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Crl.A.No.166 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.11.2022

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

Crl.A.No.166 of 2018

Sivakumar

... Appellant/accused

Vs.

State rep. by:

The Intelligence Officer,
Narcotics Intelligence Bureau,
Chennai

... Respondent

PRAYER: Criminal Appeal filed under Section 374 (2) of Code of Criminal Procedure, to set aside the conviction of the appellant in CC.No.12 of 2016 dated 04.10.2017 by the learned Principal Special Judge for NDPS & EC Act, Chennai by allowing this appeal.

For Appellant : Mr.R.C.Paul Kanagaraj

For Respondent : Mr.A.Gopinath,
Government Advocate(crl.side)

JUDGMENT

This criminal appeal is directed as against the judgment passed in CC.No.12 of 2016 on the file of the learned Principal Special Judge for NDPS & EC Act, Chennai dated 04.10.2017, thereby convicted the appellant for the offences under Section 8(c) r/w 20(b)(ii)(c) of NDPS Act.



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2. The case of the prosecution is that on receipt of secret information, on 19.03.2003, PW1 along with his team went to the place of scene of occurrence at about 12.15 hrs. At that juncture, they found A1 and A2 in possession of two polythene gunny bags. They were duly informed about their identity and after following the due procedures laid down under the Act, they made search on them. The first accused was found in possession of 22 kg of 'ganja'. The second accused was found in possession of 5 kg of 'ganja'. After completion of formalities, FIR was registered and arrested the accused persons. After completion of investigation, the respondent filed final report and the same has been taken cognizance by the trial court. In order to prove the charge, the prosecution had examined PW1 to PW4 and marked Ex.P1 to Ex.P15. On the side of the accused, no one was examined and no documents were marked. On perusal of oral and documentary evidence, the trial court found guilty and convicted the appellant for the offence under Section 8(c) r/w 20(b)(ii)(c) of NDPS Act. He was sentenced to undergo 10 years rigorous imprisonment and imposed fine of Rs.1,00,000/-, in default of payment of fine, he shall undergo 2 1/2 years rigorous imprisonment. Aggrieved by the same, the present criminal appeal has been filed.



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3. Mr.R.C.Paul Kanagaraj, the learned counsel for the appellant

submitted that the alleged occurrence took place at Velachery Mainroad near Government Workshop, Chennai. It is a public place and even then, the prosecution failed to examine any independent witness in order to prove the charge. All the witnesses PW1 to PW4 are police officials and in order to corroborate their evidence, no independent witness was examined. That apart, the contraband was allegedly seized from the accused on 19.03.2003, whereas the samples were sent for chemical analysis only on 17.04.2003. There was absolutely no explanation for delay in sending the samples for chemical examination. Further, the contraband was sent to the court only on 16.04.2003. There was no explanation by the prosecution for the inordinate delay in sending the contraband to the court. It is a put up case by the respondent for statistical purpose. Therefore, after registration of FIR, they made contraband ready and produced before the court only after 27 days. After sending the contraband to the court, it was sent for chemical analysis on 17.04.2003. Further, the prosecution also did not examine any independent witness to corroborate their evidence cumulatively. It shows that the prosecution foisted false case as against the appellant. In support of his contention, he relied upon the following judgments:



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(i) ***Xavier Vs. State of Tamilnadu rep. by the Inspector of Police***

WEB COPY reported in ***2010(1) MWN (Cr.) 494***

(ii) ***N.Raju Vs. The State rep. by the Inspector of Police***

reported in ***2015(1) MWN (Cr.) 426***

(iii) ***Vijay Pandey Vs. State of Uttar Pradesh***

reported in ***(2019) 18 SCC 2015***

(iv) ***Valsala Vs. State of Kerala*** reported in

1993 (2) KLT 550 SC

4. Per contra, Mr.A.Gopinath, the learned Government Advocate (crl.side) appearing for the respondent / police submitted that the delay in sending the contraband to the court is not the fatal to the case of the prosecution. At the same time, the delay in sending the contraband for chemical analysis is also not fatal to the case of the prosecution. When PW1 to PW4 cogently deposed about the occurrence and no independent witness is required to prove the case of the prosecution. Their evidences are trustworthy and the evidence of the police official witnesses cannot be thrown out only on the ground that they failed to examine any independent witness. In fact, the police officials followed all the procedures as contemplated under the Act and no independent witness was ready to stand as witness and as such, the prosecution



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gave opportunity of the right which is contemplated under the Act while making search of the accused and thereafter made search. Therefore, he prayed for dismissal of the criminal appeal.

5. Heard, Mr.R.C.Paul Kanagaraj, the learned counsel for the appellant and Mr.A.Gopinath, the learned Government Advocate(crl.side) appearing for the respondent / police.

6. On receipt of secret information, on 19.03.2003, at about 12.15 hrs., PW1 and his team members went to the scene of occurrence and kept surveillance near Government Workshop, Velachery Mainroad, Chennai. They found the accused 1 and 2 carrying gunny bag over their head. PW1 identified them and after complying with all necessary formalities under the NDPS Act, seized the contraband weighing 22 kg from the first accused and 5 kg from the second accused. Two samples weighing 50 grams each were taken out of 22 kg from the first accused and two samples out of 5 kg possessed by the second accused were taken. The samples were marked as MO.1 to MO.4. The remaining contraband were produced as MO.5 and MO.6. The second accused



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was absconded and as such, the case has been split up and the trial court conducted trial only as against the first accused and convicted him.

7. The learned counsel for the appellant mainly contended on three folds: (i) The contraband which was allegedly seized from the accused was not sent to the court immediately, (ii) The sample contraband was not sent for chemical analysis immediately after seizure and (iii) The prosecution failed to examine any independent witness to prove its case. In support of his contention he relied upon the judgment in the case of *Xavier Vs. State of Tamilnadu rep. by the Inspector of Police* reported in *2010(1) MWN (Cr.) 49*, wherein this court held that on receipt of secret information, the police official went to the place of occurrence without any independent witness. Some persons present at the scene of occurrence were requested to stand as witness and they refused. It was not mentioned in the mahazar. Therefore, in the absence of any independent witness supporting the evidence of the person who made search and seizure, it is not inspiring the confidence of the court. Therefore, the prosecution has not proved its case beyond reasonable doubt. He also relied upon the judgment of the Hon'ble Supreme Court of India in the case of *Valsala Vs. State of Kerala* reported in *1993 (2) KLT 550 SC*, wherein the Hon'ble



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Supreme Court of India held that the inordinate delay in sending the seized article to the Magistrate and that there is no evidence worth mentioning whether the article seized was sealed and if so when. The evidence of the officers concerned is highly discrepant and unconvincing and does not throw much light. In the absence of satisfactory proof, the courts cannot convict the accused.

8. Per contra, the learned Government Advocate(crl.side) relied upon the judgment in the case of ***Mukesh Singh Vs. State (Narcotic Branch of Delhi)*** reported in ***(2020) 10 SCC 120***, in which the Hon'ble Supreme Court of India held that there may be cases in which even the case of the prosecution is not solely based upon the deposition of the informant, but there may be some independent witnesses and/or even the other police witnesses. The testimony of police personnel will be treated in the same manner as testimony of any other witness and there is no principle of law that without corroboration by independent witnesses, his testimony cannot be relied upon. The presumption that a person acts honestly applies much in favour of a police officer as of other persons, and it is not judicial approach to distrust and suspect him without good grounds therefor. In the case of ***Rizwan Khan Vs. State of Chhattisgarh***



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reported in **(2020) 9 SCC 627**, the Hon'ble Supreme Court of India held that the testimony of the official witnesses cannot be rejected on the ground of non corroboration by independent witness. The independent witness is not an indispensable requirement and as such non examination is not necessarily fatal to the case of the prosecution case.

9. Insofar as the delay is concerned, the seal put on the material objects was intact. That itself proves and establishes that there was no tampering with the aforesaid seal in the sample at such stage and the sample received by the analysts for chemical examination contained the same contraband which was recovered from the possession of the accused. In that view of the matter, the delay in sending the samples could not have caused any prejudice to the accused. Therefore, the judgments cited by the learned counsel for the appellant are not helpful to the case on hand. The trial court rightly convicted the appellant and this Court finds no merits in this criminal appeal. However, the learned counsel for the appellant would submit that the trial court ordered to undergo 2 1/2 years rigorous imprisonment in default of payment of fine of Rs.1,00,000/- and the same may be reduced.



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10. Considering the above facts and circumstances of the case, the judgment in CC.No.12 of 2016 dated 04.10.2017 on the file of the learned Principal Special Judge for NDPS & EC Act, Chennai is modified as follows:

- (i) The conviction rendered by the trial court for the offences under Section 8(c) r/w 20(b)(ii)(C) of NDPS Act is confirmed.
- (ii) The sentence imposed by the trial court is now modified and the appellant is ordered to undergo 10 years rigorous imprisonment for the offences under Section 8(c) r/w 20(b)(ii)(C) of NDPS Act and also ordered to pay a fine of Rs.1,00,000/-, in default to undergo one month rigorous imprisonment.
- (iii) The period of remand already undergone by the appellant is to be given set off under Section 428 of Cr.P.C.

11. Accordingly, this criminal appeal is partly allowed.

24.11.2022

Speaking/non-speaking

Index : Yes/No

Internet : Yes

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G.K.ILANTHIRAIYAN, J.

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To

- 1.The learned Principal Special Judge for NDPS & EC Act,
Chennai
- 2.The Intelligence Officer,
Narcotics Intelligence Bureau,
Chennai
- 3.The Public Prosecutor,
High Court of Madras

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