

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.06.2022

CORAM:

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

Crl.A.No.430 of 2018

and

Crl.M.P.No.9932 of 2018

Devaraj

... Appellant/A2

Versus

State by the Inspector of Police,
T-9, Pattabiram Police Station,
Chennai.

(Crime No.160/2016)

... Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374(2) of Cr.P.C. praying to call for the entire records in connection with the C.C.No.59/2016 on the file of the learned Principal Special Court under NDPS Act, Chennai and set aside the judgment dated 04.06.2018.

For Appellant : Mr.D.Mario Johnson
(Counsel appointed through Legal Aid)

For Respondent : Mr.S.Udaya Kumar
Government Advocate (Crl. Side)

JUDGMENT

The appellant/Accused No.2 has filed this appeal seeking to set aside the judgment of conviction rendered by the learned Principal Special Judge, Special Court under N.D.P.S. Act, Chennai in C.C.No.59 of 2016 dated 04.06.2018.

2. This is the case under Narcotic Drugs and Psychotropic Substances (NDPS) Act, wherein the appellant(A2) along with one Suresh (A1) were charged for offence under Section 8(C) r/w 20 (b)(ii)(B) and Section 29 of the NDPS Act. The trial Court on appreciating the oral evidence of P.W.1 to P.W.5, 11 documents marked as Exs.P1 to P11 and three material objects marked as M.O.1 to M.O.3, held Accused No.1 not guilty and acquitted him, whereas, the appellant herein/Accused No.2 was found guilty for offence under Section 8(C) r/w 20(b)(ii)(B) and sentenced him to undergo 5 years Rigorous Imprisonment and to pay a fine of Rs.50,000/-, in default, to undergo 1 year Rigorous Imprisonment.

3. The case of the prosecution is that on 18.03.2016 at about 8.15 a.m., P.W.1/Sub Inspector of Police attached to Pattabiram Police Station received a secret information that one Deveraj/appellant herein is selling Ganja near Hindu College Bus Stand. On receiving the said information, he reduced it into writing and forwarded to his immediate superior, the Inspector of Police and thereafter along with his team consisting of Grade-I Police Constables, namely, Ponnurangam and Velmurugan went to the spot mentioned by the informant and mounted surveillance. At about 9.00 a.m., the informant identified the accused was carrying polythene bag in his hand. When the said person was interrogated, he gave contemporary response. He was confirmed as Devaraj S/o.Madhavan and after informing the option for him to exercise his right to be searched before the learned Judicial Magistrate or gazetted officer, he decline to exercise the option and the same was recorded and thereafter search was conducted. From his possession, 1.240 kgs. of Ganja kept in the polythene cover was recovered. Two samples, each containing 20 gms. was drawn from the lot and sealed separately. A mahazar was prepared on the spot. The said Devaraj/appellant herein was arrested, thereafter his statement was recorded and brought to the Police station at 12.00 p.m. The case was registered in Crime No.160/2016 and detailed report under Section 57 of NDPS Act was forwarded to the immediate superior, the Inspector of Police. The evidence of P.W.1 was corroborated by P.W.2-Velmurugan, Grade-I Constable, who accompanied P.W.1. The samples drawn was sent for chemical analysis. Mrs.Thilagavathy, Deputy Director, Forensic Science Lab was examined as P.W.3. She deposed that on analysing the sample, she found that it contains 'Cannabinoid' component of Ganja. P.W.5-Mukesh Rao, Inspector of Police, who received the detailed report under Section 57 of NDPS Act from P.W.1 and investigated the case, had deposed that he took up the investigation on registration of the complaint and prepared Form 95 in respect of the seized contraband. He arrested Suresh/A1 on 18.03.2016 at 2.00 p.m. near 400 feet road based on the confession statement of the appellant/A2. P.W.5 is the only prosecution witness cross examined by the accused. The trial Court while appreciating the evidence, had relied upon Section 57 of the NDPS Act, which says about the presumption of possession and held that the prosecution has proved the recovery of M.O.1 to M.O.3 from Accused No.1, the appellant herein. The accused has failed to discharge his burden cast upon him under Section 57 of the NDPS Act. The conscious possession of the Ganja has been proved by the prosecution and witnesses were not even subjected to cross examination, the case held to be proved beyond reasonable doubt. As far as the first accused is concerned, who was arrested on suspicion of conspiracy, was acquitted by the trial Court for want of evidence.

4. The learned counsel appearing for the appellant submitted

that the trial Court erred in ignoring the material contradiction found in the examination of P.W.1 and P.W.2 regarding the place of arrest and seizure. The reasoning to acquit the first accused is also applies to the present appellant/A2, whereas, the trial Court failed to apply a rule of parity. The contradiction in the weight of the sample proves tampering of sample, however, the Court below failed to appreciate the contradiction in the deposition of P.W.1, P.W.2 and P.W.3 in this regard. The delay in forwarding the contraband to the Court also not been taken note by the Court below.

5. The learned Government Advocate (Crl. Side) appearing for the respondent Police would submit that the recovery of M.O.1 to M.O.3 from the possession of the accused was spoken by P.W.1 and P.W.2. Their ocular evidence is supported by Exs.P2 and P3, which are the intimation about Section 50 of the Act and seizure mahazer, respectively. In, both the documents the appellant/A2 has affixed his signature. There is no contradiction or discrepancy regarding the place of seizure or drawing of samples. Therefore, he submitted that there is no material contradiction in the prosecution witnesses as contended by the learned counsel for the appellant.

6. Regarding the plea taken by the learned counsel for the appellant that the F.I.R. in this case was registered based on the information given by P.W.1 and he himself has proceeded to the spot and arrested the accused. There is no independent evidence to corroborate the arrest and seizure. Therefore, the same person registering F.I.R., arresting the accused person causes suspicion in the absence of independent evidence. For this plea, the learned Government Advocate relying upon the Full Bench judgment of the Hon'ble Supreme Court in the case of Mukesh Singh Vs. State (Narcotic Branch of Delhi) reported in (2020) 10 SCC 120, submitted that when there is no bias or prejudice to the accused person, the said investigation will not be vitiated even if the informant himself is the investigator. More so, in this case, the informant is not the investigator, he has handed over the investigation to P.W.5/Mukesh Rao, the Inspector of Police.

7. Heard the learned counsel appearing on either side and perused the materials available on record.

8. On cumulative assessment of the submissions made by the learned counsel on either side and on perusal of the evidence, this Court finds that the prosecution witnesses P.W.1 and P.W.2 had proved the recovery of 1.240 kgs. of Ganja from the possession of appellant herein. The samples drawn from the contraband sent to a Chemical Analyst and P.W.3/Thilagavathy had issued the analysis report marked as Ex.P8 indicating that the

sample contains 'Cannabinoid' component of Ganja. Regarding the delay in forwarding the seized material to the Court, this Court finds that Form 95/Ex.P10 has been prepared on 18.03.2016 and produced before the learned Judicial Magistrate, who has to made his endorsement and thereafter to be produced before the Special Court. Accordingly, it was produced before the Special Court on 30.03.2016 and A.No.15 of 2016 was assigned on that day by the Special Court. Therefore, this Court finds that there is no delay in forwarding the material to suspect tampering or manipulating. In the light of the above fact, this Court finds no error in the finding of the Court below convicting the appellant/accused No.2 for offence under Section 8(C) r/w 20(b) (ii) (B) of the NDPS Act.

9. Insofar as the sentence imposed, this Court is of the view that Five (5) years Rigorous Imprisonment and Rs.50,000/- fine, in default, one year Rigorous Imprisonment needs some consideration. In view of the fact that the contraband seized is only 1.240 kgs. little over and above the small quantity and the appellant even not able to pay the fine amount and he is in prison after conviction, this Court modifies the sentence as 4 years Rigorous Imprisonment and fine of Rs.25,000/-, in default, to undergo three months Rigorous Imprisonment.

10. In the result, the Criminal Appeal is partly allowed with the above modifications. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

rsi

To

1. The Principal Special Court under NDPS Act,
Chennai.
2. The Inspector of Police,
T-9, Pattabiram Police Station,
Chennai.
3. The Superintendent,
Central Prison-I, Puzhal,
Chennai.

4. The Public Prosecutor,
High Court, Madras.

COPY TO
The Section Officer,
Criminal Section,
High Court, Madras-104.

+1cc to Mr.D.Mario Johnson, Advocate, S.R.No.36994

Crl.A.No.430 of 2018
and
Crl.M.P.No.9932 of 2018

SJ(CO)
CT/11/07/2022