



Bail Slip

The Appellant/Sole Accused Mookkammal W/o.Patchaimal, was released on bail order of this Court, Dated 17/08/2016 and made in Cr1.MP(MD)No.6796/2016 in Cr1.A(MD)No.290/2016.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Cr1.A(MD)No.290 of 2016

Mookkammal : Appellant/ Sole Accused

Vs.

State, rep.by
The Inspector of Police,
B-5 Southgate Police Station,
Madurai City.
(Crime No.245 of 2013)

: Respondent/Complainant

PRAYER: The Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure, to call for the records in pertaining to the judgment dated 03.02.2016 passed in a Calendar Case in C.C.No.251 of 2013 by the II Additional Principal Special (for NDPS Cases) Court, Madurai and set aside the same by allowing the appeal.

For appellant : Mr.T.Vadivelan
For Respondent : Mr.E.Antony Sahaya Prabahar
Government Advocate (Crl.side)

JUDGMENT

The present appeal is directed against the conviction and sentence, dated 03.02.2016 made in C.C.No.251 of 2013 on the file of II Additional Principal Special (for NDPS Cases) Court, Madurai.

2.The appellant is the sole accused. She stood charged for the offences punishable under Section 8(C) r/w 20(b)(ii)(B) of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as "NDPS Act"). After full-fledged trial, the learned II Additional Principal Special Judge for NDPS Cases, Madurai, came to the conclusion that the appellant was found guilty for the offences under Section 8(C) r/w 20(b)(ii)(B) of NDPS Act and accordingly, the appellant was convicted and sentenced to undergo Rigorous Imprisonment for 15 months and to pay a fine of Rs.10,000/-, in default to undergo one month simple imprisonment. Challenging the said conviction and sentence, the appellant is before this Court, by way of filing the present Criminal Appeal.



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

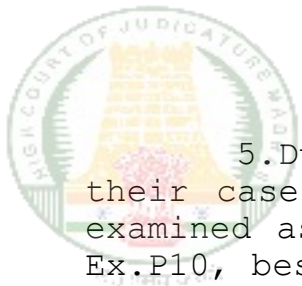
(i)PW4-Malaisamy, the then Sub Inspector of Police, B-5 Southgate Police Station, Madurai City, on 05.05.2013 around 13 hours, while he was in the Police Station, received the information about the selling of Ganja. The said information was recorded under Ex.P7 in terms of Section 42(2) of NDPS Act. Thereafter, after obtaining the permission from the Inspector of Police, he along with one Alagarsamy, the then Head Constable and PW1-Pandiyammal, around 13.45 hours, reached the Southveli Street Junction. After identifying the accused, PW4 along with team approached the accused and informed about the search made on her. In this regard, PW4 obtained Consent Letter from the accused under Ex.P8. During the time of search, they were found that the accused possessed with Ganja weighing about 1.250 kgs. On seeing the same, PW4 took 100 kms from total contraband and sealed the same for the purpose of chemical examination. He took the remaining contraband in a brown colour sheet. Around 14.15 hours, he arrested the accused and recovered the contraband along with Rs.100/- under a cover of Mahazar (Ex.P1). In turn, the accused was brought to the police station and the case has been registered against her in Crime No.245 of 2013 under Sections 8(C) r/w 20(b)(ii)(B) of NDPS Act. The printed FIR was marked as Ex.P9. After registering the case as above, he handed over the case records to PW5 for investigation.

(ii)PW5-Mahesh, the then Inspector of Police, Southgate Police Station, Madurai, after receipt of the case, made arrangements for handing over the contraband before the Jurisdictional Court. He submitted an application to forward the sample contraband for chemical examination. Then in view of the reference issued by the Court, PW2-Saleemsait, the then Head Constable, handed over the contraband with the Forensic Science Department for chemical examination.

(iii)PW3-Baskaran, the then Scientific Officer, Forensic Science Department, Madurai, on 20.05.2013 received the contraband and examined the same. On examination, he found that the sample contraband which was received from the Court, is having the character of Cannabis (Ganja). In this regard, he issued the report under Ex.P6. After receipt of the chemical examination report, PW5 came to the positive conclusion that the appellant is liable to be convicted under Section 8(C) r/w 20(b)(ii)(B) of NDPS Act and filed a final report accordingly.

4.Based on the above materials, the trial Court framed the charges against the accused under Section 8(C) r/w 20(b)(ii)(B) of NDPS Act. The accused denied the charges and opted for trial.

<https://hccourtsonline.gov.in/home.aspx> as put on trial.



5. During the course of trial proceedings, in order to prove their case, on the side of the prosecution, 6 witnesses have been examined as PW1 to PW6 and 10 documents were exhibited as Ex.P1 to Ex.P10, besides, two Material Objects [M.O.1 and M.O.2].

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6.(i) Out of the said witnesses, PW1-Pandiyammal, the then Head Constable, Southgate Police Station, Madurai, speaks about the search conducted on the accused and about the recovery made from her. PW2-Saleemsait the then Head Constable, Southgate Police Station, Madurai, speaks about the recovery of contraband.

(ii) PW3-Baskaran, the then Scientific Officer, Forensic Science Department, Madurai, speaks about the examination of contraband recovered during the time of investigation. PW4-Malaisamy and PW5-Mahesh, who are Police Officers, speak about the receipt of information, conducting search, recovery of contraband, registration of the case and about filing of final report.

(iii) PW6- Praveenkumar, who is the witness attested in Mahazar which was prepared for recovery of contraband, has not given evidence in support of the prosecution. Hence, after getting leave from the Court, he was treated as hostile witness.

7. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., the accused denied the same as false. However, she did not choose to examine any witness nor mark any document on her side.

8. Having considered all the above, the learned II Additional Special Judge for NDPS Act Cases, Madurai, came to the conclusion that the accused was found guilty for the offence under Section 8(C) r/w 20(b)(ii)(B) of NDPS Act and sentenced her as stated in paragraph No.2 of this judgment. Aggrieved by the said conviction and sentence, the appellant is before this Court with this appeal.

9. I have heard Mr.T.Vadivelan, learned counsel appearing for the appellant and Mr.E.Antony Sahaya Prabahar, learned Government Advocate (crl.side) and also perused the records carefully.

10. The learned counsel for the appellant would contend that the evidence given by the prosecution witnesses did not reveal the fact that on what date the recovered contraband was produced before the Court. Further the witness, who attested in the Seizure Mahazar, being the public, had not supported the case of the prosecution. The learned counsel further added that while at the time of securing the accused, particularly before made search, the right having by her in terms of Section 50 of the NDPS Act has not been explained to her and the same is sufficient to hold that the prosecution has failed in its attempts to prove the case. According



liable to be set aside.

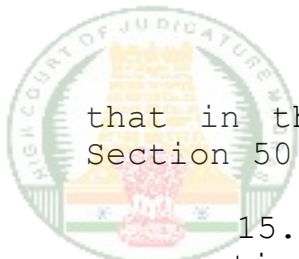
11.Per contra, the learned Government Advocate (crl.side) appearing for the respondent would contend that being the reason the witness attested in the Seizure Mahazar turned hostile, it cannot be said that the entire case of the prosecution is false one. According to him, the interference of this Court in the finding arrived at by the trial Court, is not required.

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

13.Now on go through the evidence given by PW4, it is seen that after securing the accused, she has not been explained by PW4 in respect to the right having by her under Section 50 of NDPS Act. The communication of the said right to the person, who is about to be searched, is not an empty formality. It has a purpose. Since the offence under the NDPS Act carry stringent punishment, it is necessary to follow the prescribed procedure meticulously without any lapse. In the case of **State of Rajasthan Vs Parmanand and others** reported in (2014) 5 SCC 335, our Hon'ble Apex Court has very much urged the Investigation Officer in this regard. Further, in the case of **Arif Khan Alias Agha Khan Vs State of Uttarakhand** reported in (2018) 18 SCC 380, our Hon'ble Apex Court has held as follows:-

"Their Lordships have held in Vijaysinh Chandubha Jadeja that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the police officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a gazetted officer or a Magistrate. It is held that it is equally mandatory on the part of the authorised officer to make the suspect aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a gazetted officer or a Magistrate."

14.Therefore, it is already ruled out that the suspect person may or may not choose to exercise the right. It is for the Investigation Officer to apprise the person intended to be searched, to his right under Section 50 of the NDPS Act. So it is made clear



that in the present case, the mandatory procedure required under Section 50 of the NDPS Act is not complied with.

15. Further on go through the evidences given by the prosecution witnesses, particularly, in the evidence given by the Investigation Officer, it is seen that he has not stated about the date, on which the recovered contraband was produced before the Court after made recovery on 05.05.2013. In this regard, the letter issued by the Court (Ex.P5) forwarding the samples to the Forensic Science Department had been received by the Chemical Examiner only on 20.05.2013, i.e., after 15 days from the date of recovery. So, it is necessary for the prosecution to prove under whose custody the said contraband was kept available in the interregnum period. Further, in respect to sending the detailed report to his Superior Officer, PW4, who is the Investigation Officer, has not given evidence as to what date Section 57 report was given to his Superior Officer. In this regard, in the case of **Gurbax Singh Vs State of Haryana** reported in **A.I.R 2001 S.C. 1002**, wherein our Hon'ble Apex court has held as follows:-

It is true that the provisions of Sections 52 and 57 of NDPS Act are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, the Investigation 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"

16. Applying these factors with the case on hand, here it is the case that the Investigation Officer has not stated about the date, on which the contraband was produced in the Court. Further, there is no evidence on what date he has submitted the application before the Magistrate for sending the contraband to chemical examination. More than that, the correct details in respect to the seal found on the sample contraband has also not been explained by the chemical examiner. Therefore, non-mentioning the date and other things in respect to the contraband recovered is having much significance to decide the issue raised in this case.

17. As already observed, since NDPS Act is having stringent punishment, it is necessary to scrutinize the entire aspect before sentencing the accused. Here, it is the case, the true aspect which is narrated as above, makes it clear that the prosecution has not approached this Court with clean hands. Therefore, I am of the opinion that the conviction and sentence passed by the trial Court is liable to be set aside.

18. In fine, this Criminal Appeal is allowed and the conviction and sentence imposed on the appellant, by the learned II Additional Principal Special Judge for NDPS Act Cases, Madurai, made



in C.C.No.251 of 2013, dated 03.02.2016, is set aside and the appellant is acquitted from all the charges. The fine amount, if any, paid by her, shall be refunded to her. Bail bond, if any, executed by the appellant shall stand cancelled.

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Sd/-

Assistant Registrar (CS III)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

To

- 1.The II Additional Principal Special Judge for NDPS Act Cases,
Madurai.
- 2.The Inspector of Police,
B-5 Southgate Police Station,
Madurai City.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
- 4.The Superintendent,
Special Prison for Women, Trichy.

Copy to:

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

Cr1.A(MD)No.290 of 2016
23.08.2021

RS (13.09.2021) 6P 7C