



Crl.A.(MD)No.338 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on: 31.07.2023

Delivered on: 11.09.2023

CORAM

THE HON'BLE MR.JUSTICE P.DHANABAL

Crl.A.(MD)No.338 of 2016

Saravanan

... Appellant

Vs.

State rep by
The Inspector of Police,
Cumbum North Police Station,
Theni District.
In Crime No.221 of 2013

... Respondent

Prayer : Criminal Appeal filed under Section 374 of the Code of Criminal Procedure, to call for the records in C.C.No.294 of 2013 relating to the judgment dated 15.07.2016 passed by the Second Additional Special Judge, NDPS Act Cases, Madurai and to set aside the judgment of the conviction on the appellant/accused.

For Appellant : Mr.T.Lenin Kumar

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



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JUDGMENT

This Criminal Appeal has been filed to set aside the judgment in C.C.No.294 of 2013 dated 15.07.2016 passed by the Second Additional Special Judge, NDPS Act Cases, Madurai, wherein the trial Court convicted the accused for the offence under Section 8(c) r/w 20(b)(ii)(C) of NDPS Act and sentenced to undergo 10 years rigorous imprisonment and to pay fine of Rs.1,00,000/- in default to undergo one year simple imprisonment.

2.According to the case of the prosecution, P.W.3, when he was working as Sub Inspector of Police at Cumbum North Police Station, on 12.07.2013, at about 11.05 hours, based on the secret information, after obtaining permission from the Inspector of Police, he along with police party went to the Cumbum-Kombai, road, Paramathevar Kalyana Mandabam to prevent the illegal transportation of ganja. At that time, A1 and A2 were came in two wheeler bearing Reg.No.TN 60 X 5377 TVS XL Heavy Duty and the police stopped the vehicle and searched the white bag, at that time, A2 ran away from the scene and thereafter, A1 was chased and caught hold by the police, at that time A1 had four white bags, each



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contains 5 kgs of ganja, totally 20 kgs. Thereafter, police officials packed samples of 100 grams in each and then, went to the Police Station along with contraband and the accused. Thereafter, they seized the above said ganja and the two wheeler through mahazar. The other bag dropped by the second accused, who ran away from the place of occurrence, were also searched by the Police, there also, they found 2 bags contains each 5 kgs of ganja. Thereafter, in that ganja also 200 grams samples were packed by the police officials and prepared observation mahazar. Thereafter, P.W.3 arrested the first accused and taken him along with the properties to the Police Station.

3. Thereafter, FIR was registered in Cr.No.221 of 2013 for the offence punishable under Section 8(c) r/w 20(b)(ii)(C) and 25 of NDPS Act and thereafter, he sent a detailed report to the Inspector of Police. Thereafter, the Inspector of Police/P.W.4 has taken over the case for investigation and sent the contraband to the chemical analysis and thereafter, he examined the witnesses. After completion of investigation, he filed final report before the Special Court and after receipt of final report, the Special Court furnished the copies of documents under Section 207 Cr.P.C. Thereafter, charges were framed as against the accused and the same was



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read over to the accused and he denied the charges. On the side of the prosecution, they examined P.W.1 to P.W.4 and marked Ex.P1 to Ex.P12 and they also marked material object as M.O.1 to M.O.13. On the side of the accused, no one was examined and no document was marked. On perusal of oral and documentary evidence, the trial Court found the accused guilty for the offence under Section 8(c) r/w 20(b)(ii)(C) and sentenced him to undergo 10 years rigorous imprisonment and to pay fine of Rs.1,00,000/- in default to undergo one year simple imprisonment.

4.During pending proceedings, A2 was died and thereby, case against him was abated. Aggrieved by the above said conviction and sentence, the present appeal was preferred by A1 on the following grounds:-

1)The judgement of the trial Court is against law, weight of evidence and probabilities of the case.

2)The investigating agency failed to follow the mandatory procedures under Section 42(2) of NDPS Act and the secret information has not been forwarded to the immediate superior.

3)The respondent taken two samples from the seized contraband and each sample contained 100 grams. But P.W.2



deposed that he received sample containing only 90 grams, which itself creates doubt over the prosecution case.

4)The trial Court failed to follow the mandatory procedures under Section 50 of NDPS Act.

5)There is a delay in producing the contraband to the trial Court and there is no explanation by the prosecution.

6)The respondent police should have report to the immediate superior of the recovery within 48 hours, which was not followed by the respondent police.

5.The learned counsel appearing for the appellant would contend that the judgement of the trial Court is against law, weight of evidence and probabilities of the case. The investigating agency failed to follow the mandatory procedures under Section 42(2) of NDPS Act and the secret information has not been recorded and forwarded to the immediate superior. The respondent taken two samples from the seized contraband and each sample contained 100 grams. But P.W.2 deposed that he received sample containing only 90 grams, which itself creates doubt over the prosecution case. The trial Court failed to follow the mandatory procedures under Section 50 of NDPS Act. There is a delay in producing the



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contraband to the trial Court and there is no explanation by the prosecution. The respondent police should have report to the immediate superior of the recovery within 48 hours, which was not followed by the respondent police. There is also delay in sending the contraband to the learned Magistrate. In support of his contention, the learned counsel relied upon the following judgments:

i)Karnail Singh Vs. State of Haryana reported in (2009) 8 SCC 539.

ii)Sukhdev Singh Vs. State of Haryana reported in (2013) 1 MLJ (Crl) 395 (SC).

iii)Sudarsan @ Basha Vs. State rep by Inspector of Police, R. 3, Ashok Nagar Police Station, Chennai 83 reported in (2016) 1 MLJ (Crl) 510.

iv)Thangaraj Vs. State rep by The Inspector of Police NIB CID, Thoothukudi, Thoothukudi District reported in 2015-1-LW(Crl)466.

v)Crl.A.Nos.730 and 731 of 2011 in a case of Madan and others Vs. State rep by The Inspector of Police, (L&OO), C1, Flower Bazaar Police Station, Chennai.

vi)Crl.A.1555 of 2011 in a case of Thomas Karketta Vs. State Thr. Narcotics Control Bureau.



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6.The learned Additional Public Prosecutor appearing for the respondent would contend that there is no procedure violation in this case. The prosecution witnesses categorically deposed about the recovery and the same was informed to the higher authorities. Based on the secret information, they went to the place of occurrence and searched the accused and seized the contraband and thereafter, arrested the accused and FIR was also registered. All the happenings were informed to the higher authorities and detailed report also sent to the higher authorities and the same also reflected from the evidence of P.W.4 and thereby, no violation of mandatory procedures under NDPS Act. Further, the prosecution witnesses categorically deposed about the occurrence, seizure and arrest of the accused and contraband also sent for chemical analysis and a report also received. As per the report, the ganja contained cannabinoid and hence, the trial Court rightly convicted and sentenced the accused and therefore, the present appeal is liable to be dismissed.

7.Heard both sides and perused the materials available in the records



8.The prosecution case is that on 12.07.2013, at about 11.05 hours, when P.W.3 was in Station, he received secret information and thereafter, he informed about the same to the Inspector of Police and obtained permission. Then, he went to the place of occurrence and intercepted the accused. At that time, the accused had one white bag with contraband and the same was seized. Thereafter, the appellant was arrested and then, FIR was also registered. After examining the witnesses, the respondent police filed final report as against the accused.

9.The main contention of the learned counsel appearing for the appellant is that the mandatory procedures under Sections 42(2), 50 and 57 have not been followed. In this context, the learned counsel for the appellant brought to the knowledge of this Court that P.W.3 in his cross-examination stated that he sent the samples separately and the same was not mentioned in FIR. But, P.W.3 in his chief examination categorically stated that on 12.07.2013, at about 11.05 hours, when he was in Police Station, based on the secret information, he went to the occurrence place, after informing to the Inspector of Police. Further, from the evidence of P.W.3, it reveals that on the date of occurrence, immediately after receiving the information, the same was entered



into the general diary entry and then, it was informed to the Inspector of Police. Therefore, non-compliance of Section 42(2) of NDPS Act would not arise.

10. In this context, the learned counsel appearing for the appellant relied upon judgments in Karnail Singh Vs State of Haryana, the Hon'ble Supreme Court of India held as follows:-

32. Under Section 42(2) as it stood prior to amendment such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same would adversely affect the prosecution case and to that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case, it is to be concluded that the mandatory enforcement of the provisions of Section 42 of the Act non-compliance of which may vitiate a trial has been restricted only to the provision of sending a copy of the information written down by the empowered officer to immediate official superior and not to any other condition of the Section.

33. Abdul Rashid (supra) has been decided on 01.02.2000 but thereafter Section 42 has been amended with effect from 02.10.2001 and the time of



sending such report of the required information has been specified to be within 72 hours of writing down the same. The relaxation by the legislature is evidently only to uphold the object of the Act. The question of mandatory application of the provision can be answered in the light of the said amendment. The non-compliance of the said provision may not vitiate the trial if it does not cause any prejudice to the accused.

11. In a case of Sukhdev Singh Vs. State of Haryana reported in (2013) 1 MLJ (Crl) 395 (SC), the Hon'ble Supreme Court of India held as follows:-

23. Once the contraband is recovered, then there are other provisions like Section 57 which the empowered officer is mandatorily required to comply with. That itself to some extent would minimize the purpose and effectiveness of Section 42 of the NDPS Act. It is to provide fairness in the process of recovery and investigation which is one of the basic features of our criminal jurisprudence. It is a kind of prevention of false implication of innocent persons. The legislature in its wisdom had made the provisions of Section 42 of NDPS Act mandatory and not optional as stated by this Court in the case of Karnail Singh (supra).

24. Thus, the present appeal merits grant of relief to the accused. We accordingly set aside the judgment of the



High Court as well as the Trial Court and acquit the accused of an offence under Section 15 of NDPS Act. We direct the accused to be set at liberty forthwith, if not required in any other case.

12.In a case of Sudarsan @ Basha Vs. State rep by Inspector of Police, R3, Ashok Nagar Police Station, Chennai 83 reported in 2016 MLJ 510, this Court held as follows:-

13.It is true that P.W.3 has given evidence to the effect that contraband is nothing but Ganja, but in the instant case, it has already been pointed out that there is no concrete evidence with regard to Observation Mahazar as well as Seizure Mahazar. Further, no independent witness has been examined on the side of the prosecution. It is a settled principle of law that evidence of police officials can also be relied upon, provided their evidence is trustworthy. But, in the instant case, as stated in many places, even contradictory evidence is available with regard to Mahazar as well as Seizure Mahazar. Considering the nature of contradictions available on the side of the prosecution, the Court cannot come to a conclusion that the alleged contraband has been seized from the appellant/second accused in the place of occurrence. Since the said aspect has not at all been clearly established on the side of the prosecution, the Court can very well come to a conclusion that the



prosecution has failed to prove its case.

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14.The trial court, without considering the vital infirmities found on the side of the prosecution, has erroneously invited conviction and sentence against the appellant/second accused and therefore, the present Criminal Appeal is liable to be allowed.

13.In a case of Thangaraj Vs. The State rep.by The Inspector of Police, NIB CID, Thoothukudi reported in 2015-1-LW(Crl)466, this Court held as follows:-

10. In Karnail Singh v. State of Haryana reported in 2009(10) SCALE 255, the scope and applicability of sub-section 8 (2) of Section 42 of the NDPS Act came up for consideration and as per sub-section (2) of Section 42 of the NDPS Act, the empowered officer, who have taken down information in writing or records the grounds of his belief under the proviso to sub-section (1), should send a copy of the same to his immediate official superior within 72 hours and in special circumstances involving emergent situations, the recording of the information in writing and sending a copy of thereof to the official superior may get postponed by a reasonable period. It has been further held that if the information was received when the police officer was in the police station with sufficient time to take action and if the



police officer fails to record in writing the information received or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. It has been further held that whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case.

11.As rightly pointed out by the learned Counsel for the appellant/accused, according to P.W.4, he received the information through the informant and he along with the police party mounted surveillance, but unfortunately failed to inform the same to his 9 immediate superior officials in terms of sub-section (2) of Section 42 of the NDPS Act and hence, on that sole ground alone, the appellant/accused is entitled to be acquitted.

14.In a case of Madan and another Vs. State rep by The Inspector of Police, C1, Flower Bazaar Police Station, Chennai, this Court held as follows:-

12.The next contention raised by the learned counsel for the appellant is that the contraband seized from the accused on 11.08.2008, whereas the same was sent to the Court only on 11.09.2009, for which there is no explanation by the prosecution. Section 55 of the NDPS Act reads as follows:-



55. Police to take charge of articles seized and delivered:-An officer-in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station Therefore, there is a delay of one year and one month in sending the contraband to the Court. In absence of evidence during the said period between the seized and produced in the Court, the seized article was in custody of the officer in-charge of Police Station and the same was kept under seal, it is held that it was doubtful that the very article that was seized was sent to the Chemical Examiner and investigation was perfunctory and evidence insufficient. Therefore, it vitiates the entire case of the prosecution.

15. In a case of Thomas Karetta Vs State through Narcotics Control Bureau, New Delhi High Court held as follows:-

24. Admittedly, the present case hinges on the secret information having been provided by a spy to PW.4. There is no averment in the testimony of PW.4



regarding such secret information having been reduced in writing and sent to the Superior Officer. There is no DD entry regarding such secret information having been received by PW.4. As has been decided in Karnail Singh vs. State of Haryana (supra), the mandatory requirement is of writing down the information received and sending a copy thereof to the Superior Officer, preceding the search and seizure by the officer, which could only be relaxed in special circumstances involving emergent situations, when compliance of such requirement could be postponed by a reasonable period, i.e. after the search and seizure.

Total non compliance with requirement of Section 42 of NDPS Act has been held to be impermissible. It has been reiterated a number of times by the Supreme Court that the consequences of non compliance of Section 42 of NDPS Act are grave. The stringent provisions of the NDPS Act cast a duty upon the prosecution to strictly follow the procedure and comply with all its safe guards.

16.As far as Section 50 of NDPS Act is concerned, in this case there was no search made on the person and search was made only on the bags carried by the person. Section 50 of NDPS Act would attract only for the search made on the person's body of the accused. Hence, in this case, non-compliance of Section 50 also would not arise.



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17.As far as Section 57 of the NDPS Act is concerned, after arrest and seizure of the property, within 48 hours, the same has to be informed to the higher authority. In this context, P.W.3, in his evidence, he stated that after seizing of the property and after arrest of the accused, he came to the Police Station and registered FIR and thereafter, he sent detailed report to the Inspector of Police. The said report was marked as Ex.P.12. On perusal of Ex.P. 12 it reveals that the detail report submitted by the Inspector of Police on 12.07.2013 and the date of arrest is 12.07.2013. Therefore, there is no any violation of mandatory procedures as argued by the learned counsel appearing for the appellant.

18.The learned Additional Public Prosecutor in support of his contention, he relied upon the decision of the Hon'ble Supreme Court of India in a case of Sajan Abraham Vs. State of Kerala reported in (2001) 6 SCC 692, in which, the Hon'ble Supreme Court held as follows:-

8.Next submission is, the prosecution has violated Section 50 of the Act which is mandatory as held by the Constitution Bench of this Court in State of Punjab vs. Baldev Singh (1999) 6 SCC 172. The submission is, the appellant was not informed in



writing of his right to be searched in the presence of a Magistrate or a Gazetted Officer.

9.We find PW1, PW3 and PW5 have deposed that PW5 has informed the respondent orally about it but the appellant opted out of this right. It is only thereafter a search was made.

10.In the present case we find the High Court recorded a finding that PW5 informed the appellant about his right as provided under Section 50 of the Act which is established not only by the oral evidence of PWs. 1, 3 and 5, but also by the recitals made in Ext.P1 the seizure mahazar prepared by PW5 and the F.I. Statement given by the respondent (the appellant before us). The submission, however, is communicating orally to the appellant is not a compliance under Section 50. We cannot agree. The aforesaid Constitution Bench upholds oral communication also to be valid under Section 50 of the Act. Hence, this submission has no merit.

11.Thus in our considered opinion, we do not find, on the facts of this case, as also recorded by the High Court that there has been any violation of Section 50 of the Act.

12.The last submission for the appellant is, there is non- compliance of Section 57 of the Act. He submits under it, an obligation is cast on the prosecution while making an arrest or seizure, the officer should make full report of all particulars of such arrest or seizure and send it to his immediate



superior officer within 48 hours of such arrest or seizure. The submission is, this has not been done. Hence the entire case vitiates. It is true that the communication to the immediate superior has not been made in the form of a report, but we find, which is also recorded by the High Court that PW5 has sent copies of FIR and other documents to his superior officer which is not in dispute. Ex.P9 shows that the copies of the FIR along with other records regarding the arrest of appellant and seizure of the contraband articles were sent by PW5 to his superior officer immediately after registering the said case. So, all the necessary information to be submitted in a report was sent. This constitutes substantial compliance and mere absence of any such report cannot be said it has prejudiced the accused. This section is not mandatory in nature. When substantial compliance has been made, as in the present case it would not vitiate the prosecution case. In the present case, we find PW5 has sent all the relevant material to his superior officer immediately. Thus we do not find any violation of Section 57 of the Act.

13.In State of Punjab vs. Balbir Singh (1994) 3 SCC 299, this Court held:

"The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 to 44 are by themselves not mandatory.."



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19.On careful reading of the said judgment it is clear that the provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest and seizure under Section 41 and 44 are by themselves are mandatory. However, in the case on hand the available evidences shows that all the procedures have been followed by the police officers.

20.As far as the variation in weight is concerned, according to the prosecution, 100 grams samples were packed. But as per the report of the P.W.2, he received contraband weighing 80,84,80,70,90,90 grams respectively. Due to dryness of the contraband, there is a chance to vary in the weight of the contraband and thereby, it will not affect the case of the prosecution.

21.Further, the learned counsel appearing for the appellant has also argued that there is delay in sending the contraband to the Court. On careful perusal of the records shows that very next day the contraband was sent to the learned Magistrate and the learned Magistrate also made an endorsement in the Form 95. therefore,

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the above said arguments of the appellant are not acceptable. P.W.

1 has categorically deposed about the accompany along with Sub Inspector of Police and seizure of the case properties and about the arrest of the accused and preparing the mahazar. P.W.2 also in his evidence deposed that he received contraband for chemical analysis and thereafter, he issued Ex.P.5. According to the evidence of P.W.4 and Ex.P.6, the above said contraband is cannabinoid and as per evidence of P.W.3, he received secret information and after informing about the same to the higher officials, he went to the place of occurrence and seized the contraband and arrested the accused and thereafter, registered FIR and sent detail report to the higher officials. P.W.4, who conducted the investigation have categorically deposed and thereby, the prosecution proved its case beyond any reasonable doubt and the trial Court has also elaborately discussed about the oral and documentary evidences adduced by either side and correctly found guilty and correctly convicted the accused. There is no infirmity or illegality in the judgment passed by the trial Court and there is no warrant to interfere with the judgment passed by the trial Court.

22.On careful reading of the judgments relied upon by the learned counsel appearing for the appellant reveals that as per



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Section 42(2) of NDPS Act, immediately after receipt of secret information, the same has to be informed to the immediate superior officer. As per Section 57 of the Act, after arrest and seizure, within 48 hours detail report has to be sent to the immediate superior officer. In the case on hand, on perusal of evidences shows that secret information has been informed to the Inspector of Police and arresting and seizure of the properties also immediately informed through detail report. Therefore, the judgments relied on by the learned counsel appearing for the appellant are not helpful to decide the case in his favour.

23. On careful reading of the judgment relied upon by learned Additional Public Prosecutor reveals that it is clear that provisions of 50 and 57 are dealing with the mandatory steps to be taken after making arrest and seizure. In this case, all the mandatory procedures are duly followed. Hence, the arguments of the appellant that mandatory procedures are not followed is not acceptable.

24. In view of the above discussions, this criminal appeal is dismissed and the conviction and sentence passed by the trial Court is hereby confirmed. If any bail bond executed by the



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appellant, the same stands cancelled. The trial Court is directed to secure the appellant to serve the remaining period of sentence.

11.09.2023

Index :yes/No
Internet:yes/No
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To

- 1.The Second Additional Special Judge,
NDPS Act Cases, Madurai
- 2.The Inspector of Police,
Cumbum North Police Station,
Theni District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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Pre-Delivery Order
made in
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