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Crl.A.No.491 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.03.2023

CORAM:

THE HON'BLE Mr. JUSTICE P.VELMURUGAN

Crl.A.No.491 of 2020

Selvam@Kumar@Kattakumar

... Appellant

Vs.

State represented by
The Inspector of Police,
H3, Tondiarpet Police Station,
Chennai.

... Respondent

Prayer:Criminal Appeal filed under Section 374(2) Cr.P.C., to set aside the conviction and sentence passed by the Special Judge, I Additional Special Court for exclusive trial of Cases under NDPS Act, Chennai made in C.C.No.103 of 2018 by the judgment dated 03.11.2020.

For Appellant : Mr.Balaji Thirumoorthy
for Mr.K.Prithiviraj
and
Mr.P.G.Perumal Pandian
Legal Aid Counsel

For Respondent : Mr.S.Sugendran
Additional Public Prosecutor



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JUDGEMENT

WEB COPY This Criminal Appeal has been filed against the judgment dated 03.11.2020 passed in C.C.No.103 of 2018 on the file of the learned Special Judge, I Additional Special Court for exclusive trial of Cases under NDPS Act, Chennai.

2. The respondent police registered the case against the appellant/A1 and five others in Crime No.647/2018 for the offence under Section 8(c) read with 20(b)(ii)(C) of NDPS Act. . The respondent police after investigation, laid a charge sheet and filed a final report before the learned Principal Special Judge, Special Court constituted exclusively for the trial of cases under EC and NDPS Act, Chennai and the same was taken on file in C.C.No.103 of 2018 and made over to the learned Special Judge, I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai. The learned I Additional Special Judge after completing the formalities, framed the charge as against the appellant/A1 and other accused for the offence under Section 8(c) read with 20(b)(ii)(B) of NDPS Act.



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3. During trial, before the trial court, in order to prove the case of the prosecution, on the side of the prosecution, as many as eight witnesses were examined as P.Ws.1 to 8 and twenty five documents were marked as Exs.P1 to P25. Besides four material objects were exhibited as M.O.1 to M.O.4.

4. After completing the examination of prosecution witnesses, incriminating circumstances were culled out from the evidence of prosecution witnesses, put before the accused, by questioning under Section 313 Cr.P.C., and the same was denied by the accused as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was produced.

5. On conclusion of trial and after hearing the arguments advanced on either side and also considering the materials, the trial court found that the prosecution has failed to prove the charge against A2 to A6 and acquitted them from the charge levelled against them. However, the trial court found the appellant/A1 guilty for the offence under Section 8(c) read with 20(b)(ii)(B) of NDPS Act and sentenced him to undergo rigorous imprisonment for a period of



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two years and to pay fine of Rs.20,000/- and in default to undergo further period of three months rigorous imprisonment. Challenging the said judgment of conviction and sentence, the first accused has filed the present Criminal Appeal. Though the trial court awarded sentence of two years rigorous imprisonment and imposed fine of Rs.2,000/-, the prosecution has not filed any appeal. This Court is the appellate court cannot go beyond the scope of appeal, however has to independently appreciate the evidence and testify as to the conviction and sentence passed by the trial court is in order or perverse.

6. Case of the prosecution is that on 06.07.2018 at 14.15 hours, on secret information received by the respondent police over phone that six persons namely Selvam@Kumar@Kattakumar, Mohammed Yervadi Ibrahim, Nazar, Hajira, Arumugam, Ayyappan were selling "Ganja" at Kailasa Mudali street near Corporation School Bus Stop. P.W.1-who is the Sub Inspector of Police made entry in the diary and also after obtaining permission from the Superior Officer, proceeded to the place of occurrence with his team and identified the accused based on the information given by the informant. On enquiry, they revealed their name and identified them. P.W.1 informed the information



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received by him and their rights under Section 50 of the NDPS Act to the said persons under Exs.P2 to P7 Search Notices. On search, P.W.1 recovered white colour gunny bag from the appellant/A1 and the same contained "Ganja" weighing 14.850 Kg and also cash of Rs.9,200/- cash and 6 cell phone from the accused A2. After completing the proceedings and also taken the samples, the respondent police registered the case. On conclusion of investigation, they laid the charge sheet.

7. Despite several opportunities, when the matter was taken up for hearing, none appeared on behalf of the appellant. Hence, vakalat of the counsel for the appellant on record was cancelled and this Court directed the Registry to appoint a legal aid counsel for arguing the appeal and directed to list the matter for arguments on 03.03.2023. Today, when the matter is taken up for hearing, learned counsel for the appellant made a request to argue the matter. This Court has also given opportunity to the learned counsel for the appellant on record to argue the matter.



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8. The learned counsel for the appellant would submit that the appellant/A1 was not informed about the right to be searched either before the Gazette Officer or Magistrate and hence mandatory provision of Section 50 of NDPS Act was not complied with. The accused was not searched either before the Magistrate or Gazette Officer and recovery was not made before any independent witnesses. Learned counsel for the appellant would submit that though the scene of crime is mentioned as a public place, no independent witnesses were procured by the prosecution. Seizure was effected only after arrest of the accused and the same is not valid under the said Act. Though case is registered for the offence under Section 8(c) read with 20(b)(ii)(C) of NDPS Act, where as only 14 Kg of "Ganja" was recovered which is intermediate quantity. Further, P.W.4 has not supported the case of the prosecution. In this case, the trial court wrongly invoked the provisions of Sections 35 and 54 of the said Act for reversal burden. There are material contradictions between the evidence of prosecution witnesses. One of the witnesses has stated that 250g of "Ganja" was recovered for sample and another witness has stated that 100g of kanja was recovered for sample. The person who took the "Ganja" from the court and handed over to Forensic Lab for chemical analysis was not examined



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as witness, which is fatal to the case of the prosecution. Non compliance of mandatory provisions like Sections 42 and 50 of the NDPS act is fatal to the case of the prosecution. The trial court rightly acquitted all other accused and from the very same materials, the trial court wrongly convicted the appellant/A1 alone and no reason has been assigned to convict the appellant/A1. The trial court though admitted that the possession of "Ganja" is not in commercial quantity, however erroneously convicted the appellant/A1 and awarded punishment, which is against the provisions of law. Total weight of contraband recovered from A1 itself in dispute. One of the witnesses has stated that 16.850Kg of "Ganja" was recovered, whereas, the other witness has stated that 14.850 Kg of "Ganja" was recovered. There are material contradictions between the evidence of the prosecution witnesses. The trial court failed to appreciate the evidence and not extended the benefit of doubt in favour of this appellant/A1 and also failed to acquit the appellant/A1 like other accused and erroneously convicted the appellant/A1 alone, which warrants interference of this Court.



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9. Learned Additional Public Prosecutor appearing for the respondent

submitted that there is no violation of mandatory provisions of the NDPS Act.

The presumption under Sections 35 and 54 are attracted in this case and the accused failed to rebut the presumption. In this case, on receiving the secret information, P.W.1-who is the Sub Inspector of Police made entry in the diary and also after obtaining permission from the Superior officer, proceeded to the place of occurrence with his team and identified the accused. When P.W.1 searched the sack bag carried by A1 and the same contained "Ganja" weighing 14.850 Kg and A2 has 6 cellphone and Rs.9,200/- cash. P.W.1 conducted bodily search of A1 and A6 and prepared Ex.P9 to Ex.P13-Inspection Memo and they recovered the contraband from the accused. Since the contraband was in possession of A1, the trial court convicted A1 alone and extended the benefit of doubt in favour of all other accused. Further minor contradictions as stated by the learned counsel for the appellant/A1, will not go to root of the case of the prosecution. The trial Court rightly appreciated the evidence of prosecution side witnesses and convicted the appellant/A1, which does not warrant interference of this Court. There is no merit in the appeal and the same is liable to be dismissed.



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10. According to prosecution, while P.W.1, who was the Sub-Inspector of Police in H-3, Tondiarpet Police Station, Chennai, was on duty, he had received a secret information on 06.07.2008 at about 14.15 hours regarding the illicit sale of Narcotic Drug "Ganja". Immediately, P.W.1 submitted the said information to the Inspector of Police and after obtaining his permission, he proceeded to the place of occurrence with his team and intercepted six persons based on the identification given by the informant. The accused persons were informed about their right to be searched either before the Judicial Magistrate or before the Gazetted Officer and enlightened about Section 50 (4) of the NDPS Act, through Exs.P2 to P7 Search Notices, wherein the accused signed and they have declined to accept the offer and stated that the Officer himself can make search. When P.W.1 searched the white colour gunny bag carried by A1 and the same contained "Ganja" weighing 14.850 Kgs and A2 had six cell-phones and Rs.9,200/- cash. The respondent/Police registered a case in Crime.No. 647 of 2018 against all the accused under Sections 8 (c) r/w 20 (b) (ii) (C) of the NDPS Act, 1985.



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11. Though the learned counsel for the appellant/A1 vehemently contended that only after the arrest of the accused, seizure was effected and on identification of the accused by the informant, when the respondent/Police enquired the appellant/A1, he handed over the contraband to the respondent/Police and subsequently they recovered the same and prepared the mahazar. On receipt of report submitted by P.W.1, P.W.8-Inspector of Police registered F.I.R and all the accused persons were remanded to custody. Possession of any Narcotic Drug or Psychotropic Substances except for medical or scientific purpose without valid licence or permission, is an offence under Section 8(c) of the NDPS Act. In this case, contraband was recovered from A1/ the appellant herein and the same was sent for chemical analysis to Forensic Laboratory. The Laboratory report reveals that the recovered contraband is "Ganja". In this case, the appellant/A1 has not denied the possession of "Ganja" and recovery of the same by the respondent/Police. The main defence taken by the appellant/A1 is violation of certain mandatory provisions contemplated under the NDPS Act. Though the learned counsel for the appellant cited certain decisions before the trial court and the same decisions were reiterated before this Court also, those decisions are not applicable to the



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present case on hand. Facts and circumstances of those cases are entirely different from the present case on hand. The trial court also distinguished those decisions and found that the recovery was made from the appellant/A1 and not from the residential place and it was recovered from the white gunny bag carried by the appellant/A1. Once possession and recovery were proved by the prosecution, certainly Sections 35 and 54 of the NDPS Act would attract. Once the prosecution proved the foundational fact of the possession of contraband from the appellant/A1 and recovery of the same, then it is for the accused has to rebut the presumption. In this case, from the evidence of P.W.1, it is proved that A1 was in possession of contraband and also the recovery of the same from him.

12. In this case, search was made on the body of the accused, but no recovery was effected on the body of the accused. The contraband was recovered only from the white gunny bag, which is carried by the appellant/A1. Therefore, Section 50 of the NDPS Act would not attract. Further, the contraband was seized from the accused in a public place and neither in the residence nor in the office of the accused. Therefore Section 42 of the NDPS



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Act would not attract. Hence, the learned counsel for the appellant prayed to allow the appeal and acquit the accused.

13. Considering the serious nature of the offence that the appellant/A1 is in possession of the contraband without any valid licence or permission and the possession of contraband is below commercial quantity and above minimum quantity and considering the fact the appellant/A1 is a habitual offender, the trial court convicted the appellant/A1 alone. Since no recovery was effected from all the other accused and the same has also been proved from the evidence of prosecution witnesses, the trial court acquitted all the other accused. The appellant/A1 has not denied the recovery of contraband. Once possession and recovery of contraband are proved, the prosecution has proved the foundational fact. It is for the accused to reverse the burden. The appellant/A1 admitted the possession and recovery of contraband and he has also not proved that he was not in conscious possession of the same or he possessed the same for some other medical or scientific purpose. On a perusal of the records, it reveals that all the discrepancies, which have been pointed out by the learned counsel for the appellant/A1 are only minor contradictions and the same will not vitiate the



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entire case of the prosecution and also will not go to the root of the case.

Though the learned counsel for the appellant/A1 vehemently contended that P.W.4 has not supported the case of the prosecution and the person who brought the sample to the Laboratory was not cited as a witness, the same may not be the sole ground to acquit the appellant/A1. If the evidence of the witnesses inspire confidence of the Court, the Court can safely convict the appellant/A1. In this case, evidence of P.W.1 is very clear and the trial court was also satisfied with the evidence of P.W.1.

14. From the documentary evidence and the judgment of conviction made by the Court below, this Court, as a first Appellate Court, after re-appreciating the entire materials, finds the accused guilty of the offence under Section 8 (c) r/w 20 (b) (ii) (B) of NDPS Act.

15. Under the facts and circumstances of the case, this Court as the appellate Court is a final Court of fact finding, while re-appreciating the evidence, this Court does not find any perversity in appreciation of evidence by the Court below.



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16. In the result, the Criminal Appeal stands dismissed and the judgment of conviction and sentence dated 03.11.2020 passed in C.C.No.103 of 2018 on the file of the learned Special Judge, I Additional Special Court for exclusive trial of Cases under NDPS Act, Chennai as against the appellant/A1 is hereby confirmed. Since the appellant is on bail, the trial Court is directed to take steps to secure A1 to undergo the remaining period of sentence, if any. The period of sentence already undergone by the accused shall stand set off under Section 428 Cr.P.C.,

03.03.2023

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Index: Yes/No

Speaking Order: Yes/No

Neutral Citation: Yes/No



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To

1. The Special Judge,
I Additional Special Court for exclusive trial of Cases under NDPS Act,
Chennai.
2. The Inspector of Police,
H3, Tondiarpet Police Station,
Chennai.
3. The Public Prosecutor,
High Court, Madras.



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P.VELMURUGAN, J.

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