



Bail Slip

The Appellant/Accused Sasi was directed to be released on bail vide order dated 13.10.2017 made in CRL MP(MD) No.2299 of 2017 in CRL A(MD) No.283 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 29.09.2021

CORAM:

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

Crl. A(MD) No. 283 of 2016

1. Babu

2. Sasi

: Appellants/Accused Nos. 1 & 2

Vs.

State rep. by
Inspector of Police,
N.I.B. CID, Theni.
(Crime Nos.129 & 130 of 2003) : Respondent / Complainant

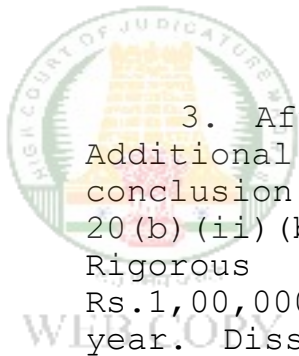
PRAYER: The Criminal Appeal is filed under Section 374 of the Code of Criminal Procedure, to set aside the judgment dated 23.06.2016 made in C.C.No.1247 of 2003 passed by the learned II-Additional Session Judge (Special NDPS Court, Madurai)

For Appellants : Mr.M.Jegadeesh Pandian
For Respondent : Mr.M.Muthumanikkam
Government Advocate (Crl.side)

JUDGMENT

This Criminal Appeal is directed against the conviction and sentence, dated 23.06.2016 made in C.C.No.1247 of 2003 on the file of the II-Additional Special Court (NDPS Cases), Madurai.

2. The appellants 1 & 2 herein are arrayed as accused Nos.1 & 2 in the above referred case. They stood charged for the offences punishable under Section 8(c) r/w 20(b)(ii)(c) of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as "NDPS Act").



3. After full fledged trial, the learned Session Judge II-Additional Special Court (NDPS Cases), Madurai, came to the conclusion that both the accused are guilty under Section 8(c) r/w 20(b)(ii)(b) of NDPS Act, convicted and sentenced to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs.1,00,000/-, in default to undergo Simple Imprisonment for one year. Dissatisfied with the said findings, both the accused are before this Court with this Criminal Appeal.

4. The case of the prosecution in brief is as follows:-

(i) On 17.06.2003 around 7.30 a.m., one Annadurai (now died), who was the then Sub-Inspector of Police, Narcotic Intelligence Bureau-Central Intelligence Department, Theni, received an information from the informer that there was a transportation of Ganja from Kerala to Tamilnadu. On receipt of the said information, he recorded the same and produced before the P.W.4-Ponram with request to grant permission for further proceedings. The said information recorded by the deceased Annadurai was marked as Ex.P13.

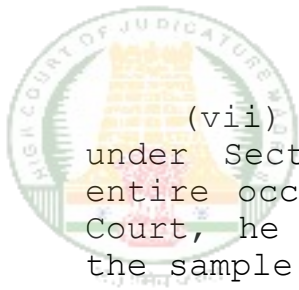
(ii) After obtaining the permission from P.W.4, the said Annadurai along with P.W.3-A.Gopalakrishnan and one Head Constable proceeded to Munthan check post area. While such a time, he requested one Murugan and Karuppaiah to stand as the witness for the recovery of contraband but the same was refused by them. Hence, he proceeded to the occurrence place along with the police constables and around 10.30 a.m., he found both the accused, who had crossed the Mundhan check-post along with Jute bags.

(iii) After securing the accused as above, he himself introduced to them as, he is the police of Narcotic Intelligence Bureau and wanted to conduct search on them. Further, he informed as above the right having by them under Section 50(2) of NDPS Act, for which, both the accused gave consent for conducting search by the said Annadurai itself. The consent letter given by them were marked as Ex.P9.

(iv) In a search, he found that every bag possessed by the accused are having 21 kilograms of Ganja and after identifying as above, for the purpose of chemical examination, he separated two 50 grams of Ganja from each bag and assigned with serial numbers as S1 to S4. The remaining contraband was sealed and assigned with serial number as B1 & B2.

(v) In continuous of investigation, the said Annadurai in the presence of witnesses Nedunjeliyan and Gopalakrishnan, prepared a Seizure Mahazar and through which, he recovered the contraband from the accused.

(vi) After made recovery as above, he brought the accused along with contraband and afterwards, registered a case against the accused in Crime Nos. 129 & 130 of 2003 under Section 8(c) r/w 20(b)(ii)(c) of NDPS Act. The printed First Information Report was



(vii) After registering the case, he sent a report to the P.W.4 under Section 57 of NDPS Act (Ex.P15) wherein, he narrated the entire occurrence. After producing the contraband before the trial Court, he submitted an application, wherein, he requested to send the sample contraband for chemical examination.

WEB COPY
(viii) In turn, the learned trial Judge issued proceedings for examination of sample contraband and afterwards, after receipt of the sample contraband, P.W.1-Hameeda Begum, the training Scientific Assistant working in the Forensic Science Laboratory, Madurai, examined two sample contrabands and issued a report under Ex.P3 and Ex.P.6 stating that the sample contraband are the cannabis. Before the trial Court, the sample contraband and the remaining contraband were all marked as M.Os.1 to 6.

(ix) In respect to the Crime No.129 of 2003, a requisition letter sent by the Investigating Officer to the Sessions Court was marked as Ex.P1 and a letter issued in respect to the said requisition by the said Court was marked as Ex.P2. Similarly, in respect to the Crime No.130 of 2003, requisition sent by the Investigating Officer was marked as Ex.P4 and the letter issued in respect to the said requisition was marked as Ex.P5.

(x) On receipt of the report from the chemical examiner, the said Annadurai examined the witnesses and recorded their statements. After concluding the investigation, he came to the positive conclusions that both the accused are liable to be convicted under Section 8(c) r/w 20(b)(ii)(c) of NDPS Act. He filed a final report, accordingly.

5. From the above materials, the trial Court framed the charges against the accused under Section 8(c) r/w 20(b)(ii)(c) of NDPS Act. Both the accused denied the same and opted for trial. Therefore, both the accused were put on trial. In order to prove their case on the side of the prosecution, 4 witnesses were examined as P.W.1 to P.W.4 and 15 documents are exhibited as Ex.P1 to Ex.P15, besides 6 Material Objects (M.O.1 to M.O.6).

6. Out of the said witnesses, P.W.1-Hameeda Begum speaks about the receipt of sample contraband from the Court and about the chemical examination made on.

(ii) P.W.2-K.Devika is the head clerk working in the Judicial Magistrate Court, Virudhunagar spoken about the receipt of contraband from the police and about the issuance of same to the Forensic Science Department for chemical examination.

(iii) P.W.3-Gopalakrishnan, who is the then Grade-I constable working in Narcotic Intelligence Bureau-Central Intelligence Department, Theni, speaks about the recovery of contraband from the accused.



(iv) P.W.4-Ponram is the Inspector of Police, Narcotic Intelligence Bureau-Central Intelligence Department, Theni. He gave evidence in respect to the recovery of contraband and about the investigation by the deceased Sub-Inspector Annadurai.

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

8. Having considered all the materials placed before him and on considering the arguments advanced by the learned counsels appearing on the either side, the learned II-Additional Special Judge (NDPS Court), Madurai, found both accused herein are guilty under Section 8(c) r/w 20(b)(ii)(b) of NDPS Act, convicted and sentenced as stated supra. Aggrieved over the said conviction and sentence, both the appellants/accused are before this Court with this appeal.

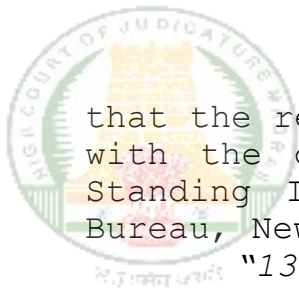
9. I have heard Mr.J.Jegadeesh Pandian, learned counsel appearing for the appellants and Mr.M.Muthumanikkam, learned Government Advocate (Crl.side) appearing for the State. I have also perused the records carefully.

10. The learned counsel appearing for the appellants would contend that before conducting the search, the Investigating Officer obtained a consent letter commonly from both the accused which is against the procedure contemplated under the NDPS Act. The further submission of the learned counsel appearing for the appellant is that during the time of recovery and when at the time of investigation, the mandatory provisions, which are required to be followed, has not been followed by the Investigating Officer and therefore, the accused is entitled to the relief of acquittal and accordingly, he prayed to set aside the conviction and allow the appeal.

11. Per contra, the learned Government Advocate (Crl.side) appearing for the respondent would contend that the evidence given by the prosecution witnesses is sufficient to hold that the accused are transported the Ganja and the same is an offence under the NDPS Act. According to him, the findings arrived at by the trial Court does not require any interference.

12. I have considered the rival submissions made by the learned counsels appearing on either side.

13. Before the trial Court, the chemical examiner, who examined the recovered contraband, gave evidence as P.W.1. Now on going through the said evidence given by her, it would appear that she has been received the sample contraband only on 15.07.2003. On the other hand, the alleged contraband has been recovered by the Investigating Officer on 17.06.2003. Therefore, it is quite clear



that the recovered contraband has been sent to the chemical examiner with the delay of 28 days. In this regard, Clause 13 of the Standing Instructions No.01/1988 issued by the Narcotics Control Bureau, New Delhi, wherein, it was stated as follows:-

"13.Mode and Time limit for despatch of sample to Laboratory;

The samples should be sent either by insured post or through special messenger duly authorised for the purpose. Despatch of samples by registered post or ordinary mail should not be resorted to. Samples must be despatched to the Laboratory within 72 hours of seizure to avoid any legal objection."

So, in this area, the Investigating Agency without following stipulated rules, forwarded the contraband for chemical examination with unexplained delay. However, the same cannot be taken into account as the Standing Instructions given by Narcotics Control Bureau, New Delhi is not a mandatory one.

14. However, it is the duty vested with the Investigating Officer to explain under whose custody the recovered contraband was found available from the date of recovery to till the date on which the same was sent to the chemical examiner. In this regard, the evidence given by the police officers did not disclose the fact that the recovered contraband was found available in the custody of a particular person. The evidences given by P.W.3 and P.W.4, who are the police officers, recovered the contraband, are not a substantial evidence as the recovered contraband was found available in a proper custody.

15. The specific submission made by the learned counsel appearing for the appellants is that the consent letter obtained from the accused in respect to conducting the search over them is not within the ambit of Section 50 of NDPS Act and therefore, the mandatory provisions, which are required to be followed during the time of conducting search, has been violated in this case and hence, the prosecution fails to prove their case.

16. In this regard, now on considering the said submission with the relevant records before the trial Court, the consent letter given by the accused was marked as Ex.P9. Now, on going through the said document, it seems that the same was obtained by the Investigating Officer jointly from both the accused. It is unknown to this Court that after registering the separate cases against each of the accused, under what provision the Investigation Officer has obtained the consent letter jointly from both the accused.

17. At this juncture, it would be relevant to see the judgment of our Hon'ble Apex Court in a case of ***State of Rajasthan vs. V.Parmanand and others*** reported in (2014) 5 SCC 335, wherein, it was observed as follows:-

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



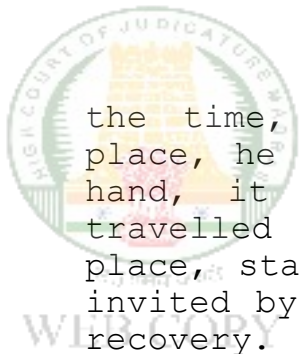
"14. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences 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 a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in *Paramjit Singh* and the Bombay High Court in **Dharamveer Lekhram Sharma** meets with out approval."

Therefore, applying the ratio laid down in the above referred judgment, herein it is a case, obtained a joint consent letter from both the accused is nothing but a violative of mandatory requirements under Section 50(1) of NDPS Act.

18. In this regard, the learned Government Advocate (Crl.side) appearing for the respondent police relying upon the judgment of **State of Himachal Pradesh vs. Pawan Kumar** reported in (2005) 4 SCC 350 would submit that under Section 50 of NDPS Act would be applicable only in a case of personal search of the accused and not when it is made in respect of some baggage like a bag, article, vehicle or container etc.

19. Now, on considering the relevant records, in the consent letter obtained by the Investigating Officer, it was stated that during the time of occurrence, he wanted to conduct the personal search over the accused. Therefore, though in the alleged occurrence the contraband has been recovered from the bag which is possessed by the accused, the averments found in the consent letter needed some fact that during the time of search, the police officers conducted only a personal search. Therefore, the submission made by the learned Government Advocate is not at all relevant for this case.

20. The another one aspect which is necessary to clarify in this case is that in view of the evidence given by P.W.4, while at



the time, the Investigation Officer is going to the occurrence place, he requested two persons to stand as a surety. On the other hand, it is the evidence given by P.W.3, who was the person travelled along with the Investigation Officer to the occurrence place, stated in his evidence as at any point of time nobody has invited by the Investigating Officer to stand as a witness for the recovery. So in this aspect, the evidences given by the police officers are contradictory in nature and created a doubt whether the Investigation Officer is attempted to secure the contraband in the presence of private individuals or not.

21. More than that, the alleged contrabands have been recovered from the area in which, so many Government check-posts are found available, but none of the persons, who are worked in the said check-post, are not stand as witness for the recovery. The said circumstances also dilute the case of the prosecution. Accordingly, after violating all the rules and regulations, the present case has been investigated by the Investigating Officer. Being the reason that the NDPS act provided as stringent punishment. It is necessary for the prosecution to follow the prescribed procedure without any omission.

22. In the light of the foregoing discussions, I am of the opinion that the conviction and sentence passed by the trial Court is liable to be set aside. Accordingly, this Criminal Appeal is allowed and the conviction and sentence imposed on the appellants/accused, by the learned Additional District and Sessions Judge and Principal Special Court for NDPS Act case, Madurai, dated 23.06.2016 is set and aside and the appellants/accused are acquitted from all the charges. The fine amount, if any, paid by them, shall be refunded to them. Bail bond, if any, executed by the appellants shall stand cancelled.

Sd/-

Assistant Registrar (CS III)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

am

To:-

1. The Inspector of Police,
N.I.B. CID,
Theni.

2.The II-Additional Special NDPS Court District and Session Judge,
Madurai.



3.The Principal Sessions Judge, Madurai.

4.The Superintendent, Central Prison, Madurai.

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

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

Crl. A(MD)No.283 of 2016
29.09.2021

MGJ/PM(02.11.2021) 8P 7C