

BAIL SLIP

The appellant/Sole Accused namely Balamurugan, Male, aged 36 years, S/o. Ayyavuthevar, was directed to be released on bail as per the order of this Court, dated 01.03.2016 in CRL MP(MD).1893 of 2016 in CRL A(MD).No.71 of 2016 on the file of this Court.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 19.03.2021

Pronounced on : 30.04.2021

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

CRL.A(MD).No. 71 of 2016

Balamurugan : Appellant / accused

Vs.

State rep. by the
The Inspector of Police,
Alanganallur Police Station,
Madurai District.
(Crime No. 52 of 2003)

: Respondent / complainant

PRAYER:- Criminal Appeal filed under Section 374 Cr.P.C., to call for the records in C.C.No.142 of 2004 dated 10.02.2016 on the file of the II Additional Special Sessions Judge (NDPS Act Cases), Madurai and set aside the same.

For Appellant : Mr.M. Jagadeesh Pandian

For respondent : Mr. V. Neela Kandan

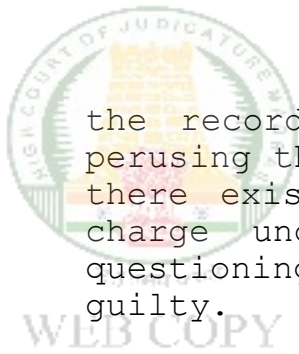
Additional Public Prosecutor

JUDGMENT

The Criminal Appeal is directed against the Judgment of conviction and sentence passed in C.C.No.142 of 2004, dated 10.02.2016 on the file of the II Additional Special Sessions Judge (NDPS Act Cases), Madurai.

2. During the pendency of the case, the second accused was reported dead and hence, the charge against him was ordered to be abated.

3. The case of the prosecution is that on 28.03.2003 at about 8.00 a.m., in one Acre of land situated in S.No. 83/C, Sambakkulam Village, owned by one Ayyavu Thevar, both the accused without the permission of the Government, cultivated 600 ganja (Cannabis) plants and that the accused had committed the offence under Section 8(b) r/w. 20(a)(i) of NDPS Act. After appearance of the accused, the learned Sessions Judge, furnished the copies of



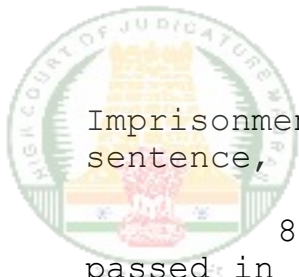
the records under Section 207 Cr.P.C., on free of costs and on perusing the records and on hearing both sides, being satisfied that there existed a prima facie case against the accused, framed a charge under Section 8(b) r/w. 20(a)(i) of NDPS Act and on questioning the accused had denied the charges and pleaded not guilty.

4. During trial, the prosecution in order to prove its case, examined four witnesses as PW.1 to PW.4 and exhibited 7 documents as Exs.P1 to P7 and one material object as M.O.1.

5. PW.2, the then Inspector of Police, holding additional charge of Alanganallur Police Station, on 28.03.2003 received a secret information at about 6.30 a.m., and he immediately proceeded to Alanganallur and visited the lands of Ayyavu Thevar along with Bommaiyaasamy and Vijayaraghavan, Sub Inspectors of Police, Village Administrative Officer - Gurusamy (PW.1) and his Assistant Pandi and inspected the land in S.No. 83 / 2C and 2D Sambakulam Village, where they had noticed three months aged ganja plants between Rose plants and Pigeon Pea (Thuvarai) plants and that the accused were found watering the ganja plants. He immediately arrested both of them and plucked 600 ganja plants and seized 2 ganja plants as sample through seizure mahazar under Ex.P1. Thereafter, the remaining ganja plants were destroyed by setting ablaze. PW.2 along with other officials had returned to the police station and registered a case in crime No. 52 of 2003 and prepared the First Information Report under Ex.P4. Thereafter, PW.3 had taken up the investigation. He submitted the requisition under Ex.P5 - for sending M.O.1 ganja plants for chemical examination to the Regional Forensic Laboratory, Madurai. PW.4, the then Scientific Officer attached to the Forensic Laboratory has examined the samples received and noticed the presence of Cystolithic Hair and Cannabinoids and the remaining samples were sent back to the Court along with the report under Ex.P7. PW.3 has examined the Scientific Officer and recorded her statement. After completing the investigation, he laid a final report. With the examination of PW.4, the prosecution has closed their side evidence.

6. When the accused was examined under Section 313(1)(b) Cr.P.C. with regard to the incriminating aspects found against him, the first accused denied the prosecution evidence as false and further stated that a false case has been foisted against him. Though the accused has stated that he is having defence witness, he has not let in any evidence subsequently.

7. The learned Sessions Judge, upon considering the evidence adduced and on hearing the arguments of both sides, has passed the impugned Judgment on 10.02.2016 convicting the accused for the offence under Section 8(b) r/w. 20(a)(i) of NDPS Act and sentenced him to undergo 3 ½ years Rigorous Imprisonment and to pay a fine of Rs.25,000/-, in default to undergo 6 months Simple



Imprisonment. Aggrieved by the said Judgment of conviction and sentence, the accused has preferred this appeal.

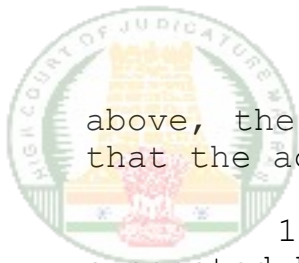
8. Whether the impugned Judgment of conviction and sentence passed in C.C.No.142 of 2004 dated 10.02.2016 on the file of the II Additional Special Sessions Judge (NDPS Act Cases), Madurai is liable to be set aside? is the point for consideration.

9. I have heard the learned counsels appearing on either side and perused the materials available on record.

10. The prosecution case is that on 28.03.2003 at about 6.30 a.m., PW.2, who was in-charge of the respondent Police at that time, received a secret information and based on which, he along with PW.1 Village Administrative Officer and two other officials had inspected the property in S.No. 83 / 2C and S.No. 83 / 2D of Sambakulam Village, Alanganallur Taluk, that at the time of their visit, they had noticed the ganja plants which were 3 months old planted in between Rose plants and Pigeon Pea (Thuvarai) plants, that both the accused were arrested, that all the ganja plants were plucked and out of which two plants were seized as samples under Ex.P1 mahazar, that rest of the ganja plants were destroyed by setting fire and that after returning to the station, First Information Report came to be registered.

11. According to the prosecution, the land in which ganja plants were cultivated was previously owned by one Ayyavu Thevar, who is the father of the present accused and after the death of the said Ayyavu Thevar, the accused has been in possession of the said land. Section 8(b) of the NDPS Act contemplates that no person shall cultivate the Opium Poppy or any other Cannabis plant. It is for the prosecution to prove the essential ingredient of cultivation. In the present case, according to the prosecution, PW.1 and PW.2 had specifically witnessed that the accused were watering the ganja plants at the time of inspection. PW.2 in his evidence would say that after receiving the secret information, he had taken two Sub Inspector of Police, PW.1 - Village Administrative Officer and his Assistant and went to the occurrence place. PW.1 would say that when he visited the place of occurrence, police were already present. PW.2 in his cross examination would admit that no police was present at the occurrence place, when he visited that place with the team.

12. As rightly contended by the defence, it is highly doubtful as to whether PW.1, PW.2 and other officials had visited the occurrence place at the same time since PW.1 has stated that the police were already present when he visited the occurrence place. Hence, the main contention of the prosecution that all of them had found that the accused were watering the ganja Plants at the time of the inspection is proved to be false. Except the above ocular evidence of PW.1 and PW.2 and that too with the contradictions noted



above, the prosecution has not produced any other evidence to show that the accused had really cultivated the ganja plants.

13. No doubt, during the cross examination of PW.1, it was suggested by the defence that after the death of the Ayyavu Thevar, the lands remained unattended and the neighbouring persons without the consent of the accused had raised cultivation. PW.1 would deny the said suggestion specifically. Moreover, the above suggestion would not be sufficient enough to say that the accused had admitted his ownership over the land in question. PW.1 in his cross examination would say that the lands in which ganja plants were cultivated stand in the name of the accused Balamurugan and that he has not produced any documents to prove the same. PW.1 would further admit that he came to know about the particulars of the accused only at the time when they were examined by the police.

14. As rightly contended by the defence, it is clear from the evidence of PW.1 that he was not aware of the ownership and possession of the land in dispute, nature of cultivation made therein and about the accused. PW.2 in his cross examination would say that PW.1 - Village Administrative Officer has stated in his statement that the land in dispute was owned by Ayyavu Thevar and that the same was in his possession. The prosecution has only produced the copy of FMB plan under Ex.P2, but, admittedly, they have not chosen to produce the copies of Chitta, Adangal or other records or documents with respect to the said land. PW.2 would also admit that he has not examined the adjoining land owners. It is not the case of the prosecution that the accused Balamurgan is the only son and legal heir of the deceased Ayyavu Thevar. Considering the above, as rightly contended by the defence, the prosecution has miserably failed to prove that the land in question was owned and possessed by the accused and that the accused alone had cultivated the ganja plants.

15. PW.2 would say that he received the secret information at about 6.30 a.m., on 28.03.2003, and that he has not recorded said information separately but recorded in the general diary. He would admit that he has not mentioned the receipt of the information in Column 3(c) as well as in Column 12 of the First Information Report. Moreover, the prosecution has also not chosen to produce the general diary to show that PW.2 had entered the receipt of the information therein.

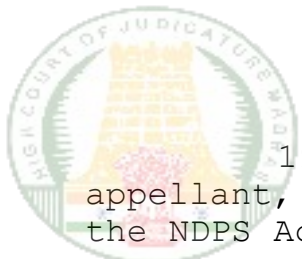
16. The learned counsel appearing for the Appellant would submit that PW.2 has not complied with the mandatory requirements contemplated under Section 48 of NDPS Act and he ought to have obtained orders from the Gazetted Officials of the State Government before destroying the ganja plants and he relied on the decision of this Court reported in **2007 (2) MLJ (Cr1.) 926 (Sathish and another Vs. State rep. by Forest Range Officer, Sirumugai.**



"12. So under such circumstances, it is highly doubtful whether the plant seized under Ex.P1 mahazar was sent for chemical analysis Ex.P5 and Ex.P8 report relates to the sample plant seized from the place of occurrence under Ex.P1 mahazar. The learned counsel would further point out that according to PW.1 after taking samples under Ex.P1, the remaining plants were destroyed by fire. But as per Section 48 of the NDPS Act, only under an order from the Gazetted Officer of the State Government the Ganja plants can be destroyed. But admittedly as per the evidence of PW.1, there was no order passed by the competent authority for the destruction of the remaining plants. In the cross examination PW.1 would admit that he has not prepared any mahazar for the destruction of the remaining plants at the place of occurrence. PW.2 also in the cross examination would admit that there was no mahazar prepared for the destruction of the remaining ganja plants at the place of occurrence and the ash was also not seized after the destruction."

17. It is the case of the prosecution that after recovering two ganja plants, they had destroyed the remaining plants at the occurrence place itself. PW.2 in his cross examination would admit that he has not obtained any previous permission from any Government Officials for destroying the ganja plants, that he had intimidated to his superior officer and then destroyed the plants, that he has not obtained any written order and that he also not mentioned that ganja plants were destroyed as per the oral order of the superior officer. Moreover, it is pertinent to mention that even according to the prosecution, they have not prepared any destruction mahazar except the seizure mahazar for the two ganja plants, which were recovered as sample. They have not prepared any mahazar to show that there were 600 ganja plants and the same were uprooted and that two plants were recovered as sample and the remaining were destroyed by fire. He would also admit that he has not recovered any ash from the destruction place. It is pertinent to mention that neither PW.2 nor PW.3 has prepared the observation mahazar and rough sketch with respect to the occurrence place. PW.2 would admit that he has not even mentioned the boundaries of the land in question.

18. Even according to the prosecution, two ganja plants were recovered on 28.03.2003 and the same were submitted to the Court on 08.04.2003. No doubt, PW.2 in his cross examination would say that they have produced the property on 28.03.2003 itself to the Court, but the same was returned and that subsequently, the property was again submitted on 08.04.2003. He would admit that the property was in the safe custody of the police during the intervening period. Though PW.2 has submitted that they are maintaining Return Property Register, the same was not produced before the Court.



19. As rightly contended by the learned counsel for the appellant, the prosecution has failed to comply with Section 55 of the NDPS Act. Admittedly, the prosecution has failed to produce the necessary evidence to show the place where the said contraband was kept in safe custody during the interregnum period. As rightly pointed out by the defence, as per Section 57 of the said Act, any arrest or Seizure made under the Act shall be reported to the immediate superior officer with all particulars of such arrest or seizure within 48 hours. No doubt, non-sending of report u/s. 57 of NDPS Act, within 48 hours of arrest or seizure will not vitiate the entire proceeding. But, in the present case PW.2 has nowhere whispered that he sent the report as contemplated under Section 57 of the said Act.

20. The learned Additional Public Prosecutor, relying on Sections 35 and 54 of NDPS Act, would submit that presumption is available in favour of the prosecution and against the accused. No doubt, the presumption against the accused of culpability under Sections 35 and 54 of NDPS Act to explain the possession satisfactorily are rebuttable and it does not dispense with the duty of the prosecution to prove the charges beyond all reasonable doubt.

21. Moreover, in order to raise the presumption against the accused, it is for the prosecution to prove the foundational facts and only thereafter, the burden gets shifted to the accused. Moreover, the proof required for rebutting the presumption is of preponderance of probabilities. In the case on hand, as already pointed out, the prosecution has failed to prove that the accused had actually cultivated cannabis plants and as such Sections 35 and 54 of NDPS Act could not be invoked. From the above discussion, this Court decides that the prosecution has miserably failed to prove the guilt of the accused beyond all reasonable doubt and as such, the conviction and sentence imposed by the trial Court on the accused is liable to be set aside.

22. In the result, the Criminal Appeal is allowed and the Judgment of conviction and sentence imposed on the accused in C.C.No.142 of 2004 on the file of the II Additional Special Sessions Judge (NDPS Act Cases), Madurai is set aside and the accused is acquitted. Fine amount, if any paid is ordered to be refunded. Bail bond if any, stands cancelled.

Sd/-

Assistant Registrar(CS-)

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/ /2021

Sub Assistant Registrar(CS)



1. II Additional Special Sessions Judge (NDPS Act Cases), Madurai.
2. The Superintendent, Central Prison, Madurai.
3. The Inspector of Police,
Alanganallur Police Station,
Madurai District.
4. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

order made in

CRL.A (MD) .No. 71 of 2016
30.04.2021

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