

Bail Slip

The Appellant herein/Accused namely Suresh S/O Murugesan was directed to be released on bail by order of this Court dated 23.04.2012 and made in MCOP No.1 of 2012 in CrI.A.No.261/12.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.03.2018

Pronounced on : 28.12.2018

CORAM

THE HONOURABLE MR.JUSTICE R. SURESH KUMAR

CrI.A.No.261 of 2012

Suresh ... Appellant / Accused

Vs

The Inspector of Police  
C1 Flower Bazaar Police Station,  
Chennai - 600 001. ... Respondent / Complainant

Criminal Appeal filed under Section 374(2) r/w Section 36B of the NDPS Act, 1985, to set aside the conviction and sentence rendered by the Principal Special Judge for NDPS Act, Chennai, dated 21.02.2012 in C.C.No.63/2009 in Cr.No.890 of 2009 for the offence under Section 8(c) r/w 20(b) (ii) (B) of NDPS Act and acquit the accused.

For Appellant : Mr.T.S.Sasikumar

For Respondent : Mr.T.Shanmuga Rajeshwaran  
Govt. Advocate (CrI. side)

J U D G M E N T

This Appeal has been preferred against the Judgment and conviction made by the Principal Special Judge for NDPS Act at Chennai, dated 21.02.2012 made in C.C.No.63 of 2009.

2. The case of the prosecution was that, on 09.11.2009 at about 12 hours (12 Noon) based on the secret information about the illegal custody of dry ganja, after getting prior permission, the Sub Inspector of Police (P.W.1) and his police team attached to C1 Flower Bazaar Police Station went to the spot, i.e., near Ambedkar Nagar Telephone office, Muthusamy

Road, where the accused was identified by the informer. Thus P.W.1 approached the accused and informed him about his right to be searched / examined in front of the concerned Magistrate or Gazetted Officer as per Section 50(1) of the NDPS Act and accordingly, followed all the procedures.

3. Since the accused did not choose to be produced before the Magistrate and he had shown willingness to be searched by P.W.1 himself, the P.W.1 searched the accused and found that, the accused Suresh was in illegal possession of dry ganja of 513 pockets, each will carry 2gm dry ganja without proper permission / approval from the concerned authorities. Immediately the said contraband was seized under the seizure mahazar in the presence of witnesses, namely one Sethuraman, Head Constable, i.e., P.W.2 and another Head Constable Vilvanathan and had taken 13 sample pockets for chemical analysis and the accused was arrested at about 13.30 hours. Along with seized materials, he was brought to the police station at about 14.00 hours. Thereafter a special report was submitted by the P.W.1 and a case was registered in C1 Flower Bazaar Police Station in Crime No.890 of 2009 under Section 8(c) r/w 20 (b) of NDPS Act against the accused and thereafter, the case was handed over to the P.W.4, Inspector of Police, who after having investigated the same sent the accused to the VIII Metropolitan Magistrate Court, George Town, Chennai, where the accused was remanded to judicial custody.

4. Thereafter during the course of investigation, P.W.4 examined the witnesses and recorded the statements and also sent the samples dry ganja to the Forensic Science Department for chemical analysis and thereafter received the report. After completion of investigation, the P.W.4 altered the Section in to 8(c) r/w 20(b) (ii) (B) of NDPS Act and final charge sheet had been filed against the accused before the Special Court for EC Act Cases, Chennai and the same was taken on file vide C.C.No.63 of 2009 on 22.12.2009.

5. On behalf of the prosecution, 4 witnesses were examined, i.e., P.W.1 to P.W.4, 8 Exhibits were marked, i.e., Ex.P.1 to Ex.P.8 and 2 Material Objects were produced.

6. The trial Court after having tried the matter, has given its Judgment, dated 21.02.2012, whereby the trial Court found the accused guilty of the offence punishable under Section 8 (c) r/w 20 (b) (ii) (B) of NDPS Act and accordingly, convicted the accused and sentenced him to undergo 2 years RI with fine of Rs.15,000/-, in default 3 months RI was also imposed. As against the said Judgment and conviction, the accused preferred this Appeal.

7. I have heard Mr.T.S.Sasikumar, learned counsel appearing for the appellant / accused and Mr.T.Shanmuga Rajeswaran, learned Government Advocate (Crl. side) appearing for the respondent / prosecution.

8. It is the case of the prosecution that, on 09.11.2009 at about 12 Noon, the P.W.1, Sub Inspector of Police, while he was on duty had received a secret information from the informer stating that, the accused had been in possession of ganja at the given address and therefore he alerted the police party to act upon. Thereafter the P.W.1 recorded the said information and sought for the permission from P.W.4, which the P.W.4 had given. Thereafter the P.W.1 along with P.W.2 and another Head Constable rushed to the spot in the police vehicle, where they found the accused having a black colour plastic bag and on seeing them, when he tried to flee, he was caught by the police party and thereafter the P.W.1 claimed to have informed to the accused that, he has got right to be searched in front of the Judicial Magistrate or a Gazetted Officer. However, the accused had agreed to be searched by the P.W.1, Sub Inspector of Police himself. Accordingly, the P.W.1 searched the accused and found that, the accused was having 513 numbers of small pockets in light green colour and when they opened the pocket, they found that, it appears to be ganja. Therefore they weighed the pockets and thereafter under seizure mahazar, they seized the contraband and by giving the arrest memo, they also arrested the accused and along with the contraband the accused was brought to the police station at about 2 p.m and thereafter FIR was registered and special report was prepared. Thereafter the investigation was handed over to the P.W.4, who took the investigation and after having sent the accused for remand to the concerned Magistrate Court, the P.W.4 claimed that, he had sent the contraband also under Form No.95 to the learned Magistrate on the same day same time.

9. With regard to these theory of the prosecution and in support of the same, there were four witnesses examined by the prosecution. The P.W.1, Sub Inspector of Police has deposed in his examination that, at exactly 12 Noon on 09.11.2009, he received the secret information from his informer, which has been recorded in Ex.P.1, where the Inspector of Police, i.e., P.W.4 had given permission to P.W.1 and his police party to rush to the spot and act upon.

10. In his cross-examination, the P.W.1 has deposed as follows :

"குறுக்கு விசாரணை / ஆஜர் எதிரியின் மீது எங்கள் காவல் நிலையத்தில் இந்த வழக்கை தவிர வேறு எந்த வழக்கும் கிடையாது"



என்று சொன்னால் சரிதான். எதிரியின் அங்க, அடையாளங்களைப் பற்றி எனக்கு எந்த தகவலும் இல்லை என்றால் சரிதான். தகவல் வரும்போது ஆய்வாளர் நிலையத்தில் இருந்தார். தகவல் கிடைத்து 20 நிமிடத்தில் சம்பவ இடம் பறப்பட்டு சென்றோம். நிலைய வாகனத்தில் சொன்றோம். பொது நபர் சாட்சிகளை அழைத்தோம். அவர்களின் பெயர்கள் ரூபகம் இல்லை. சம்பவ இடத்திற்கு நான் மற்றும் 2தலைமைக் காவலர்கள், தகவலாளி அந்த நபருக்கு 5 அடி தூரத்தில் இருந்தார். எனக்கு எதிரிக்கும் 20 அடி தூரம் இருக்கும். எங்களுக்கு தகவலில் நானே நேரடியாக வந்து எதிரியை அடையாளம் காண்பிக்கிறேன் என்று இல்லை. தராதசை எந்த எடையில் வாங்கி வந்தார்கள் என்று எனக்கு தெரியாது. நகை போடும் தராக மற்றும் 1 கிலோ வரை எடைபோடக்கூடிய பெரிய தராக. எடை கற்கள் 1 கிராம் முதல் 5 கிலோ வரை எடைபோடும் தராதசை எடுத்து வந்தார். அவற்றில் 5 கிலோ வரை எடை போடலாம். ஒவ்வொரு பொட்டலத்தையும் பிரித்துப் போட்டு எடை போடவில்லை. பொட்டலங்களுடன் எடைபோட்டோம். கைப்பற்றப்பட்ட வழக்கு சொத்தை மொத்தமாக பொட்டலங்களுடன் தான் எடைபோட்டோம். சுமாராக நாங்கள் 2 கிராம் எடைபோட்டோம். 513 பொட்டலங்களையும் வரிசை எண் கொடுக்கவில்லை. சாம்பிலுக்கும் வரிசை எண் கொடுக்கப்படவில்லை. இன்ஸ்பெக்டர் மெமோ தயாரிக்கவில்லை. நிலையத்திற்கு 14 மணிக்கு வந்தோம். சம்பவ இடத்தில் வேறு நபர்களும் கஞ்சா விற்பனை செய்வார்கள் என்றால் சரியில்லை. ஆஜர் எதிரி ரிக்சுடா ஓட்டுபவர். கூலி வேலைக்கு போகிறவர் என்றால் தெரியாது. எனக்கு தகவல் வந்ததாக சொன்னது உண்மைக்கு மாறானவை என்று சொன்னால் சரியல்ல. நான் மேற் சொன்ன சம்பவ இடத்தில் கஞ்சா யார் விற்கிறார்கள் என்று கண்காணிக்கும் போது எதிரி மீது சந்தேகத்தின் பேரில் அவர் மீது வழக்கு பொய்யாக போடப்பட்டுள்ளது என்று சொன்னால் சரியல்ல. இந்த வழக்கிற்கும் எதிரிக்கும் வழக்கு சொத்திற்கும் எந்த சம்பந்தமும் இல்லை என்று சொன்னால் சரியல்ல."

11. The P.W.1 states that, the police team started from the police station after 20 minutes from the receipt of the secret information, which means that, they started by 12.20 p.m. P.W.1 had further stated that, each and every pocket has not been opened and weighed, but without opening each of the pocket, it was weighed. He has further stated that, all the seized contraband pockets had been combinely weighed (கைப்பற்றப்பட்ட வழக்கு சொத்தை மொத்தமாக பொட்டலங்களுடன் தான் எடை போட்டோம்) / Whereas the P.W.2 Head Constable in his cross-examination has stated as follows :

"குறுக்கு விசாரணை - நான் சம்பவ தேதியில் தலைமை காவலர் பொறுப்பில் இருந்தேன். தகவல் வரும் போது இன்ஸ்பெக்டர் ரோந்து பணியில் இருந்தார். உதவி ஆய்வாளர் என்னை சம்பவ இடத்திற்கு அழைத்தார். காவல் நிலையத்திலிருந்து சம்பவ இடத்திற்கு காவல் நிலைய வாகனத்தில் வந்தோம். நாங்கள் சம்பவ இடத்திற்கு

போகும்போதே சம்பவ இடத்தில் இருந்தார். இந்த தராசை உதவி ஆய்வாளர் நிலையத்திலிருந்து கொண்டு வந்தார். ஒரு பொட்டலத்தை பிரித்து எடை போட்டோம் 2 கிராம். பிறகு எல்லாம் பொட்டலங்களையும்து எடைபோட்டு பார்த்தோம் 1.026 கிலோ கிராம் இருந்தது. மாதிரி பொட்டலங்கள் 13 எடை போட்டு எடுத்தோம். 513 பொட்டலங்களையும்து பிரித்து கஞ்சாவை 13 எடை போட்டு எடுத்தோம். 513 பொட்டலங்களையும்து பிரித்து கஞ்சாவை சோத்து அதிலிருந்து 13 பொட்டலங்களை மாதிரிக்கு எடுத்தோம். மகஜர் சம்பவ இடத்தில் எழுதப்பட்டது. சம்பவ இடத்தில் மகசர் மற்றும் சோதனை அறிவிப்பு, எழுதினோம். கைதி குறிப்பாணை சம்பவ இடத்திலேயே தயார் செய்தோம். முதல் தகவல் அறிக்கை நிலையத்தில் தயாரிக்கப்பட்டு குற்ற எண் கொடுக்கப்பட்டுள்ளது. தகவலின் பெயரில் சம்பவ இடத்திற்கு போகவில்லை என்றால் அது சரியல்ல. சம்பவ இடமானது கஞ்சா விற்பது பற்றிய விவரங்களை கேட்கும் பொழுது சொல்ல மறுத்த காரணத்தினால் இந்த வழக்கு அவர் மீது பொய்யாக தொடரப்பட்டது என்றால் அது சரியல்ல."

12. The P.W.1 and P.W.2, who are the only witnesses explain about the entire occurrence has stated statements in the cross-examination, which are completely contradictory to each other as P.W.1 and P.W.2 has not corroborated each other.

13. That apart the P.W.1 states that, he did not know from where they brought the balance (தராசை எந்த எடையில் வாங்கி வந்தார்கள் என்று எனக்கு தெரியாது), whereas the P.W.2 says the balance was brought by P.W.1, Sub Inspector of Police from the police station (இந்த தராசை உதவி ஆய்வாளர் நிலையத்திலிருந்து கொண்டு வந்தார்). There is complete contradiction between P.W.1 and P.W.2 in this regard as to by whom and from where the balance was brought in.

14. The further contradiction to be noted is that, the P.W.2 in his cross-examination has stated that, at the time of receipt of secret information, the Inspector of Police, i.e., P.W.4 was in rounds (தகவல் வரும் போது இன்ஸ்பெக்டர் ரோந்து பணியில் இருந்தார்). However, the P.W.4, the Inspector of Police in his cross-examination has stated that, when the Sub Inspector received the information, I was at the station (உதவி ஆய்வாளருக்கு தகவல் வந்த போது நான் நிலையத்தில் இருந்தேன்).

15. It is pertinent to be noted that, there is absolutely no independent witnesses on the side of the prosecution, except the P.W.1, Sub Inspector of Police, P.W.2, Head Constable, P.W.4, Inspector of Police, i.e., the Investigating Officer.

16. In this regard, it is the case of the prosecution that, at the time of occurrence or before search and seizure, when they called for public to be witnesses, no one has come forward.

However not even single person's name from the public has been mentioned by the prosecution to state that, they made an attempt to invite the public to be witnesses. Therefore it was a mere statement on the side of the prosecution that, though they invited the public to be witnesses, no one turned up.

17. Whether the prosecution had really seized 513 pockets of contrabands and whether they really weighed each of the pocket to measure the weight is a question to be probed.

18. In this context, the P.W.1, Sub Inspector of Police says that, without opening each of the pocket, they weighed the pockets, whereas the P.W.2, Head Constable says that, all the 513 pockets had been opened and the contraband had been put together, from where they prepared 13 pockets for sample. Whereas in this context, when this was specifically raised by the defence side before the trial Court, the learned trial Court Judge has given his reason rejecting the defence theory, which reads as follows :

"ஆனால், எதிரி தரப்பில் வாதிட்டபோது, 13 பொட்டலங்கள் மட்டுமே ரசாயன பரிசோதனைக்கு அனுப்பப்பட்டுள்ளது என்றும், மீதியிருந்த 500 பொட்டலங்களை அனுப்பாத காரணத்தால், அதில் கஞ்சா தான் இருந்தது என்று முடிவு செய்வதற்கு வாய்ப்புகள் இல்லை என்றும், அதற்கேற்றவாறு தீர்மானம் செய்ய வேண்டும் என்றும் வாதிடப்பட்டது.

ஆனால், அந்த வாதம் ஏற்றுக்கொள்ளக்கூடியதாக இல்லை. அசா1, 2 இருவரும் சாட்சியத்தில், அனைத்து பொட்டலங்களையும் பிரித்துப் பார்த்ததில் கஞ்சா என்ற போதைப் பொருள் இருந்ததாகவும், அதில் 13 பொட்டலங்களிலிருந்து 26 கிராம் எடையுள்ள போதைப்பொருளை தனியாக மாதிரிக்கு எடுத்து, ரசாயன பரிசோதனைக்கு அனுப்பியதாக தெளிவாக கூறியுள்ளார்கள்."

19. When it was the statement of P.W.1 that, they weighed all the 513 pockets without opening it, it was the statement of the P.W.2, Head Constable that, they opened all the 513 pockets and put the contraband together and thereafter they prepared 13 pockets of contraband for sample for the purpose of chemical analysis. Whereas the learned Judge has stated in his reasoning in the Judgment impugned that, the P.W.1 and P.W.2 both in their deposition had stated that, all the pockets were opened, where they found that, the contraband ganja was available and they took 13 pockets consisting of 26 grams, i.e., 2 grams each as sample for the purpose of chemical analysis. The learned Judge has neither taken the version of P.W.1 nor taken the version of P.W.2 and in fact, he has taken a version mixing the version of P.W.1 and P.W.2 in this regard and has given his own version in the Judgment impugned in this context, which is completely erroneous.



20. The secret information had come to the P.W.1 at 12 Noon, which was recorded in writing under Ex.P.1. At that time, according to P.W.1, the P.W.4 Inspector of Police was not in station, only thereafter he could have come to the station and then only he had given permission to the police team to rush to the spot and that is the reason why it has been stated by the P.W.1 that, they left police station after 20 minutes from receipt of the information. Assuming that, the team left at 12.20 p.m, they would have reached the spot by 12.30 p.m, where after caught the accused and after explaining the right of the accused under Section 50(1) of the NDPS Act and after inviting the public witness, which they refused, after getting the concurrence of the accused to be searched by the P.W.1 himself and thereafter search would have been taken place and after found the contraband consisting of 513 pockets and according to them, since each of the pocket had been weighed, every pocket should have been put in the balance and after noting the weight only, they could have taken the other pocket. Therefore for weighing the 513 pockets one by one, definitely it would have taken minimum of at least 250 minutes and thereafter only seizure mahazar could have been prepared and arrest memo could have been given to the accused and then only he would have been arrested. However the prosecution theory is that, every thing was happened between 12.30 to 1.30 p.m, as by 1.30 p.m, after seizure of contraband, taking the measurement, the accused was arrested and in fact he was brought to the station by 2 p.m.

21. All these acts could not have been taken place within a span of one hour, if really they have measured all the 513 pockets of contraband as they claimed. Therefore it is thoroughly impossible or hardly to believe the theory of prosecution in this context.

22. It is the further case of the prosecution, as has been deposed by P.W.4, Investigating Officer that, after having sent the accused for remand to the concerned Magistrate Court, the seized contraband had been also sent to the Court under Form No.95. However, no such Form No.95 had been marked before the trial Court and this aspect has not been questioned by the trial Court.

23. In the absence of Form No.95, it is highly doubtful whether the contraband had been accompanied along with Form No.95 on the same day of arrest and remand of the accused and in this context, the law has been well settled that, delay in producing the contraband would vitiate the prosecution case under NDPS Act.

24. In this context, though number of decisions has been cited by the learned counsel appearing for the appellant / accused, one such decision reported in 1993 Supp (3) SCC 665 in the matter of Valsala v. State of Kerala can be pressed into service, where the Hon'ble Supreme Court has made the following findings and observation :

"4. We have seen the report of the Chemical Examiner and there no doubt it is mentioned that one sealed parcel was received containing a powder and it was analysed to be Brown Sugar. But from the records it is clear and it is also noted by both the courts below that the seized article was produced in the court only on 14.1.88 i.e. after a period of more than three months and there is no evidence whatsoever at all to show with whom the seized article was lying and even assuming that it was in the custody of P.W.6, the Officer-in-charge of the Police Station who seized it, there is again nothing to show whether it was sealed and kept there. The learned Counsel for the State no doubt argued that the provisions of Section 55 of the Act are not mandatory but only directory. We need not go into this legal question in this case. Suffice it to say that the article seized appears to have been not kept in proper custody and proper form so that the court can be sure that what was seized only was sent to the Chemical Examiner. There is a big gap and an important missing link. In the mahazar Ex.P.2 which is immediately said to have been prepared, there is nothing mentioned as to under whose custody it was kept after seizure. Unfortunately for the prosecution even P.W.6 does not say that he continued to keep it in his custody under seal till it was produced in the court on 14.1.88. The evidence given by P.W.6 Police Sub-Inspector, who seized the article is absolutely silent as to what he did with the seized article till it was produced in the court. As a matter of fact he did not produce it in the court. P.W.3, A.S.I. is supposed to have produced the same in the court. But P.W.3 does not say anything about this. It is only P.W.7. the Circle Inspector who comes into the picture at a later date, who



admitted in the cross-examination that the seized article was sent by P.W.3 (A.S.I.) to the court and P.W.7 in his cross-examination further admitted that he did not even see if the recovered material object was sealed but still he claims that he made the necessary application for sending the material object for chemical examination and it is only through P.W.7 that the Chemical Examiner's Report is marked. P.W.7 further admitted that he did not even know when it reached the court. We are constrained to say that the investigation in this case has been perfunctory and on important aspects the evidence of the concerned officers is highly discrepant and unconvincing and does not throw much light. Therefore the evidence adduced is wholly insufficient to conclude that what was seized from the appellant alone was sent to the Chemical Examiner. Though this is purely a question of fact but this is an important link. Both the courts below have not examined this aspect in a proper perspective. No doubt the trafficking in narcotic drugs is a menace to the society but in the absence of satisfactory proof, the courts can not convict.

5. In the result the judgment of the learned Sessions Judge as affirmed by the High Court is set aside and the convictions and sentences passed against the appellant are also set aside. If the appellant is in jail, she shall be set at liberty forthwith. The appeal is accordingly allowed."

25. Here in the case in hand, the very Form No.95 itself is in absence, as the same has not been shown as an Exhibit. Therefore it can be presumed that, there had been no production of contraband under Form No.95 to the concerned Magistrate Court on the same date.

26. When these contradictions are found from the evidences of the prosecution and in absence of any independent witness from the prosecution side and there is no mentioning about the name of one or two public, who are attempted to be the witness, who refused and also in the absence of Form No.95, which was not produced before the trial Court by the prosecution, without appreciating these lacuna or flaw on the part of the prosecution, the learned Judge in the trial Court has accepted

the theory of prosecution and has convicted the appellant / accused.

27. However when this Court applied its mind on the facts and circumstances of the case as well as the prosecution theory and the supporting evidence produced on the side of the prosecution, has come to a irresistible conclusion that, there has been a complete flaw on the side of the prosecution to substantiate their case by giving cogent and believable evidence. Therefore this Court has no hesitation to come to a conclusion that, the prosecution has not proved their case beyond reasonable doubt. Hence, by giving the benefit of doubt, this Court is of the considered view that, the accused cannot be found guilty for the alleged offence. Therefore he is entitled to get acquittal.

28. In the result, the Judgment and conviction made by the trial Court in C.C.No.63 of 2009, dated 21.02.2012 on the file of the Principal Special Judge for NDPS Act, Chennai, is hereby set aside and the accused therefore is set at liberty. If there is any bail bond executed by the accused, the same shall be discharged forthwith. The fine amount, if any paid by the appellant shall be refunded. Hence the Criminal Appeal is allowed accordingly.

Sd/-  
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

tsvn

To

1. The Principal Special Judge for NDPS Act  
Chennai.
2. The Inspector of Police  
C1 Flower Bazaar Police Station,  
Chennai - 600 001.

3. The Public Prosecutor  
High Court of Madras, Chennai.

Copy to

The Section Officer,  
Criminal Section, High Court, Madras-104.

Crl.A.No.261 of 2012

sv[co]  
srg 30/01/2019



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