



Crl.A.No.90 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :09.09.2022

Pronounced on :15.09.2022

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Crl.A.No.90 of 2012

Devaraj

.. Appellant

/versus/

State rep.by
Inspector of Police,
NIB, CID,
Chennai.

.. Respondent

Prayer: Criminal Appeal has been filed under Section 374 Cr.P.C., r/w 36-B of NDPS Act, 1985 to set aside the conviction and sentence rendered by the Principal Special Judge of NDPS Act, Chennai dated 27.12.2011 in C.C.No.37 of 2005 in Crime No.97 of 2004 for offence under Section 8(c) r/w 20(b)(ii)(B) of NDPS Act and may be pleased to acquit the accused.



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For Appellant :Mr.Cibi Vishnu

Legal Aid Counsel
For Respondent :Mr.R.Kishore Kumar,
Government Advocate (Crl.Side)

J U D G M E N T

This Criminal Appeal by the sole accused was convicted for the offence under Section 8(c) r/w 20(b) (ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short “NDPS Act”)

2. The case of the prosecution is that based on specific information received by the Sub Inspector of Police, NIB CID, Chennai on 04.08.2004 at about 10.00a.m., a team of NIB headed by N.G.Kumar proceeded to Vyasarpadi, Erukkancheri High Road, Ambedkar College and kept surveillance for the person mentioned in the information, who was supposed to come there to sell ganja. At about 11.15 hours, the intercepted person was carrying ganja bag on his left shoulder, who was identified by

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the informant as the person, who had come to sell ganja. The said person disclosed his name as Devaraj and his residence. The local public declined to be a witness for the search procedure. Hence, in the presence of Head Constables Muruganantham and Danachezhian, the accused Devaraj was informed about his right under Section 50 of NDPS Act to opt for being searched by a Gazettted Officer or Judicial Magistrate. The accused Devaraj declined to exercise the option and said no objection for the Sub Inspector to conduct the search. Thereafter, Gunny bag carried by the accused Devaraj was opened and they found that it contains ganja and it is 15.500 kgs. From out of the lot, two samples each 50 grams was taken separately and packed in two small polythin cover and sealed. The balance 15.400 kgs of ganja kept in the gunny bag, tied and sealed and the samples and the major contraband was labelled with details.

3. PW-1 [Tr.N.G. Kumar] seized the contraband under mahazar and arrested the accused for illegal possession of ganja and narcotic drug. The arrest of the accused informed to the mother of the accused. The



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contraband was submitted to the Inspector under Form-95 for further proceedings. The accused was remanded to judicial custody. The detailed report of search and seizure under Section 57 of NPDS Act was forwarded to the immediate Superior, the Inspector of Police. One of the samples was sent to the Forensic Science Laboratory and the Report was confirmed as cannabinoids. Final Report was filed and the accused was charged for the offence under Section 8(c) r/w 20(b) (ii)(B) of NDPS Act.

4. To prove the charges, the prosecution examined 4 witnesses and marked 13 exhibits. 3 Material Objects were marked.

5. The trial Court on considering the evidence found the accused guilty and sentenced him to undergo 2 years RI and fine of Rs.10,000/-, in default, to undergo 3 months RI. Being aggrieved by the sentence and conviction, the present Criminal Appeal is filed.



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6. The learned counsel, who filed appeal on behalf of the accused/appellant withdrew his appearance and therefore, Mr.Cibi Vishnu, was appointed by the Legal Services Authority as Legal Aid Counsel on behalf of the appellant.

7. The learned counsel appearing for the appellant submitted that the case of the prosecution bristles with infirmity and it lacks corroboration. The seizure of contraband was not supported by any public witness. When PW-1 has admitted that near the place of seizure, they were several Government Offices and shops, none of them were called to witness for the search and seizure. It is unbelievable that when the several respectful persons of the locality were available, PW-1 has called a person in the pavement running a temporary puncher shop. Ex.P1 the alleged information reduced into writing states that the accused with contraband will come to the place mentioned between 10.45 to 12.30. Whereas Ex.P2 time of offering the option under Section 50 of NDPS Act before the search not



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mentioned except reference about the information and between 10.30 and 12.30 the accused is about come. The difference in time mentioned in Ex.P2 not considered. In this regard, PW-1, who has prepared information Ex.P1 and Section 50 Report Ex.P2 has not offered any explanation. The corrections in the mahazar regarding the weight of the contraband creates doubt about the prosecution case. Two sample packets are not given any specific identification and the presence of crime number in the label pasted on the packets contain contraband proves that the documents relied on by the prosecution were not prepared on the spot but at later point of time. PW-2, the Head Constable, who alleged to have witnessed the search and seizure not able to recollect, how the contraband was weighed. PW-2 has not able to recollect who prepared the mahazar.

8. The learned counsel appearing for the appellant relying upon the judgment in *K.Kalyani v. State Rep by Inspector of Police* reported in *[2019 SCC Online Mad 21838]* submitted that the presence of the crime number in the label prepared on the spot of seizure and prior to the



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registration of the case creates doubt about the manner in which the seizure and arrest was done and therefore, the appeal is to be allowed.

9. The learned Government Advocate (Crl.Side) appearing for the State submitted that the search was conducted in a public place, while the accused was carrying contraband on his shoulder. The search was conducted based on the prior information. PW-1, who was received the information had deposed about the information and he proceeded to the spot along with PW-2. The seizure was conducted after offering the option under Section 50 of NDPS Act. The said option is duly recorded in writing and the signature was received and the same is marked as Ex.P2. There is no illegality in having the member of the team as witness when the public witness refused to come forward to be as witness for seizure fearing repercussion by the drug peddlers. Relying upon the seizure and the chemical analysis report, the learned Government Advocate (Crl.Side) submitted that the conviction to be sustained.



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10. Heard both sides. Perused records.

11. This Court, on examining Ex.P1 and Ex.P2 and evidence of PW-1 who admits that expected time of presence of the accused on the spot differs from Ex.P1 and Ex.P2 hold that this error cannot be ignored as trivial in view of other lapses in the prosecution case. PW-2, who alleged to have been present along with PW-1 in the course of search and seizure was not able to re-collect, how the contraband was weighed. There is no explanation from the prosecution witnesses, how crime number on the label prepared and affixed on the contraband at the place of seizure before registration of the case.

12. The contraband alleged to have been seized from the accused on 04.08.2004 at about 12.30 hours. The First Information Report has reached the Court on the same day and the property was produced before the Magistrate during the remand on 04.08.2004. The Magistrate has returned the property with direction that the case property should be produced before



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the learned Special Judge for NDPS Act cases on the next working day.

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However, from Ex.P9 (Form-95), this Court finds that the contraband was produced before the learned Special Judge only on 24.08.2004 i.e 20 days after the seizure. Neither PW-1 nor PW-4 to whom the property was handed over soon after the seizure has explained the custody of the contraband for 20 days between the seizure and the production before the Special Court. In this context, the correction of the weight in the mahazar marked as Ex.P3 gains significance. The correction though seen palpably on the mahazar, for the reason best known, PW-1, who has prepared the mahazar has denied in the cross examination that there is no correction in the weight. The reason for falsehood regarding the correction in the weight probably due to cover up the embellishment in the case of the prosecution. This said doubt gains further force, since PW-2, who accompanied with PW-1 during the raid and seizure not able to recollect, how the contraband was weighed. Considering these lacuna in the case of prosecution, this Court extends the benefit of the doubt to the appellant and reverse the finding of the Court below.



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13. Hence, **this Criminal Appeal is allowed.** The judgment of conviction and sentence passed by the learned Principal Special Judge, Special Court for NDPS Act, Chennai made in C.C.No.37 of 2005, dated 27.12.2011 is set aside. The Appellant is set at liberty forthwith. Bail bond executed, if any shall stand cancelled. Fine amount, if any paid by the appellant shall be refunded to him.

15.09.2022

Index:yes/no
speaking order/non speaking order
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To :

- 1.The Principal Special Judge of NDPS Act, Chennai.
- 2.The Inspector of Police, NIB, CID, Chennai.
- 3.The Public Prosecutor, High Court, Madras.

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DR.G.JAYACHANDRAN,J.

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Pre-delivery Judgment made in
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