



CRL.A(MD)Nos.100 & 465 of 2017

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	21.09.2023
Pronounced on	17.11.2023

CORAM

THE HONOURABLE MR. JUSTICE P.DHANABAL

CRL.A(MD)Nos.100 & 465 of 2017

Pandi @ Sornapandi

... Appellant in
Crl.A(MD)No.100/2017

Lakshmanan

... Appellant in
Crl.A(MD)No.465/2017

Versus

The Inspector of Police,
B-6, Jaihindpuram Police Station,
Madurai City.
(Crime No.417 of 2001)

... Respondent in
both cases

Common Prayer : The Criminal Appeal is filed under Section 374 of Criminal Procedure Code, to call for the records and set aside the judgment and conviction dated 14.03.2017 made in C.C.No.369/2006 on the file of the learned II Additional District and Sessions Judge for Exclusive Trial of NDPS Act Cases, Madurai.

For Appellants : M/s.P.Krishnaveni



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CRL.A(MD)Nos.100 & 465 of 2017

(in both cases)

Legal Aid Counsel

For Respondent :
(in both cases)

Mr.M.Sakthi Kumar
Government Advocate (Criminal Side)

COMMON JUDGMENT

These Appeals have been preferred by the Appellants as against the judgment and conviction dated 14.03.2017 passed by the II Additional District and Sessions Judge for Exclusive Trial of NDPS Act Cases, Madurai in C.C.No.369 of 2006.

2. Wherein, the Trial Court has convicted the Accused for the offences under Section 8(c) read with 21 of NDPS Act. The Crl.A.(MD)No. 100 of 2017 has been preferred by the 1st Accused as against the judgment and conviction passed in C.C.No.369 of 2006, dated 14.03.2017, by convicting the Appellant under Section 8(c) read with 21 of NDPS Act and sentenced him to 3 years of Rigorous Imprisonment and to pay a fine of Rs. 20,000/- in default to under go 1 year of Simple Imprisonment.



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3. The Crl.A.(MD)No.465 of 2017 has been preferred by the 2nd

Accused as against the judgment and conviction passed in C.C.No.369 of 2006, dated 14.03.2017, by convicting the Appellant under Section 8(c) read with 21 of NDPS Act and sentenced him to 3 years of Rigorous Imprisonment and to pay a fine of Rs.20,000/- in default to under go 1 year of Simple Imprisonment.

4. The case of the prosecution is that on 25.04.2001 at about 15 hours, nearby M.K.Puram Railway Gate, Madurai, when the police parties where in patrol, they searched the Accused A1 Pandi @ Sornapandi and seized 10 grams of herion from him. At about 16 hours, they searched Accused A2 Lakshmanan and seized 10 grams of heroin from him. At about 16-15 hours, they searched Accused A3 Vasanthi and seized 15 grams of heroin from her.

5. Thereafter, they arrested the Accused and seized the contraband from them and then registered the First Information Report for



the offences under Section 8(c) read with 21 of NDPS Act. Thereafter, the Investigation Officer examined the witnesses. The said contraband was sent to chemical analysis and as per the chemical analysis report in Ex.P.12, Ex.P.15 and Ex.P.18, it was confirmed that the contraband was herion and it contains diethylmorphine. Thereafter, the Investigation Officer P.w.3 has filed the final report as against the accused for the offences under Section 8(c) read with 21 of NDPS Act. The case against the 3rd accused Vasanthi was split up and assigned C.C.No.62/2017. Thereafter, the copies of the records relied on by the prosecution were furnished to the Accused under Section 207 of Code of Criminal Procedure. After hearing both sides, the Trial Court has framed charges under Section 8(c) read with 21 of NDPS Act as against the accused. The charges were read over and explained to the accused and the accused have denied the charges. Thereafter, the prosecution has examined P.w.1 to P.w.4 and Ex.P.1 to Ex.P.23 were marked and no M.Os were marked. After completion of prosecution side witnesses, the accused were examined under Section 313(1)(b) of Code of Criminal Procedure with regard to the incriminating evidence found against them and they have denied the evidence as false. Thereafter, no witnesses were examined and no documents were marked on the side of the accused.



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The Trial Court after analyzing oral and document evidences adduced on either side found both accused guilty for the offences under Section 8(c) read with 21 of NDPS Act and convicted there under. The accused were sentenced to undergo 3 years of Rigorous Imprisonment and to pay a fine of Rs.20,000/- in default to under go 1 year of Simple Imprisonment. Aggrieved over by the above said conviction and judgment, the 1st Accused has preferred the Crl.A.(MD)No.100 of 2017 and the 2nd Accused has preferred the Crl.A.(MD)No.465 of 2017.

6. The grounds raised in Crl.A.(MD)No.100 of 2017 are as follows :

(a). The order of the Court was opposed to law, weight of evidence, probabilities of the case and the Trial has not even considered the case of the Appellant/Accused and without consideration, the conviction has been made by the Trial Court.

(b). There are statutory violations under Sections 52 and 57 of NDPS Act made by the respondent during the investigation and the alleged confession statement was also not recorded before the Public Officers or gazette officer.



(c). There are material contradiction of the evidence P.w.2 and P.w.3 in respect of dates in which the chemical analysis report was sent and received, and before making search the P.w.1 and P.w.3 must told about their right under Section 50 of the NDPS Act to the Appellant, but they did not do so and also they did not have any authorization letter from the superior officers while making search, seizure or arrest. Hence, it is a violation of Section 43 of NDPS Act.

(d). The P.w.1 prepared the athatchi which was marked as Ex.P.8 on 06.06.2010 and had obtained consent letters from the accused which was marked as Ex.P.1, Ex.P.4 and Ex.P.7 only on coercion.

(e). The report of arrest and seizure were not sent to the immediate superior officer within 48 hours from the time of arrest, which was a violation of Section 57 of NDPS Act.

(f). The extract of RPR register which were marked as Ex.P.21 and Ex.P.22 through P.w.3 was doubtful and also there was a material contradiction in the statement of P.w.1 and P.w.3 in respect to the paper where the brown sugar was kept.

(g). The Appellant had possession of 10 grams which was less than commercial quantity but greater than small quantity but the same has been



within the purview of Section 21 (b) of NDPS Act whereas the respondent police laid the charge sheet against the Appellant under Section 21 of NDPS Act without any specific charge, which was not at all maintainable, and without any material evidences on the side of the prosecution, the Trial Court came to conclusion and passed the order.

7. The grounds raised in CrI.A.(MD)No.465 of 2017 are as follows :

(a). The order of the Court was opposed to law, weight of evidence, probabilities of the case and the Trial has not even considered the case of the Appellant/Accused and without consideration, the conviction has been made by the Trial Court.

(b). There are statutory violations under Sections 52 and 57 of NDPS Act made by the respondent during the investigation and the alleged confession statement was also not recorded before the Public Officers or gazette officer.

(c). There are material contradiction of the evidence P.w.2 and P.w.3 in respect of dates in which the chemical analysis report was sent and



received, and before making search the P.w.1 and P.w.3 must told about their right under Section 50 of the NDPS Act to the Appellant, but they did not do so and also they did not have any authorization letter from the superior officers while making search, seizure or arrest. Hence, it is a violation of Section 43 of NDPS Act.

(d). The P.w.1 prepared the athatchi which was marked as Ex.P.8 on 06.06.2010 and had obtained consent letters from the accused which was marked as Ex.P.1, Ex.P.4 and Ex.P.7 only on coercion.

(e). The report of arrest and seizure were not sent to the immediate superior officer within 48 hours from the time of arrest, which was a violation of Section 57 of NDPS Act.

(f). The extract of RPR register which were marked as Ex.P.21 and Ex.P.22 through P.w.3 was doubtful and also alleged that there was a material contradiction in the statement of P.w.1 and P.w.3 in respect to the paper where the brown sugar was kept.

(g). The Appellant had possession of 10 grams which was less than commercial quantity but greater than small quantity but the same has been within the purview of Section 21 (b) of NDPS Act whereas the respondent



police laid the charge sheet against the Appellant under Section 21 of NDPS Act without any specific charge, which was not at all maintainable, and without any material evidences on the side of the prosecution, the Trial Court came to conclusion and passed the order.

8. Since both the appeals are arising out of the same judgment, this Court has heard the appeals altogether and passing common judgment.

9. The learned counsel appearing for the Appellants would contend that the prosecution has failed to prove the charges beyond doubt as against the accused and the accused have been charged for offences under Section 8(c) read with 21 of NDPS Act alleging that they had possession of each 10 grams of Herion. In order to prove the case against accused the prosecution has P.w.1 to P.w.4 and marked Ex.P.1 to Ex.P.23. The evidences of prosecution witnesses are not cogent, they are filled with doubts and the accused are entitled for the acquittal by giving benefit of doubt. The mandatory procedure under Sections 42, 50, 52A and 57 of NDPS Act also have not been followed and thereby, the prosecution violated the mandatory procedure and thereby, the accused are entitled for acquittal. Further, at the



time of search no consent was obtained from the accused and also the prosecution failed to examine the independent witnesses near to the place of arrest of the accused. The prosecution failed to conduct purity test in this case and thereby, the accused are entitled for acquittal and the judgment and conviction passed by the Trial Court are liable to be set aside by allowing these appeals.

10. The learned Government Advocate (Criminal Side) appearing for the respondent would contend that the accused had possession of each 10 grams of Herion and as per the secret information, when the police party during patrol, they suspected these accused and when they enquired, the accused had admitted the possession of Herion. At the time of search, the police found each 10 grams of Herion and seized the contraband from the each of the accused and they prepared Mahazar and then they arrested the accused and they have taken them along with the contraband to the police station and then registered FIR and the case has been registered by the Inspector of Police. The factum of secret information has been recorded in the diary and the said information was informed to the higher authorities and further, the accused themselves consented for the search made by the



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police party and the report was sent to the higher authority immediately after the arrest and seizure of case properties and thereby all the legal formalities to the provisions of NDPS Act have been duly followed by the prosecution. Therefore, the Trial Court after taking into consideration of all the aspects correctly convicted the accused and thereby, these appeals are liable to be dismissed.

11. This Court heard both sides and perused the records. Upon hearing both sides, perusing the records and the judgment of Trial Court and the grounds of both the appeals. The points for determination in Crl.A(MD)No.100 of 2017 as follows :

(a) Whether the prosecution has proved the charge leveled against the Appellant/1st Accused for the offences under Section 8(c) read with 21 of NDPS Act.

(b) Whether the judgment and conviction passed by the Trial Court in respect of 1st Accused is sustainable in law and on facts.

12. The points for determination in the Crl.A.(MD)No.465 of



2017 are as follows :

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(a) Whether the prosecution has proved the charge leveled against the Appellant/2nd Accused for the offences under Section 8(c) read with 21 of NDPS Act.

(b) Whether the judgment and conviction passed by the Trial Court in respect of 2nd Accused is sustainable in law and on facts.

13. The case of the prosecution is that each of the Accused had possession of 10 grams of Herion at the time of search by the police party and thereby police seized the case properties and then registered FIR in Crime No.417 of 2001 for the offences under Section 8(c) read with 21 of NDPS Act. Thereafter, the Investigation Officer examined the witnesses. The said contraband was sent to chemical analysis and as per the chemical analysis report in Ex.P.12, Ex.P.15 and Ex.P.18, it was confirmed that the contraband is herion and it contains diethylmorphine. Thereafter, the Investigation Officer P.w.3 has filed the final report as against the accused for the offences under Section 8(c) read with 21 of NDPS Act. The case against the 3rd accused Vasanthi was split up and another case number assigned in C.C.No.62/2017.



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14. In order to prove the case of the prosecution they examined P.w.1 to P.w.4 and marked Ex.P.1 to Ex.P.23. According to the prosecution, based on the secret information given by the informant, the P.w.3 along with other police party went to the place of occurrence and searched the accused and found that the possession of Herion by the accused and thereafter, they arrested the accused. The P.w.3 in his evidence stated that on 25.04.2001, when he was working as Inspector of Police at B-6 Jaihindpuram Police Station, Madurai, at about 3 p.m. received an information that near M.K.Puram Railway Gate, three persons were selling Herion. Immediately, he along with P.w.1 one Seik Mohamed Sha, Special Sub Inspector and one Subburaman, Sub Inspector of Police and others went to the M.K.Puram Railway Gate and as per the instructions of informant, they searched the Accused and explained about the search in the presence of Gazetted Officer but they consented for the search by the police party themselves and also obtained written consent from them. At the time of search, the police found that the accused 1 and 2 had each 10 grams of Herion and another accused one Vasanthi had 15 grams of Herion. The said contraband was seized and sealed. Thereafter, at about 4.45 p.m. came to the police station and



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registered FIR in Crime Nos.417/2009, 418/2009 and 419/2009 under Section 8(c) read with 21 NDPS Act and thereafter, the FIR and other connected papers were sent to the higher authorities. Further, he sent a detailed report in Ex.P.20 to the Assistant Commissioner of Police, Madurai. The seized contraband were sent to Forensic Science Lab and obtained certificate from the Forensic Science Lab on 20.01.2001. Thereafter, he filed final report as against the accused. Therefore, from the evidence of P.w.3, it reveals that the P.w.3 at the time of arrest informed about the right of the accused with regard to search in the presence of Gazetted Officer or the Magistrate but they consented to search by the police and further after the registration of FIR, he sent the detailed report to the Assistant Commissioner of Police, Madurai.

15. Therefore, from the evidence of P.w.3, it reveals that he followed the mandatory procedures at the time of conducting search and sent the detailed report after the arrest and seizure of the properties. Further P.w. 1 also in his evidence stated that on 25.04.2001, when he was working as Sub-Inspector of Police, Jaihindpuram, Madurai, he along with the Inspector of Police and lady constable one Muthulakshmi went to M.K.Puram Railway



Gate and watched the movements. At the time, all the accused were standing there under suspicious manner. When they searched the accused, they had possession of Herion. At the time of search, the P.w.3 disclosed about the entitlement of the accused for search in the presence of Magistrate or any other Gazetted Officers. But the accused consented to have search by the police. Thereafter, they seized the contraband and prepared Mahager and then arrested the Accused and went to the police station. Then the Inspector of Police registered the FIR and then he assisted the Inspector of Police. Therefore, the evidence of P.w.3 is corroborated by the P.w.1 with respect to arrest and seizure of properties. The P.w.2, who is the Chemical Analyst had also deposed that she receive the contraband from the Court and she analysed the contraband and found that all the contraband received from the Court had raw Herion and contain diethylmorphine. Therefore, from the evidence of P.w.2, it reveals that the contraband is Herion. Further, the prosecution examined the P.w.4, who is the Head Clerk of the concerned Court where the contrabands were produced and he deposed about the receipt of contraband and sending of contraband to the Chemical Analysis.

16. The main contention of the learned counsel appearing for



the Appellants is that, the Investigation Agency has not followed the procedures under Sections 42, 50, 52A and 57 of NDPS Act. As far as the mandatory procedure under Section 50 of NDPS Act is concerned, the prosecution has produced consent letter from the Accused and as per the Ex.A.1, the accused were explained about the entitlement of search before the Judicial Magistrate or any other Gazetted Officers but they themselves consented for searching by the police. The accused also have not raised any serious objection before the Trial Court in this regard.

17. Therefore, the contention of the Appellants that the Investigation Agency has not followed the mandatory procedure laid down under Section 50 of NDPS Act is not acceptable. As far as the mandatory procedure under Section 42 is concerned, as per the prosecution the information was recorded in the diary and the P.w.3 in his evidence stated about the same. Further the learned Trial Judge has recorded in the judgment that the copy of the information is available in the case bundle. Further, the P.w.2 has stated in his evidence that immediately after registering the FIR, all the papers were sent to the higher authorities and it shows that the mandatory procedure under Section 42 of NDPS Act has been complied.



Though, the prosecution has failed to produce the diary with regard to the entries made in respect of information, sending of FIR and other connected case papers to the higher authorities is sufficient to satisfy the procedure under Section 42 of NDPS Act. Therefore, the contention of the learned counsel appearing for the Appellants is not acceptable one. As far as the mandatory procedure under Section 57 of NDPS Act is concerned, the P.w.3 has deposed that immediately after the arrest and seizure of properties, the detailed report was sent to the higher authorities under Ex.P.20 and thereby there is no violation of procedure under Section 57 of NDPS Act.

18. The another contention raised by the Appellants is that the prosecution has failed to follow the procedure under Section 52A of NDPS Act and the samples have to be drawn in the presence of Magistrate and the Magistrate has to certify to the correctness of the samples drawn by the police. In this case, it is admitted fact that the contraband was seized by the police and same was produced before the Court and then the said entire contraband was sent for chemical analysis. Therefore, the procedure under Section 52A of NDPS Act with respect of samples to be drawn in the presence of the Magistrate and Magistrate has to certify the correctness of



the above said samples were not followed. In this case, though the seized properties were remanded to the custody of the Court and then the samples were sent for chemical analysis, it is not sufficient to satisfy the procedure laid down in the Hon'ble Apex Court in the case of ***Simarnjit Singh .vs. State of Punjab*** reported in ***2023 Live Law (SC) 570*** wherein the Hon'ble Apex Court has held as follows:

8. In paragraphs 15 to 17 of the decision of this Court in Mohanlal's case, it was held thus: thus:

“15. It is manifest from Section 52-A(2)include (supra) that upon seizure of the contraband the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of (a) certifying the correctness of the inventory, (b) certifying photographs of such drugs or substances taken before the Magistrate as true, and (c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

16. Sub-section (3) of Section 52-A requires



that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with subsections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the



doubt. The learned Additional Public Prosecutor has argued that in the case on hand the prosecution has clearly deposed about the seizure of property, arrest of accused and other formalities by the officials, the sample was not drawn before the Magistrate and not certified by the Magistrate but at the same time immediately after the seizure of properties, they were produced before the jurisdiction magistrate through Form -95 thereby the procedures under Section 52 (A) of the NDPS Act was complied.

20. In the case of hand it is pertinent to note that the Hon'ble Supreme Court in the above cases clearly observed in para 16 that,

“Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which



samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct”.

21. Therefore it is clear that the samples ought to have been drawn in the presence and supervision of Magistrate and entire exercise have to be certified by him to be correct. Therefore mere production of samples which were seized by the police before the Court is not sufficient to satisfy the condition of Section 52(A) of NDPS Act. As per article 141 of the Constitution of India the law laid down by the Hon'ble Supreme Court is law in land thereby this Court has to strictly follow the law laid down by the Hon'ble Supreme Court. As per Article 21 of the Constitution of India “ *No person shall be deprived of his life or personal liberty except according to procedure established by law*”.

22. Therefore, as discussed above this Court is of the opinion



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that the prosecution has failed to prove the charges as against each of the accused for the offences under Section 8(c) read with 21 NDPS Act and the Accused are entitled for acquittal.

23. In the result, this Criminal Appeal (MD)No.100 of 2017 is allowed and the judgment and conviction passed by the Trial Court in C.C.No.369 of 2006 as against the Appellant/1st Accused is set aside and the Accused is acquitted for the charges under Section 8(c) read with 21 NDPC Act and the accused, be set at liberty subject to other cases, if any. The bail bonds executed by the accused shall stands canceled. The fine amount if any paid to the Court shall be refunded to the accused.

24. In the result, this Criminal Appeal (MD)No.465 of 2017 is allowed and the judgment and conviction passed by the Trial Court in C.C.No.369 of 2006 as against the Appellant/2nd Accused is set aside and the Accused is acquitted for the charges under Section 8(c) read with 21 NDPC Act and the accused, be set at liberty subject to other cases, if any. The bail bonds executed by the accused shall stands canceled. The fine amount if any paid to the Court shall be refunded to the accused.



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Index: Yes/No

Speaking Order : Yes/No

To

The II Additional District and Sessions Judge
for Exclusive Trial of NDPS Act Cases,
Madurai.



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P.DHANABAL., J.

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PRE- DELIVERY JUDGEMENT MADE IN

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