5.4. Further he submitted that another contention on the side of the defence is that there was a delay in sending the material object to the Court. But in this case occurrence had taken place on 20.04.2005 and on the very next day the respondent police had handed over the same to the Judicial Magistrate and the same was returned to be produced before the competent Special Court. Hence, there is no substantial delay in sending the property to the Court.

5.5. He further submitted that on proper appreciation of evidence, the learned Sessions Judge, Special Court under NDPS Act, Madurai, in his judgment had elaborately discussed the entire materials available before him in page Nos.43 to 56, and had arrived at a logical conclusion.

5.6. Also, the learned Government Advocate (Crl. Side) submitted that the appellate Court shall not disturb the finding of the learned trial Judge, if the learned trial Judge had on proper appreciation of entire materials before him or her through the witnesses, documents and material objects as per the provision of Indian Evidence Act, had arrived at a just and logical conclusion. This is because, the learned trial Judge has the advantage of observing the demeanour of the witnesses whereas the learned appellate Judge does not have the benefit of the same. Therefore, the finding of facts arrived at by the learned trial Judge shall not be disturbed. Even though, on the same set of evidence, the learned appellate Judge arrives at a different and opposite finding, the learned appellate Judge shall not thrust his/her findings on the learned trial Judge. In view of the above guidelines issued by the Hon'ble Supreme Court regarding the appreciation of evidence by the learned appellate Judge, this Court shall not disturb the finding arrived at by the learned Sessions Judge, Special Court under NDPS Act, Madurai. In the light of the above, the learned Government



Advocate (Crl. Side) argued that this appeal lacks merits and is to be dismissed.

6. Point for Consideration

Whether the judgement of conviction recorded by the learned Sessions Judge, Special Court under NDPS Act, Madurai in C.C.No.131 of 2009, dated 26.07.2016 is perverse warranting interference of this Court as appellate Court?

7. Perused the evidence of Prosecution witnesses under P.W-1 to P.W-4 and marked documents under Ex.P-1 to Ex.P-10 and the judgment of the learned trial Judge.

8. On a perusal of the entire materials available on record and on the judgment of the learned trial Judge, as rightly pointed out by the learned Government Advocate (Crl. Side) placing reliance on the ruling of the Hon'ble Supreme Court that the search and seizure to be conducted in the presence of independent witnesses and the confession of the Accused to be obtained before any Gazetted Officer or learned Judicial Magistrate is not mandatory provision of the NDPS Act, particularly, when the raid had taken place in a public place when Accused himself had given consent. In this case, the Accused had given consent under Ex.P-2. Also, the learned Sessions Judge had discussed about the evidence of P.W-4-Sub Inspector of Police who had registered the FIR under Ex.P-10 based on the report of Nagaraj-Head Constable under Ex.P-9. Based on which, the Investigation Officer-P.W-3-Inspector of Police had recorded the statement of officials who had conducted search and seizure and the arrest of the Accused and he had laid final report. Based on the final report, the Court had taken cognizance of the case and on continuation of the same, the trial was conducted. Also, 50 gm of Ganja packet from the seized property of Ganja was sent to the Forensic Laboratory. The Forensic Analyst was examined as P.W-2. Therefore, nothing is found perverse.

9. As per the reported ruling of the Hon'ble Supreme Court, this Court is of the view that Section 42 (2) and 50 of the NDPS Act is not mandatory that when suspect under the NDPS Act is restrained and searched in the public place and they shall be taken to the place where the Gazetted Officer available and confession to be obtained in his presence and search and seizure to be conducted in the presence of independent witness. Particularly, it is to be observed that when the police officials or any law enforcement agency searched absconding suspects in public place, the public who may be available there will not come forward to volunteer as a witness. They are apprehensive regarding the time to be spent in Court for their examination and threat posed from the person who face criminal Prosecution. Therefore, people are not willing to come as a witness. That cannot be a ground to set aside the



judgment or process of the investigation having not followed due procedure. Therefore, as rightly pointed out by the learned Government Advocate (Crl. Side), the judgment of the learned Sessions Judge, Special Court under NDPS Act is not found perverse.

10. Point for consideration is answered in favour of the Prosecution/respondent and against the appellant/Accused. The judgment of conviction recorded by the learned II Additional District and Special Judge for NDPS Act, Madurai in C.C.No.131 of 2009 dated 26.07.2016 is not perverse warranting interference of this Court.

This Criminal Appeal is dismissed.

11.The Judgment of conviction recorded by the learned Second Additional District Special Judge for NDPS Cases, Madurai in C.C.No.131 of 2009, dated 26.07.2016 is confirmed. The learned Second Additional District Special Judge for NDPS Cases, Madurai is directed to issue warrant against the Accused to forward him to Prison to undergo the remaining period of sentence imposed on the Accused by Judgment dated 26.07.2016 in C.C.No.131 of 2009. The period of detention already undergone by the appellant/Accused is set off under Section 428 of Cr.P.C.,

Sd/-

Assistant Registrar (AE)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

dh

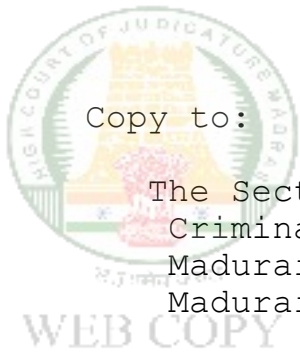
To

1.The Judge, II Additional District and Special Court
under NDPS Cases, Madurai.

2.Inspector of Police,
NIB CID Police Station,
Dindugul District.

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

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



Copy to:

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

+1 CC to M/s.R.GANDHI, Advocate (SR-36382[F] dated 29/11/2021)

CRL.A.(MD)No. 279 of 2016
26.11.2021

RD(24.02.2022) 9P 8C