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Crl.A.No.863 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.07.2023

DELIVERED ON : 02.08.2023

CORAM :

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

Crl.A.No.863 of 2022 &
Crl.M.P.No.12202 of 2022

1.Ayoouluwa David Adebakin
2.Olugu Olisaemekka Emmanuel ... Appellants
Vs.

State Rep. by
The Inspector of Police,
NIB-CID,
Kancheepuram.
(Crime No.47 of 2019) ... Respondent

PRAYER: Criminal Appeal filed under Section 374 (2) Cr.P.C. r/w.36-B of NDPS Act, 1985 to set aside the conviction of the appellants in C.C.No.16 of 2020 dated 29.06.2022 by the learned Special Judge, Special Court for Exclusive Trial of Cases under NDPS Act, Chennai by allowing this appeal.

For Appellants : Mr.M.S.Charles
For Respondent : Mr.R.Vinothraja, GA (Crl.Side)



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J U D G M E N T

This appeal is against the judgment dated 29.06.2022 in C.C.No.16/2020 (Crime No.47/2019) on the file of NIB-CID, Kancheepuram. This judgment was delivered by Principal Special Court under EC & NDPS Act, Chennai in and by which the accused were convicted and sentenced as detailed hereunder :

<i>Conviction</i>	<i>Sentence</i>
U/s.8(c) r/w. 20(b)(ii)(B) of NDPS Act	Rigorous Imprisonment for 7 years each and to pay a fine of Rs.50,000/- each, in default, to undergo simple imprisonment for 6 months each.
U/s.29(1) of NDPS Act	Rigorous Imprisonment for 7 years each and to pay a fine of Rs.50,000/- each, in default, to undergo simple imprisonment for 6 months each.

The aforesaid sentences were ordered to run concurrently.

2. Prosecution case in brief :

- On 19.11.2019 at about 06.00 a.m. S.Prabakar, Inspector of Police (PW-5) attached to NIB-CID, Kancheepuram received a tip off regarding possession of ganja by the appellants near coffee day shop



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at Urappakkam, Kancheepuram.

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- ii. It was intimated by PW-5 to the Deputy Superintendent of Police by way of a note (Ex.P12) and took his permission to proceed to the spot along with his team consisting of M.Selvam (Sub Inspector of Police) (PW-1) and Linganathan (Head Constable of Police) (PW-2) with the required NDPS kits.
- iii. They reached the place at 8 a.m. along with the informer who identified the two suspects. They apprehended them and the Inspector of Police (P.W.5) explained to them in english as to their right to be searched before the Magistrate or a gazetted officer to which they agreed to be searched by the police team. Subsequently A1 was searched and his black shouler bag contained Khaki
- iv. At about 08.00 am the suspects were identified by the informer and then intercepted by the police team.
- v. Both of them who were in possession of ganja were Nigerians with the names Ayoouluwa David Adebakin (A-1) and Olugu Olisaemeka Emmanuel (A-2).
- vi. They were told about their rights under Section 50 of NDPS Act to be



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checked and searched in the presence of a Judicial Magistrate or any gazetted officer. Since they were ready to be searched by the police team, notices (Ex.P1 & Ex.P2) were served to both of them and found a shoulder bag from A-1 containing 4 kgs of ganja out of which two samples of 50 gms each were drawn from the seized ganja and marked as S1 & S2 and affixed seals NIB KPM on them.

vii. Remaining 3.9 kgs ganja also was packed on P-1. Signatures of the Investigating Officer (PW-5), A-1 and other policemen as witnesses were obtained on all the three packets.

viii. A mahazar (Ex.P3) also was prepared and signed by witnesses. Similarly, the A-2 also was in possession of 3 kgs of ganja in his shoulder bag out of which two samples of 50 gms each S3 & S4 were made and packed.

ix. The remaining 2.900 kgs also was packed as P-2 and all the three packets were sealed by affixing the seal of NIB KPM and signatures were obtained from PW-5, A-2 and the police witnesses.

x. A mahazar also was prepared (Ex.P-4) and signatures obtained from all.



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xi. Subsequently, both A-1 & A-2 were arrested and arrest intimation memo Ex.P5 & Ex.P6 were recorded under Section 52(1) of NDPS Act. Inspection memo (Ex.P9 & Ex.P10) were prepared by the Investigating Officer (PW-5) stating that no fresh injuries and old injuries were on their bodies and also confession statements Ex.P7 & Ex.P8 were also recorded by the police.

xii. All of these were witnessed by the police witnesses present there viz., M.Selvam (PW-1) and Linganathan (PW-2). Independent witnesses one Ravi and another Mani refused to be witnesses in the beginning itself.

xiii. An FIR was registered (Ex.P13) in Crime No.47/2019 at 02.00 pm in the police station against the two accused under Section 8(c), 20(b)(ii)(B) and 29(1) of NDPS Act.

xiv. A special report was submitted (Ex.P12) to the Deputy Superintendent of Police, NIB CID under Section 57 of NDPS Act and after recording the statements of the witnesses, the accused were produced before the Judicial Magistrate-II, Chengalpet for judicial custody.



xv.The seized properties were deposited under Form No.95 (Ex.P15).

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The samples were sent through the Court for forensic chemical analysis.

xvi.The forensic report was received through PW-2 and the same was marked as Ex.P11. PW-5 after recording the statement of Visalakshi the Deputy Director of Forensic Science Department, submitted the final report before the trial court.

3.The trial in the Court :

- i. There were five witnesses PW-1 to PW-5 and 15 exhibits (Ex.P1 to Ex.P5) on the side of the prosecution MO1 to MO6 were also marked by the prosecution.
- ii. Selvam (PW-1), the Special Sub Inspector of Police NIB-CID Kancheepuram deposed that the Investigating Officer (PW-5) had come down to the station and asked him as well as Thiru.P.Linganathan (PW-2) Head Constable of Police on 19.11.2019 at around 06.00 a.m. to accompany him with their required accessories and documents to Ottery, Kancheepuram District. They



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reached the place at 08.00 am along with the informer who identified the two suspects. They apprehended them and the Inspector of Police (PW-5) explained to them in English as to their right to be searched before a Magistrate or a gazetted officer to which they agreed to be searched by the police team. Subsequently, A1 was searched and his black shoulder bag contained khaki colour tape, white cover containing ganja leaves and seeds. It weighed about 4 kgs and was seized immediately.

- iii. Two samples of 50 gms each were drained from the seized contraband and were put in a silver colour cover and marked as S1 and S2. The remaining 3.9 kgs of Ganja was put back in the same white cover with khaki tape and marked as P1. All the three packets were signed by A-1, PW-5, PW-1 & PW-2.
- iv. Similarly, A-2 was found in possession of 3 kilograms of Ganja leaves and seeds in his shoulder bag which was also recovered and two samples of 50 gms each were drawn and put in khaki cover marking it as S3 and S4 and the remaining 2.9 kgs of Ganja was put back in the white cover covered with khaki coloured tape and marked as P2. All



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the three covers were sealed and signed by PW-1, PW-2, PW-5 and A-2.

- v. Both the accused along with the seized contraband were taken to the police station and FIR (Ex.P14) in Crime No.47/2019) was registered, confession statements were also obtained from both the accused in which he / PW-1 signed as a witness along with PW-2. PW-2 and the Investigating Officer (PW-5) corroborated the versions of PW-1.
- vi. Tmt.Visalakshi (PW-3) Deputy Director, Forensic Science Department, Mylapore, Chennai in her deposition stated that she had received the four samples sent to her from Special Court under EC & NDPS Act on 10.12.2019 and that she had submitted the report (Ex.P11) dated 18.12.2019 signed along with her Assistant Director and the remaining samples weighing 33.7 gms and 38.6 gms were returned back in sealed covers bearing the seal of the forensic department dated 08.01.2020.
- vii. Thiru.Rajarajan (PW-4), the then Head Constable of Police recorded 161(3) Cr.P.C. of statement of all the witnesses as dictated to him by the Inspector of Police (Investigating Officer).



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viii. The accused were questioned with regard to the incriminating circumstances appearing in evidence against them and they were questioned under Section 313 Cr.P.C. for which they denied of having committed any offence. A-2 examined himself and one another witness and marked Ex.D1 to Ex.D3.

ix. Thiru. V.P.Raghu (DW-1), Senior Assistant Editor of DT Next Newspaper had deposed that he was the author of the news item which appeared in DT Next Newspaper dated 21.11.2019 along with photographs. The news item was titled 'Nigerian Students Selling Ganja' and reported about the accused's house searched on 18.11.2019 and about the recovery of Ganja from their house.

x. A-2 (DW2) in his statement had stated that he was arrested on 18.11.2019 at about 07.00 p.m. in the evening and that he realized the date in the charge sheet was wrong only after he was let out on bail.

xi. The trial Court opined that the onus of proving their innocence fell on the accused who could not substantiate their contention that they were not involved in the crime. Therefore, they were found guilty for the



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offence punishable under Section 8(c) r/w.20(b)(ii)(B) and 29(1) of NDPS Act and sentenced them as stated in paragraph No.1.

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4.The present appeal :

4.1. The present appeal is against this conviction and punishment.

4.2. Heard Mr.M.S.Charles, learned counsel for the appellants and Mr.R.Vinothraja, learned Government Advocate (Crl.Side) for the respondent.

4.3. The learned counsel for the appellants would contend that the mandatory provisions of Section 42 & 50 of NDPS Act are not complied with making the prosecution vitiated. According to him, the alleged 'seized contraband' was even as per the prosecution kept in custody by the police without any record for a month or so by the NIB-CID Kancheepuram before they were sent to the forensic lab. The Form 95, it is alleged, did not have the signature of the judicial officer thereby making it murkier. He further contended that the likelihood of tampering the seized contraband was there in the instant case. He also added that the mandatory provisions of Section 55 and 52A of NDPS Act were also not followed. This is particularly



insisted because when the NDPS Act itself is very stringent, the procedure followed by the prosecution ought to have been fool proof to establish the guilt of the accused. He had also argued that both the accused were bonafide students belonging to Nigeria and this aspect was not considered by the trial Court. The learned counsel for the appellants also relied on the following decisions :

- 1) ***Simarnjit Singh Vs State of Punjab*** in ***Crl.Appeal No.1443 of 2023*** arising out of SLP (Crl) 1958 of 2023 in the Supreme Court of India.
- 2) ***State of Rajasthan Vs Tara Singh*** reported in ***(2011) 11 SCC 559*** and contended that prosecution had failed to account for custody of the contraband seized from the accused prior to its delivery to laboratory as envisaged in Section 55 of NDPS Act.

He also relied on the judgment in ***Danraj vs State Rep. by the Inspector of Police, K6, T.P.Chatram Police Station, Chennai*** in Crl.A.No.819/2012 order dated 13.03.2019 of this Court which had spelt out elaborate guidelines to be followed scrupulously by the prosecution officials in order to strengthen the prosecution mechanism under NDPS Act. According to



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him, this case is a fit one for acquittal.

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4.4. Per contra, learned Government Advocate (Crl.Side) argued that it was an 'open and shut' case. He contended that the seizure was based on a tip off from a reliable source and that it was duly informed to the Deputy Superintendent of Police of NIB-CID Unit of Kancheepuram and the team of sleuth went to the place, waited for the accused, explained to them their 'right' to be searched in the presence of the Judicial Magistrate or any gazetted officer, went ahead with the search on their 'no objection', seized the ganja in their shoulder bag, drew samples, took the signatures of the accused and the police witnesses, took them to custody and to the police station, registered the FIR, informed the superior police officer and also remanded them to judicial custody along with the deposit of the seized contraband in court. His further contention is that the defence has been harping on minute 'technical' points instead of trying to disprove the case. In fact their defence witness as well as the defence exhibits regarding the news item in a local newspaper only helped in confirming the offence. The newspaper report on 21.11.2019 was about the seizure of the contraband in the residence of the



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two accused. Merely based on this newspaper report, it cannot be held that the contraband was seized in the house of the accused and they were arrested only on 18.11.2019. Moreover, according to the learned Additional Public Prosecutor, the possession of ganja with the accused is a matter of undisputed fact. He argued that the punishment awarded by the trial court was correct and needs no intervention of this Court.

5. Before concluding the appeal we need to go into the relevant provisions of the NDPS Act to enable a better understanding of the facts of the present case vis a vis the legal status. The investigation in NDPS Act, 1985 usually pertains to receiving secret information, getting ready a search team, taking the higher authorities permission, gathering public witnesses, apprehending the accused and conducting a search procedure of him and his vehicle or bag. Now regarding the search process, Section 50 of NDPS Act, sets out, certain conditions which are to be complied with.



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6. In fact, Section 50 of the Act provides a reasonable safeguard to the accused before the search of his person is made, in order to avoid any kind of criticism of arbitrary and high handed action against the authorised officers. Section 50 of the Act provides that the officer apprehending the accused must inform him of his right to be searched in the presence of a gazetted officer of any department as mentioned under Section 42 or before the nearest Magistrate. The most essential part under this Section is that the accused should be informed that he was a 'right' and not just an option to be searched in their presence. The Apex Court in its landmark judgment in ***State of Punjab Vs. Baldev Singh (1999)*** reported in ***(1999) 6 SCC 172*** ruled that "the failure to so inform the suspect of his right, would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50."

6.1. Section 42 of the Act has two parts. While part 1 of the Section 42 authorises the empowered officer to reach the premises, seize the drugs, detain any person, or arrest the persons who has committed the offence without warrant, Part 2 deals with the empowered officer taking down in



writing under sub-section (1) or recording grounds for his belief under the proviso thereto, and shall within 72 hours send a copy thereof to his immediate official superior.

6.2. Section 43 of the Act empower the authorised officers to detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if he or she is found in possession of any narcotic drug, arrest him or any other person in his company.

6.3. Section 52A of the Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by arrest order facilitating his approval either certifying the inventory or for a photograph taken apart from the list of samples drawn and lastly Section 55 of the Act makes it mandatory for the police to take charge of the contraband and keep in safe custody, pending the orders of the Magistrate, in order to rule out any possibility of tampering with the contraband.



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7. In the instant case, the right of the suspect at the time of search was duly informed and recorded. There is no dispute on that aspect. The suspects knew about their right and did not desire to avail that right. Secondly, they were found to be in possession of the narcotic substance 'Ganja' in intermediate quantities of 4 Kgs (A-1) and 3 Kgs (A-2). They were immediately taken to custody. Initially, the secret information was put down in writing by the Investigating Officer (PW-5) and oral permission obtained from his superior officer, the Deputy Superintendent of Police, NIB-CID Kancheepuram. On finding 'Ganja' in their possession the Investigating Officer arrested both the suspects and took them to the police station along with the seized contraband and completed the formality of registering FIR and remanding them to judicial custody. Form 95 was sent along with the material objects (Contraband) seized to the Court. The Judicial Magistrate who remanded the accused directed the police officer to produce the seized articles before the Special Court under EC & NDPS Act. The seized contraband was sent for Forensic Sciences Department on 10.12.2019.



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8. The main contention of Mr.M.S.Charles, learned counsel for the accused is that there is no clarity as to why the contraband which was seized on 19.11.2019 was kept in the police custody and sent to the NDPS Court only on 10.12.2019 from where the samples were forwarded to the Forensic Sciences Department for chemical analysis. According to the learned counsel though there is no bar on the police officials to store the contraband in safe custody till it is sent to forensic lab through Court, there is no clear evidence on the side of the prosecution to substantiate that they have evidence of storing it in the safe custody. But at the same, PW-5 the Investigating Officer during his cross examination has deposed that he had kept the contraband from 19.11.2019 to 19.11.2019 i.e. just one day which is perplexing. This Court in order to cross check the status summoned for Receive Register (Register No.55) from Special Court, NDPS Act. This was also important because Form 95 had an endorsement 'produce before the Court concerned during working hours' written by the judge with the date as 19.11.2019. This shows that on the date of the remand of the accused the contraband was produced before the Court. It also shows that there was no malafide intention on the part of the prosecution to either conceal or hide



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any facts. It is true that as per the records shown to this Court as well as the deposition of PW-3 the letter from the NDPS Court along with the samples were sent to the forensic lab only on 10.12.2019. Surprisingly, only the requisition letter of the Investigating Office and the letter dated 10.12.2019 sent by the judge of the NDPS Court finds a place in Register No.55. There is no clear entry regarding the receipt of Form 95 along with seized contraband on 10.12.2019. Merely because the samples taken out from the contraband were sent to Forensic Department on 10.12.2019 it cannot be concluded that the police had kept the contraband in their custody and did not adduce any evidence like Safe Custody Register to show that the property was safely kept. Mr.R.Vinothraja, learned Government Advocate (CrI.Side) also pointed out that the system of maintaining of Mulkana Register (Safe Custody Register) by the police was not in practice in the State of Tamilnadu and that it is now in nascent stage. It appears that the concerned staff of NDPS Court did not get the initials of the judge and orders with regard to the receipt of Form 95 and the disposal of the property on the date when it was received. It is dangerous to rely upon the seal of the Court on Form 95 in the absence of the initials with date of the presiding



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officer.

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9. The Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 is a crucial legislation in India aimed at controlling and regulating the production, manufacture, transportation and consumption of Narcotic Drugs and Psychotropic Substances. The investigation procedure under this Act is unique and different from other criminal laws. From the date of inception till now the Act has been frequently rinsed and amended to close certain gaps and flaws. But basically the important aspect to be considered is the mind boggling question of trade in these illegal products. The irreversible damage these drugs inflict upon the society has to be kept in mind and it is essential to equip the enforcement agency adequately with the knowledge and procedures so the culprits do not escape the clutches of law easily.

10. This appeal does not have any merit. The appellants are students of a renowned university. When students abroad earn for their sustenance by doing part time jobs, these appellants have resorted to drug trafficking for 'quick' money. This is deplorable.



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- i. the Criminal Appeal is dismissed. No costs. Consequently, connected Criminal Miscellaneous Petition is closed.
- ii. The judgment in C.C.No.16 of 2020 dated 29.06.2022 passed by the learned Special Judge, Special Court for Exclusive Trial of Cases under NDPS Act, Chennai, is confirmed.

02.08.2023

mtl/bga

Index : yes/no

Speaking /Non speaking Order

To

- 1.State Rep. by the Inspector of Police, NIB-CID, Kancheepuram.
- 2.The Special Court for Exclusive Trial of Cases under NDPS Act, Chennai
- 3.The Section Officer, Criminal Section, High Court, Madras.

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R.HEMALATHA, J.

mtl/bga

Pre-Delivery Judgment in
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