



Crl.M.P.No.20245 of 2023 in Crl.A.No.1658 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.01.2024

CORAM:

THE HON'BLE MR.JUSTICE M. NIRMAL KUMAR

Crl.M.P.No.20245 of 2023
in Crl.A.No.1658 of 2023

Dinesh Kumar,
S/o.Anbu.

... Petitioner

Vs.

STATE BY:
The Inspector of Police,
NIB-CID,
Kancheepuram.
[Crime No.29/2020].

... Respondent

PRAYER: Criminal Miscellaneous Petition has been filed under Section 389(1) of Cr.P.C., to suspend the sentence in the judgment, dated 20.12.2023 in C.C.No.130 of 2020 passed by the Court of the learned Special Judge, I Additional Special Court for Exclusive Trial of Cases under NDPS Act, Chennai, pending disposal of the appeal.

For Petitioner : Mr.A.Venkateswara Babu
For Respondent : Mr.C.E.Pratap,
Government Advocate (Crl. Side)

ORDER

This Criminal Miscellaneous Petition has been filed to suspend the sentence imposed on the judgment, dated 20.12.2023 in C.C.No.130 of 2020 by the learned I Additional Special Judge, I Additional Special Court for



exclusive trial of cases under NDPS Act, Chennai (trial Court) and enlarge him on bail pending disposal of the main appeal.

2.The petitioner was convicted by the trial Court for offence under Section 8(c) r/w 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced to undergo Rigorous Imprisonment for one year and to pay a fine of Rs.10,000/-, in default to undergo two months Rigorous Imprisonment. Challenging the conviction and sentence of the trial Court, the petitioner preferred an appeal and the present Suspension of Sentence.

3.Gist of the case is that on 15.05.2020, PW1, the Special Sub Inspector of Police, NIB CID, Kancheepuram received information (Ex.P1) that the petitioner was trafficking 2 kgs of ganja near Oli Mohamedpet Junction, Kancheepuram. Ex.P1 was recorded by PW1 and the same was placed before the Inspector of Police (PW4). After getting permission from the Inspector of Police (PW4), PW1 along with Police party viz., PW2-Head Constable and one Rajarajan, Head Constable proceeded to Oli Mohamedpet Junction, Kancheepuram where one person was carrying white colour gunny



bag in his left hand and the same was identified by the informant.

Thereafter, the Police party intercepted him and informed him about their right under Section 50 of NDPS Act. On enquiry, the said person disclosed his identify as Dinesh Kumar, the petitioner herein. Then search was conducted. Since independent witnesses refused to assist the prosecution, in presence of Police party the petitioner was searched. The search notice was marked as Ex.P2. When PW1 enquired the petitioner, he handed over gunny bag which contains 2 kgs of ganja. Thereafter, the samples were taken from the bag and the same were marked as MO1 & MO2, the remaining quantity marked as MO3. Thereafter, PW1 arrested the petitioner and produced him before PW4 along with seized contraband. Thereafter, the samples were forwarded to the Forensic Expert (PW3). PW3 examined the samples and confirmed the contraband was ganja and gave report (Ex.P7). Then, the Inspector of Police (PW4) took up further investigation, examined the witnesses, collected the documents and filed charge sheet before the trial Court.

4.During trial, on the side of the prosecution, five witnesses examined as PW1 to PW5 and eleven documents marked as Exs.P1 to P11 and marked three Material Objects as MO1 to MO3. On the side of the defence, no



witness examined and no document marked. On conclusion of trial, the trial Court convicted the petitioner as stated above.

5.The learned counsel for the petitioner submitted that in this case, no private person examined as witnesses during trial and the witnesses examined are all Police personnels except PW3. In the information (Ex.P1), search notice (Ex.P2), inspection memo (Ex.P4), arrest intimation memo (Ex.P5) and special report under Section 57 of the NDPS Act (Ex.P6), there is no mention of quantum of contraband seized from the petitioner. He further submitted that in this case, though there is no mention about refusal of independent witnesses to assist the prosecution in any of the documents, in the evidence of witnesses two private persons name introduced. He further submitted that LW3-Rajarajan is the person who said to have recorded the statement of the petitioner, prepared all exhibits in the scene of occurrence, typed the same in laptop, took print out in the mobile printer, but strangely the said person not examined as witness and no 65-B Certificate produced. In view of the same, the above said documents cannot be considered.



6.He further submitted that in this case, the alleged occurrence is said to have taken place on 15.05.2020, PW2 stated that he produced the contraband to PW3 only on 09.06.2020 with a delay of 28 days, for which no reason given and under whose custody the contraband was entrusted is not known. In this case, Section 52A of NDPS Act not followed since the samples not taken in presence of Magistrate, which is mandatory condition. The Hon'ble Apex Court in the case of “*Union of India Versus Mohanlal and another*” reported in *(2016) 3 SCC 379*” clearly held that violation of Section 52-A is fatal to the case of the prosecution and the accused is entitled for acquittal. In this case, such mandatory not followed by the prosecution.

7.The learned Government Advocate (Crl. Side) appearing for the respondent Police filed counter and opposed the suspension of sentence stating that in this case, PW1 received secret information (Ex.P1), recorded the same and obtained permission from his superior officer (PW4). After getting approval, PW1 along with Police party viz., PW2 and one Rajarajan proceeded to the scene of occurrence and was waiting there. The informant identified the petitioner. The Police party intercepted the petitioner,



enquired him and informed about their right under Section 50 of NDPS Act and search was conducted. The petitioner handed over gunny bag, from which, the contraband ganja found and samples were taken. Since no independent witness was willing to assist the prosecution, in presence of Police personnels, seizure mahazar prepared. Thereafter, the contraband was seized, samples were taken, the petitioner was arrested and produced before PW4 and the special report under Section 57 of NDPS Act prepared. PW4 took up further investigation, recorded the statement of witnesses, collected contraband and sent the same for chemical analysis. PW3, the Scientific Officer examined the samples and confirmed the same as contraband ganja and issued chemical analysis report (Ex.P3) and filed charge sheet. During trial, on the side of the prosecution, five witnesses examined as PW1 to PW5 and eleven documents marked as Exs.P1 to P11. On conclusion of trial, the trial Court convicted the petitioner as stated above.

8.Considering the submissions and on perusal of the materials, it is seen that in this case, after getting permission from the Inspector of Police (PW4), PW1 along with Police party viz., PW2-Head Constable and one



Rajarajan, Head Constable proceeded to Oli Mohamedpet Junction, Kancheepuram. There is no recordings in the exhibits to show that private individuals not willing to assist the prosecution. Admittedly, in this case, the samples not taken in presence of the Magistrate which is mandatory as per Section 52-A of the NDPS Act. The Hon'ble Apex Court in the case of ***“Union of India Versus Mohanlal and another*** reported in ***(2016) 3 SCC 379***” clearly held that violation of Section 52-A is fatal to the case of the prosecution.

9.In this case, the contraband is said to have been seized on 15.05.2020 but the same sent to the forensic expert (PW3) only on 09.06.2020. No reason given for the delay and also in whose custody, the contraband was kept is not known. Hence, the chain of custody not proved in this case. The evidence of PW1 is that he kept the samples in brown colour cover and thereafter, tied with thread and sealed it and marked the same as S1 and S2. On the contrary, the evidence of PW3 is that the specimen S1 was kept in a aluminium foil inside the paper cover. The covering of samples in aluminium foil not stated by PW1. LW3-Rajarajan is the person who typed down the statement of the accused, prepared exhibits



and took print out in the mobile laptop, but strangely the said person not examined as witness in this case. Added to it, PW2 has not spoken about any of the exhibits in his evidence. It is not in dispute that the petitioner has got no criminal antecedents and no case is against him except the above case. In view of the same, the conviction of the petitioner needs reassessment.

10.In view of the above, the Substantive Sentence of Imprisonment imposed on the petitioner is suspended till the disposal of the appeal and the petitioner is ordered to be enlarged on bail, on condition that he shall execute a bond for a sum of Rs.10,000/- (Rupees Ten Thousand only) with two sureties each for a like sum to the satisfaction of the trial Court.

11.The petitioner shall appear before the Trial Court on the first working day of once in three months at 10.30 a.m., until the disposal of the appeal and if he is not able to appear before the Trial Court on that day, he shall make arrangements to file an application under Section 317 Cr.P.C. and shall appear before the Trial Court on any other day in lieu of the date of his absence as directed by the Trial Court. Accordingly, this Miscellaneous



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Petition is ordered.

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29.01.2024

To

- 1.The Principal District and Sessions Judge,
Ariyalur.
- 2.The Inspector of Police,
NIB-CID,
Kancheepuram.
- 3.The Superintendent,
Central Prison-I, Puzhal, Chennai.
- 4.The Public Prosecutor,
High Court, Madras.

M. NIRMAL KUMAR., J.

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