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Crl.A.No.362 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 25.01.2023

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.362 of 2020

Kumar

...Appellant

Vs.

State represented by
The Inspector of Police,
NIB CID, Salem.
(Crime No.148/2016)

...Respondent

The Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure seeking to set aside the judgment of conviction and sentence passed by the learned Special Judge for EC/NDPS Act Cases (FAC), III Additional District Judge, Salem, in C.C.No.19 of 2017 dated 31.01.2020.

For Appellant : Mr.K.Shivakumr
Legal Aid Counsel

For Respondent : Mr.S.Sugendran,
Additional Public Prosecutor



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JUDGMENT

The criminal appeal has been filed against the judgment of conviction and sentence passed by the learned Special Judge for EC/NDPS Act Cases (FAC), III Additional District Judge, Salem, in C.C.No.19 of 2017 dated 31.01.2020.

2 The respondent police registered a case in Cr.No.148 of 2016 against the appellant/accused for the offence punishable under Sections 8(c) r/w 20(b)(ii)(B) and 31 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter, referred to as the “NDPS ACT”). After completing investigation, the respondent police laid charge sheet before the learned Special Judge for EC / NDPS Act Cases, Salem, which was taken on file in C.C.No.19 of 2017. The learned Special Judge, after completing formalities, since found *prima facie* case against the appellant, framed charges for the offence under Sections 8(c) r/w 20(b)(ii)(B) of NDPS Act.



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3 Before the trial Court, in order to prove the case of the prosecution, as many as 6 witnesses were examined as P.W.1 to P.W.6, 11 documents were marked as Ex.P1 to Ex.P11, besides 3 material objects were exhibited as M.O.1 to M.O.3. After completing examination of prosecution witnesses, when incriminating circumstances culled out from the evidence of prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C, he denied the same as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was let in.

4 After completion of trial, hearing arguments advanced on either side and after perusal of the records, the trial Court found the appellant/accused guilty for the offence punishable under Sections 8(c) r/w 20(b)(ii)(B) of NDPS Act. Therefore, the learned trial Judge convicted and sentenced the appellant to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for a further period of two years.



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Aggrieved against the judgment of conviction and sentence, the appellant has preferred the present criminal appeal before this Court.

6 Case of the prosecution is that when Aranganayaki, Sub-Inspector of Police was on duty on 12.12.2016 at about 10.00 a.m. received information that a person aged about 34 years would come to Salem Railway Junction at about 11 to 12.00 noon with Ganja and if surveillance is mounted at the said place, the above said person would be identified and the contraband would be seized.

6.1 Based on the information and after obtaining permission from her immediate superior the Inspector, she proceeded to the place along with P.W.2, P.W.3 and P.W.5 and reached the place of occurrence at about 11.00 a.m. After reaching the place, P.W.1 and her team monitored the place and at about 11.30 a.m. the appellant/accused came, who was identified by the informer. Thereafter P.W.1 approached the accused and revealed the information received by P.W.1. Thereafter P.W.1 explained the



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appellant/accused about his right under Section 50 of NDPS Act, the right of the accused to be searched before the Magistrate or a Gazatted Officer, but, the appellant declined to exercise his rights and stated that the Officer present themselves can search him. Since public witnesses did not come forward to stand as witness, P.Ws.2 and 3 stood as witness. Thereafter P.W.1 received the bag from the accused and opened it, in which, he found Ganja, which is narcotic substance, weighing 1.300 Kgs. P.W.1 collected two pockets of Ganja weighing about 25.00 grams each for court sample and chemical analysis, affixing the NIB seal, which were marked as S1 and S2. Thereafter remaining contraband was tied in the same bag brought by the accused, which was marked as P1 and obtained signatures from the witnesses and the appellant/accused including on S1 and S2.

6.2 Thereafter, describing the above, P.W.1 prepared a detailed mahazar and recorded confession statement of the appellant/accused. P.W.1 handed over the detailed report under Section 57 of NDPS Act along with the seized contraband and the accused to P.W.6, the Inspector of Police. The recovered contraband was marked as M.O.s 1 to 3. P.W.6, after completing



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investigation and the formalities, laid charge sheet before the Special Court for EC/NDPS Act Cases, Salem.

7 The case was taken on file in C.C.No.19 of 2017 by the learned Special Judge for EC/NDPS Act Cases, Salem, which was ended in conviction and aggrieved over the conviction and sentence, the convict is before this Court with the present criminal appeal.

8 The learned counsel appearing for the appellant would submit that there are violations of mandatory provisions under Section 57 of NDPS Act. P.W.1 who is the author of the FIR has not reduced the information said to have received by him into writing and has not obtained necessary permission from the competent authority to proceed further. The learned counsel would further submit that there are contradictions between the evidence of the prosecution witnesses and the documents marked by the prosecution. The appellant was not properly informed about his right to be searched either before the Magistrate or Gazetted Officer and thereby the mandatory provision of Section 50 of NDPS Act was not complied with,



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which itself would vitiate to the case of the prosecution. There is no document to show that arrest of the accused was informed to their relative and thereby prosecution has failed to follow the guidelines of the Hon'ble Supreme Court.

8.1 P.W.1, the Seizure Officer, has failed to examine any independent witness to prove the recovery of the contraband. P.W.1 is not the competent officer to conduct search and seizure. P.W.6 has not followed the procedures contemplated under the NDPS Act. It is the duty of the prosecution to prove its case beyond all reasonable doubt and it cannot take advantage of the weakness of the defence. In this case, prosecution has not proved the search and seizure in the manner known to law and the prosecution witnesses were not subjected to cross examination by the defence. To support his contentions, the learned counsel has placed reliance on the decisions of this Court reported in *(1923) 44 MLJ 567* and the case in the *Criminal Appeal No.457 of 2012*.

8.2 The learned counsel further contended that the chemical analyst



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whose has given report Ex.P11, was not examined and Ex.P11 was simply marked through P.W.6 and thereby opportunity was not given to the defence to challenge the report of chemical analysis Ex.P11.

8.3 The Special Court has failed to consider all the above facts, which are fatal to the case of the prosecution and convicted the appellant erroneously only based on the evidence of the prosecution witnesses, which were not subjected for cross examination by the defence. Hence the judgment of conviction and sentence passed by the trial Court is liable to set aside and the appellant/accused is entitled for acquittal.

9 Mr.S.Sugendran, learned Additional Public Prosecutor would submit that none of the mandatory provisions contemplated under the NDPS Act had been violated by the prosecution. The Seizure Officer/P.W.1, soon after receiving the information, reduced the same into writing and obtained necessary permission from his immediate superior/P.W.6 and proceeded to the place of occurrence with team. They identified the accused and on enquiry, the appellant/accused informed that he was having about 1.3 Kgs of



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drugs in the bag carried by him and subsequently seizure was effected, which was witnessed by P.W.2 and 3 and prepared seizure Mahazar, which was marked as Ex.P3. Ex.P11 is the Chemical Analysis Report, which, proved the fact that the recovered contraband is cannabinoids, a substance of Ganja, covered under the NDPS Act.

9.1 Based upon the seizure and the statements, the appellant was arrested through Ex.P4 arrest memo and remand report and the same was duly informed to his relatives over telephone. Therefore, all the mandatory provisions of the NDPS Act have been scrupulously followed by the prosecution. Ex.P11, which is the chemical analysis report has also proved that the contraband recovered from the accused shown positive for cannabenoids, which is the substance of Ganja. Therefore, there are materials to prove that the appellant indulged in trafficking of cannabenoids. Further, despite sufficient time granted to the defence, the prosecution witnesses were not subjected to cross examination by the defence. Hence the trial Court has rightly appreciated the evidence of prosecution side witnesses and convicted the appellant, which does not warrants any interference of this



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Court.

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10 Heard the rival submissions made by the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the respondent and perused the materials on record.

11 This Court, being the appellate Court and the final Court of fact finding, has to necessarily re-appreciate the entire evidence and give its independent findings and accordingly this Court re-appreciated the entire evidence on record and gives its independent findings as follows.

12 In order to substantiate the charges, on the side of the prosecution, 6 witnesses were examined, 11 documents were marked and 3 material objects were exhibited. Out of six witnesses, P.W.1 is the Head of the team, the Sub Inspector of Police. P.W.1 has clearly deposed that she received the information on 12.12.2016 and after completing formalities, informed the same to his immediate superior P.W.6. After obtaining permission from P.W.6, P.W.1, proceeded to the place along with the team



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P.Ws.2, 3 and 5 and on identification of the appellant/accused by the informer, P.W.1 approached the accused and on enquiry, the accused admitted the possession of contraband and confession statement was also recorded. Even though confession statement recorded by the NCB Officer is not admissible in evidence, however, in this case, prosecution has proved its case with the other material evidence and the conviction against the appellant/accused is not solely based on the confession statement alone.

13 It is the contention of the learned counsel appearing for the appellants that prosecution had violated the mandatory provisions as contemplated under the NDPS Act and the appellant was not duly informed about his right to be searched either before the Magistrate or before the Gazetted Officer through search notice.

14 On a perusal of the records, it reveals that the appellant was duly informed about his right to be searched either before the Magistrate or before the Gazetted Officer, but, through Ex.P2 he told that it was not necessary to take him either before the Magistrate or before the Gazetted



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Officer and instead the Officer himself could make personal search. P.Ws.2, 3 and P.W.5 have clearly spoken about the compliance of the mandatory provisions under the NDPS Act. Further it is pertinent to note that the contraband was not recovered from the body of the appellant and it was recovered only from the bag, which was in possession of the appellant. Therefore there is no violations as contended by the learned counsel appearing for the appellant.

15 Regarding the contention of non examination of independent witnesses is concerned, from the materials available it is seen that P.W.1 asked the independent witnesses to stand as witness for search and since no one was willing to stand as witness for the seizure, P.Ws.2 and 3 were stood as witness for seizure and therefore non examination of independent witness was duly explained. From the evidence of P.Ws.1 to 5 and the documents marked by the prosecution, it is clear that prosecution has proved the compliance of all the mandatory provisions under the NDPS Act and guilt of the appellant.



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The other defence is that the prosecution witnesses were not subjected to cross examination and solely based on their evidence, the trial Court recorded conviction against the appellant. From the materials it could be seen that even after giving sufficient opportunity, the defence did not come forward to cross examine the prosecution witnesses stating that an unnumbered revision is pending before this Court and no order copy was produced. Further this Court by an order dated 11.07.2019 directed the trial Court to dispose of the case on a day to day basis and fixed time. At that time the appellant filed petition under Section 311 Cr.P.C. seeking to recall the prosecution witnesses and the trial Court allowed the same on condition to deposit a sum of Rs.6000/-, but the appellant did not comply with the order of the trial Court by depositing the said amount and avail the opportunity. Therefore, the contention of the learned counsel is not acceptable and the same is rejected. The decisions referred to by the learned counsel appearing for the appellant are not applicable to the present case on hand, since the facts and circumstances of this case are distinguished.



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17 Further the defence has not disputed the possession and recovery of the contraband. From the materials available, prosecution has proved possession and recovery of the contraband. Once prosecution proved the foundational fact that the contraband was recovered from the accused and he was in conscious possession and the defence also not disputed the same, it is for the accused to rebut the presumption in the manner known to law. It is true that prosecution has to prove its case beyond reasonable doubt and it should not take advantage of weakness of the defence, but in this case as already observed that even after giving sufficient opportunities, the defence did not make use of the same and did not cross examine the witnesses and challenge the evidence of the prosecution witnesses. Now the defence taken by the appellant is only technicalities, which should not be allowed into stand in the way of administration of justice. From the careful reading of entire materials, this Court finds no perversity in appreciation of evidence by the Court below.



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P.VELMURUGAN, J.,

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