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Crl.A(MD)No.304 of 2016



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date : 27.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

Crl.A.(MD)No.304 of 2016

1.Maharajan

2.K.Eswaran

... Appellants/A1 and A2

vs.

State Rep. by
The Inspector of Police,
Cumbum North Police Station,
Theni District.
Crime No.48 of 2014

... Respondent/Complainant

PRAYER : This Criminal Appeal has been filed under Section 374 Cr.P.C., to call for the records in C.C.No.63 of 2014 dated 05.08.2016 on the file of the learned II Additional Special Sessions Judge (NDPS Act Cases) Madurai and set aside the same.

For Appellants : Mr.M.Jegadeesh Pandian
For Respondent : Mr.T.Senthilkumar
Additional Public Prosecutor

JUDGMENT

This Criminal Appeal is filed against the order passed in C.C.No. 63 of 2014 on the file of the learned II Additional Special Sessions Judge (NDPS Act Cases) Madurai, dated 05.08.2016.



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2.The case of the prosecution is that on receipt of secret information on 12.02.2014 at about 11.00 a.m., the Sub-Inspector of Police obtained permission from the Station House Officer and went to the place of occurrence along with the informant and team. When they were on surveillance at about 12.00 noon, the first appellant/A1 was carrying white colour gunny bag along with the second appellant. After identification by the informant and by following the procedures laid down under Section 50 of NDPS Act, they made search on the first appellant/A1 and on his consent, he handed over the white colour gunny bag to the respondent. On verification, they found 5 kgs of Ganja from the first appellant/A1. After taking samples, the appellants were brought to the police station and registered the First Information Report in Crime No.48 of 2014 against them for the offence punishable under Sections 8(c) r/w 20(b)(ii)(B) of NDPS Act. Thereafter, they were produced before the Court along with the contraband and they were remanded to judicial custody. After completion of investigation, the respondent police filed a final report and the same has been taken cognizance in C.C.No.63 of 2014, on the file of the learned II Additional Special Sessions Judge (NDPS Act Cases), Madurai.



3. On the side of the prosecution, they had examined P.W.1 to P.W.4 and exhibited 11 documents as Ex.P.1 to Ex.P.10 and marked 2 material objects as M.O.1 and M.O.2. On the side of the appellants, no one was examined and no documents were exhibited.

4. On perusal of the oral and documentary evidence, the trial Court found that the appellants guilty for the offence under Sections 8(c) r/w 20(b)(ii)(B) of NDPS Act and sentenced them to undergo 7 years Rigorous Imprisonment and to pay a fine of Rs.25,000/- each, in default to undergo one year Simple Imprisonment. Aggrieved by the same, the present appeal has been filed.

5. The learned counsel for the appellants would submit that the respondent has failed to follow the procedures as contemplated under Section 42 of the NDPS Act. Even according to the prosecution, both the appellants were served with search memo and not obtained separate consent search letter. Therefore, it is clear one of the procedures let out under Section 42 of the NDPS Act. Further, the respondent has also failed to follow the procedures let out under Section 50 of the NDPS Act. The search memo and also the consent letter were typed by the respondent and obtained signature from both the appellants. Therefore, a



false case has been foisted against the appellants. There were contradictions between the evidence of P.W.3 and P.W.4. There was no corroboration between their evidence in respect of arrest of the police. Therefore, the prosecution has failed to prove the case beyond any doubt. In support of his contention, he relied upon the Judgment of this Court in the case of ***Babu and Another vs. State Rep. by the Inspector of Police, N.I.B CID, Theni*** reported in ***(2022) 1 MLJ (Crl) 467***, wherein, this Court has held that the joint consent letter from both the accused is nothing but violative of the mandatory requirements under Section 50(1) of NDPS Act. Therefore, though in the alleged occurrence, the contraband has been recovered from the gunny bag, which is possessed by the appellants/accused, the averments found in the consent letter needed some fact that during the time of search, the police officers conducted only a personal search. He would further submit that the appellants were not given any opportunity in respect of quantum of sentence, while sentencing them to undergo 7 years Rigorous Imprisonment and in support of his contention, he relied upon the Judgment of the Hon'ble Supreme Court reported in ***2023 LiveLaw (SC) 326***, in which, the Hon'ble Supreme Court has held that sub-Section (2) of Section 235 of Cr.P.C., the Court is obliged to hear the accused persons after their conviction on the quantum of sentence before passing



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a sentence against them. Even otherwise, as a general rule, the trial Court is duty bound to adjourn the matter to a future date after recording the conviction so as to call upon both the sides to hear on the question of sentence before sentencing the accused persons. The principle of according opportunity of hearing to the convict before sentencing them is equally applicable where the sentencing is done by the appellate Court. It may be true that an opportunity of hearing may not have a bearing, if minimum of the sentence is being imposed. It may also not be necessary in every case to fix a future date after conviction for the purpose of sentencing but the convicts are entitled to have an opportunity of hearing on sentence. Therefore, he prayed for acquittal of the appellants. He would further submit that insofar as the first appellant is concerned, he died as such, the entire charges as against him stands abated.

6.Per contra, the learned Additional Public Prosecutor would submit that the respondent had scrupulously followed the procedures as laid down under Section 42 of NDPS Act. On receipt of secret information, the team after obtaining written permission from the Inspector of Police, went to the scene of crime. While they were on surveillance, the informant identified the appellants. Both the appellants were served the search memo and received their consent. Though both



were given joint search memo and received joint consent, for search, the first appellant himself had handed over the white colour gunny bag with contraband. Therefore, there was no search made on both the appellants and no vehicle search was made on them. In fact, after handing over the entire contraband by the first appellant, samples were taken and sealed the entire contraband. Therefore, no prejudice would be caused to both the appellants. If at all any search was made on the body of the appellants, the joint consent letter is fatal to the case of the prosecution. In support of his contention, he relied upon the Judgment of the Hon'ble Supreme Court reported in **(2009) 8 SCC 539** in the case of **Karnail Singh Vs. State of Haryana**, in which, the Hon'ble Supreme Court held that the question of non-compliance of the said provision may not vitiate the trial, if it does not cause any prejudice to the accused. As a result, if the statutory provisions under Sections 41(2) and 42(2) of the Act of writing down the information is interpreted as a mandatory provision, it will disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/offenders as a major ground for acquittal. He would further contend that admittedly, the memo search was conducted on the body of the appellants. After giving consent letter, the first appellant himself had handed over the entire contraband and as such,



there was no search conducted on the appellants. Therefore, there is no violation of the procedures laid down under Section 50 of the NDPS Act.

It would not apply in such a case. It would be applicable only in a case of person, search of the accused and when is made in respect of bag, briefcase or any such article, vehicle or container etc. Therefore, the prosecution has proved its case beyond any doubt. Hence, the order of conviction does not warrant any interference.

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

8. The learned counsel for the appellants would submit that the first appellant is reported dead and as such, the charges as against him are abated. Insofar as the second appellant is concerned, he was also present along with the first appellant. The first contention raised by the learned counsel for the appellants that the respondent has failed to follow the procedures as contemplated under Section 42 of the NDPS Act. On a perusal of Ex.P.5, the search memo and the consent letter given by both the appellants revealed that Ex.P.5 is a typed copy. In order to handle the search and seizure, they used to have typed form in order to apply the portion under Section 50 of the NDPS Act. There is no bar to have typed



copy of search memo and consent letter. If the appellants does not consent for search by the police officials, the said form may not be helpful to search the appellants. When the appellants have consented for search by the police officials, the said form would never comply with the procedures under Section 42 of the NDPS Act.

9. In the case on hand, both the appellants were served with search memo, in which, both have consented for search by the police officials. At that juncture, the first appellant himself had handed over the white colour gunny bag consisting the contraband. Therefore, there was no search conducted on the body of the appellants. The Hon'ble Supreme Court has categorically held that under Section 50 of the NDPS Act would be applicable only in a case of person, search of the appellants and when is made in respect of bag, briefcase, article, vehicle or container etc. In fact, in the case on hand, admittedly, the search was made in the gunny bag handed over by the appellants. Therefore, both the appellants have given a joint consent and no prejudice would be caused to the appellants, since the search was made only on the briefcase handed over by the first appellant.



10.The next contention raised by the learned counsel for the appellants is that the appellants were not given opportunity at the time of imposing sentence as contemplated under Section 235(2) of Cr.P.C.

11.On a perusal of the Judgment rendered by the trial court, it would reveal that even after questioning under Section 313 of Cr.P.C., the appellants have not appeared before the trial Court and also not cooperated with the Court for conducting trial. On so many occasions, the trial Court adjourned the case and even then, the appellants and their counsels have not appeared before the trial Court. Therefore, the trial Court had no occasion to give any opportunity to the appellants in respect of imposing sentence on them. Therefore, the Judgments cited by the learned counsel for the appellants are not helpful to the case on hand. Insofar as the contradictions between P.W.3 and P.W.4 are concerned, they were examined after a period of two years from the date of crime. P.W.3 deposed after receipt of secret information, immediately informed to the Inspector of Police, through phone and also by messenger. After receipt of the written permission, they formed a team and went to the scene of crime. He further deposed that they went to the police jeep, which is used by the Inspector of Police. Though P.W.4 deposed that the jeep was not used for any surveillance, he did not depose subsequently



that on the date of occurrence, his vehicle was not used. That apart, the said contradictions would not cause any prejudice to the appellants, at any cost. Since both the appellants were found in possession of contraband weighing 15kgs of Ganja and they were arrested and remanded to judicial custody.

12.The learned counsel for the appellants would submit that even according to the case of the prosecution, the entire contraband was seized only from the first appellant and no charge was framed for abetment and conspiracy under Section 29 of the NDPS Act. According to the case of the prosecution, both the appellants joined together, the respondent suspected them and served a search memo. Thereafter, the first appellant himself had handed over a white colour gunny bag consisting of the contraband. Therefore, in any prosecution for an offence under the NDPS Act which requires a culpable mental state of the accused. It is relevant to extract the provision under Section 35 of the NDPS Act:

“35. Presumption of culpable mental state.?”

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in



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that prosecution. Explanation.?culpable mental state? includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

13.Thus, it is clear that the Court shall presume the existence of mental state of the accused. Further, it may be presumed not only proved that the appellants have committed an offence under the NDPS Act. In the case on hand, the appellants failed to disprove the case of the prosecution by let in any evidence. Therefore, the trial Court had rightly convicted the appellants and this Court finds no infirmity or illegality in the order passed by the court below.

14.Insofar as the sentence is concerned, the learned counsel for the appellants would submit that except this case, the second appellant has involved in any other case. Therefore, the sentence may be reduced.

15.Since the first appellant is reported dead, the entire charges as against him are abated and this appeal is dismissed insofar as the first appellant is concerned.



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16. In view of the above, insofar as the second appellant is concerned, the conviction for the offence under Sections 8(c) r/w 20(b) (ii)(B) of NDPS Act, passed in C.C.No.63 of 2014 dated 05.08.2016 by the learned II Additional Special Sessions Judge (NDPS Act Cases) Madurai is hereby confirmed and the sentence is reduced from 7 years Rigorous Imprisonment to 4 years Rigorous Imprisonment.

17. With the above modification, the Criminal Appeal is partly allowed.

27.04.2023

sjj

NCC : Yes/No

Index: Yes/No

Internet: Yes/No

To

1. The II Additional Special Sessions Judge (NDPS Act Cases) Madurai.

2. The Inspector of Police,
Cumbum North Police Station,
Theni District.

3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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4. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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sji

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