

N.Raju Vs. the State Rep by

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Court : Chennai

Decided On : Sep-24-2014

Judge : P.R.Shivakumar

Appellant : N.Raju

Respondent : The State Rep by

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED: 24.09.2014 CORAM THE HONOURABLE MR.JUSTICE P.R.SHIVAKUMAR Criminal Appeal(Md.No.92 of 2008 N.Raju ..Appellant versus The State rep by Inspector of Police, NIBCID Police, Trichy District.

(Crime No.26 of 2007) ..Respondent Appeal filed under Section 374(2) Cr.P.C., to set aside the judgment and sentence passed in C.C.No.108 of 2007, dated 13.02.2008 on the file of the Additional District and Sessions Court, Special Court for E.C.Act and NDPS Act, Pudukkottai, convicting the appellant under Section 8(c) r/w 20(b)(11)(B) of NDPS Act, 1985 and amended as Act 9 of 2001 and sentence to undergo one year Rigorous Imprisonment and imposed a fine of Rs.1,000/- in default to undergo 2 weeks Rigorous Imprisonment.

!For Appellant : Mrs.R.Yamuna ^For Respondent : Mr.T.Mohan, Additional Public Prosecutor.

:

JUDGMENT

The sole accused in C.C.No.108 of 2007, who was convicted in the said case by the learned Additional District and Sessions Judge, Special Court for E.C.Act and NDPS Act, Pudukkottai for an offence under Section 8(c) read with 20(b)(11)(B) of NDPS Act, 1985 and sentenced to undergo Rigorous Imprisonment for one year and also to pay a fine of Rs.1,000/- and to undergo 2 weeks Rigorous Imprisonment in case of default in payment of fine, is the appellant/accused in the present appeal preferred under Section 374 (2) of the Code of Criminal Procedure.

2.The prosecution story, in brief, can be stated as follows:- (i) On 17.03.2007 at about 5.00 a.m when P.W.1-Balasubramanian was on duty as the Sub Inspector of Police in the Narcotic Intelligence Wing, Trichy he received an information from the informant (undisclosed) who came to the police station.

P.W.1 recorded the information as Ex.P.1 and got necessary permission from P.W.3 for taking action after passing on the information to P.W.3-Umasankar, the then Inspector of Police.

Thereafter, along with the secret informant, Head Constable/Baskaran and other members of the police party, P.W.1-Balasubramanian, Sub Inspector of Police, went to Ramji Nagar near Trichy bus-stand and was watching for the suspicious movements of persons with narcotic drugs.

At about 6.00 a.m, the appellant/accused Raju came there holding a polythene bag in his hand.

The informant identified him to be the person selling ganja and left the place as advised by P.W.1.

P.W.1 introduced himself to the appellant/accused showing his identity card and informed him that he was going to search the appellant/accused and that the appellant/accused could have the search being conducted in the presence of the nearest Judicial Magistrate or a Government Gazetted Officer.

The appellant/accused replied that he did not want to be taken either to a Judicial Magistrate or to a Government Gazetted Officer for such search and on the other hand, the police themselves could conduct the search.

He expressed his consent for such search under Ex.P.2.

Pursuant to such consent, the polythene bag which was in the possession of the appellant/accused was searched and it was found by P.W.1 that it contained 2250 grams of ganja, a narcotic drug and psychotropic substance as defined under the Narcotic Drugs and Psychotropic Substances Act, 1985.

From the said contraband, P.W.1 took two samples for chemical analysis and sealed them in the presence of witnesses.

The samples from the contraband allegedly seized from the appellant/accused are M.Os.1 and 2.

The remaining contraband was seized in a cover namely, M.O.3 under Ex.P.3-seizure mahazar.

Thereafter, the appellant/accused was arrested for possessing ganja, a narcotic drug and psychotropic substance for sale and the arrest memo prepared by P.W.1 for the said purpose is Ex.P.4.

Along with the samples, the seized contraband and the accused, who was arrested in the place of occurrence, P.W.1 returned to the police station, prepared Ex.P.5-FiRs.Information Report and registered a case in Crime No.26 of 2007 on the file of the NIB CID, Trichy for an offence punishable under Sections 8 (c) read with 20(b)(ii) (B) of the NDPS Act, 1985 and submitted the file to the Inspector of Police (P.W.3) along with Ex.P.6- detailed.

(ii) P.W.3-Umasankar, the then Inspector of Police took up the investigation, examined the witnesses recorded their statements under Section 161 (3) Cr.P.C and submitted a requisition to the Court under Ex.P.8 to send the samples for chemical analysis.

The samples were sent to the Assistant Director of Narcotic Wing, Regional Forensic Laboratory, Madurai along with the requisition letter-Ex.P.7.

During the couRs.of investigation P.W.3 received a copy of Ex.P.9-chemical analysis report sent to the Court from the Regional Forensic Laboratory, Madurai, examined and recorded the statement of P.W.2-Annammal Mary-Scientific Assistant, completed the investigation and submitted a final report against the appellant/accused alleging the commission of offence under Sections 8 (c) read with 20(b)(ii) (B) of the NDPS Act, 1985 by him.

3.After considering the records and after hearing the submissions made on behalf of the prosecution and also the appellant/accused, the learned trial Judge framed a charge for an offence under Sections 8 (c) read with 20(b)(ii) (B) of the NDPS Act, 1985 and recorded the plea of the accused, who claimed that he was not guilty of the offence.

Consequently, a trial was conducted, in which three witnesses were examined as P.Ws.1 to 3 and 9 documents were marked as Exs.P.1 to 9 besides producing M.Os.1 to 3 on the side of the prosecution in order to prove the charge against the appellant/accused.

On completion of the evidence adduced on the side of the prosecution, the appellant/accused was given an opportunity to explain the incriminating materials found in the evidence adduced on the side of the prosecution by recording his statement under Section 313(1)(b) of Cr.P.C denied the evidence adduced on the side of the prosecution to be false and contended that the case was one foisted against him by the police for the statistical purpose.

He did not examine any witness on his side.

4.The learned trial Judge, after hearing the arguments advanced on both sides, considered the evidence and upon such consideration pronounced a judgment holding the appellant/accused guilty of the offence under Sections 8 (c) read with 20(b)(ii) (B) of the NDPS Act, 1985 for which he was prosecuted and sentencing him to undergo punishment as indicated supra.

The said judgment of the trial Court is challenged by the appellant/accused on various grounds set out in the appeal petition.

5.The point that arises for consideration in this appeal is as follows:- Whether the judgment of the trial Court convicting and sentencing the appellant/accused for the offences under Sections 8 (c) read with 20(b)(ii) (B) of the NDPS Act, 1985 suffers from any defect or infirmity requiring interference by this Court in respect of conviction or in respect of punishment??.

6.The arguments advanced by Mrs.R.Yamuna, learned counsel for the appellant/accused and Mr.T.Mohan, learned Additional Public Prosecutor for the respondent were heard.

The judgment of the trial Court and the materials available on record sent from the Court below were also perused.

7.Learned counsel for the appellant/accused has contended that except P.W.1-the Sub Inspector of Police, who allegedly received the secret information and proceeded to the place of occurrence to arrest the accused with the contraband and the Inspector of Police, who is said to have investigated the case, no other witness to prove the prosecution case regarding the alleged receipt of secret information, recording of the same and obtaining orders from the superior for proceeding to the place for the seizure of the contraband and arrest of the accused, was examined The further contention of the learned counsel for the appellant/accused is that no independent witness was examined to prove the seizure of the contraband from the appellant/accused, when the alleged occurrence of arrest and seizure took place in the public vicinity at a place where several persons would have visited.

The learned counsel for the appellant/accused also contended that, according to the evidence of P.W.1-Sub Inspector of Police, the informant accompanied him to the place of occurrence and it was he who identified the appellant/accused pursuant to which the appellant/accused, was stopped and a search was made by P.W.1.

If at all no other independent witness was available at that place, nothing prevented P.W.1-the Sub Inspector of Police to have the secret informant at least as one of the attestors of the search and seizure mahazar.

The further contention of the learned counsel for the appellant/accused is that there is vital contradiction between the evidence of P.W.1-Sub Inspector of Police and P.W.3-Inspector of Police regarding the order said to have been obtained before P.W.1 proceeded towards the place of occurrence.

8.Learned counsel for the appellant/accused pointed out the fact that there was an admission by P.W.1-Sub Inspector of Police that the place of occurrence was on the main road and was at a distance of two kilo meters from Trichy and that it was a place called Ramji Nagar wherein there was a lot of vehicle traffic and movement of people.

It is the contention of the learned counsel for the appellant/accused that the evidence of P.W.1-Sub Inspector of Police to the effect that the members of public who were invited by P.W.1 to be witnesses for the search declined his invitation and therefore, he had to get the signature of the appellant/accused in Ex.P.2-consent letter and conduct the search in the presence of the police personnels could not be believed.

Learned counsel for the appellant/accused pointed out the fact that P.W.1 could have issued summons and asked the persons present there to be witnesses for the search and seizure but he did not issue such summon in writing and that the same itself might go to show that there was a concoction of a story by the prosecution for the purpose of statistics.

9.Learned counsel for the appellant/accused contended further that even though two head constables by names, Baskaran and Muthuramalingam, were projected as the witnesses who attested the letter giving consent for search on the spot itself without taking the appellant/accused to the nearest Judicial Magistrate or a Government gazetted officer, none of the said witnesses was examined by the prosecution and that non examination of the said persons will strengthen the suspicion that surrounds the story of arrest of the appellant/accused and seizure

from the appellant/accused when he was found possessing the contraband that the same could not be true and the case could have been a concocted one.

10.Learned counsel for the appellant/accused also pointed out that the testimony of P.W.1 that, he on receipt of the secret information from the informant recorded the same and got the permission of the Inspector of Police-P.W.3 over phone, whereas P.W.3-the Inspector of Police in his evidence denied and not supported the said contention of P.W.1 and that P.W.3's evidence is to the effect that he came to know about the case only on receipt of the FiRs.Information Report prepared by P.W.1 after his return from the place of occurrence along with the contraband and the appellant/accused, and contended that the said discrepancy coupled with the failure to produce any proof in writing that the secret information was recorded and the same was placed before a higher official and his permission for proceeding to the place of occurrence was obtained will cast grave suspicion on the prosecution version.

Learned counsel for the appellant/accused also pointed out the contradiction between the evidence of P.W.1 and P.W.3, regarding the time at which the secret information was received by P.W.1.

Since according to P.W.1, he got the information at 5.15 a.m on 17.03.2007, recorded the same, obtained the permission of the Inspector of Police over phone and proceeded towards the scene of occurrence at 5.30 a.m and intercepted the appellant/accused at the place of occurrence at 6.30 a.m on the same day, whereas according to the evidence of P.W.3, the time of receipt of the secret information was noted as 8.30 a.m in the FiRs.Information Report.

It is his further submission that even though only other witness namely, Annammal Mary-P.W.2 would have confirmed that the samples allegedly taken from the contraband seized from the appellant/accused was found to be ganja, the other discrepancies found in the case of the prosecution were not adverted to by the learned trial Judge and that the same led to erroneous and rather a perverse finding that the prosecution case was proved by the police beyond reasonable doubt.

11. Per contra, learned Additional Public Prosecutor for the respondent police would contend that the identity of the secret informant employed by the police could not be revealed by making him to be witness for the arrest and seizure and attestation of the documents prepared in the place of occurrence; that such revelation will diminish his utility as a secret information and that the same was the reason why P.W.1 did not ask him to be a witness.

It is his further contention that the evidence of P.W.1 that the public, who were invited by P.W.1 to be witnesses, did not oblige and hence he was left with no other option than to proceed with the search and arrest in the presence of the police witnesses and that therefore, the mere fact that only the official witnesses (police) acted the attestors of the consent letter, the search and seizure mahazars shall not be enough to cause any reasonable doubt on the prosecution case.

12. Learned Additional Public Prosecutor has contended further that the contention raised on behalf of the appellant/accused that there was contradiction between the evidence of P.Ws.1 and 3 regarding the time of receiving the secret information, was made on a mistaken understanding of the particulars found in Ex.P.5-FIR.

Learned Additional Public Prosecutor has contended that the fiRs.page of Ex.P.5-FIR recites the date and time of the occurrence as 17.03.2007 and 6.30 a.m respectively, whereas the date and time of receipt of the information (referring to the registration of the FIR) was noted as 17.03.2007 and 8.30 a.m in the second page of the FIR.

It is his further argument that the time at which the secret information was received, the time at which the permission of the Inspector of Police was obtained, the time at which the police party headed by P.W.1 started from the police station towards the place of occurrence, the time at which they reached the place of occurrence and the time at which they intercepted the appellant/accused and seized the contraband from him have been noted as 5.00 a.m, 5.15 a.m, 5.30 a.m, 6.00 a.m and 6.30 a.m respectively.

Learned Additional Public Prosecutor would also contend that the time noted in column 3(b) of the FiRs.Information Report was the time at which at which the

FiRs. Information Report came to be prepared, after the police party headed by P.W.1 returned to the police station along with the appellant/accused and the contraband and that hence no discrepancy could be found in the same.

13. The above said submissions made on both sides have been taken into consideration.

14. The alleged secret information received by P.W.1 and recorded by him has been produced as Ex.P.1.

In Ex.P.1, it has been stated that at 5.00 a.m on 17.03.2007 when P.W.1 was in the office, his secret informant appeared in person and gave information that the appellant/accused was selling ganja near Ramji Nagar bus stop in the morning hours. According to the testimony of P.W.1, after recording the said information, he informed the same to the Inspector of Police over phone, got his permission and then proceeded towards the place of occurrence.

15. Learned counsel for the appellant/accused contended that a written permission ought to have been obtained.

But Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act, 1985 does not contemplate a written permission to be obtained from the higher official.

It has been contended on behalf of the prosecution that only oral permission was obtained.

However, there is nothing in the endorsement made by P.W.3 on Ex.P.1 to show that the same was received on 17.03.2007 at Trichy NIBCID office.

As rightly contended by the learned counsel for the appellant/accused both the police witnesses before whom allegedly the search was made and samples were drawn were not examined as witnesses on the side of the prosecution.

The consent letter allegedly prepared in their presence and signed by the appellant/accused that he could be searched at the place of occurrence by P.W.1 himself without taking him to the nearest Judicial Magistrate or a Gazetted Officer has been produced as Ex.P.2.

The mahazar for seizure and for drawing the samples for chemical analysis has been produced as Ex.P.3.

The fiRs.witness is said to be one Baskaran (Head Constable) and the second witness is said to be one Muthuramalingam, (Head Constable).Though the number of Muthuramalingam has been furnished by P.W.1 as H.C.977, he has not furnished the number of Head Constable (Baskaran).His number has been noted as H.C738in Exs.P.2, 3 and 4.

Since they are not so legible P.W.1 did not furnish his number in his evidence and at the same time chose to furnish the number of other witness (Muthuramalingam) alone.

FiRs.Information Report has been produced as Ex.P.5 and the detailed report under Section 57 of the Narcotic Drugs and Psychotropic Substances Act, 1985, has been produced as Ex.P.6.

It is true that there is a discrepancy between the evidence of P.Ws.1 and 2 regarding the time at which the information was received.

According to P.W.1's evidence and Exs.P1 and P.6, the oral information from the secret informant was received at 5.00 a.m, the same was recorded under Ex.P.1 at 5.15 a.m and at 6.30 a.m the appellant/accused was arrested, search and seizure were made at the place of occurrence.

However, in Ex.P.5-FIR it has been noted at serial No.3 (b) that the information in the police station was received on 17.03.2007 at 8.30 a.m.If at all, the said timing refers to the time of preparation of FIR in the printed form, it should have been clearly stated in serial No.4 of the printed FIR that the information was received in the form of a report of P.W.1-Sub Inspector of Police, which shall have been in writing.

Quite surprisingly the defacto complainant himself has recorded the FiRs.Information Report with the recitals in the fiRs.page that the same was registered on information.

In the second page at the conclusion of FiRs.Information Report, the date and time have been noted as 17.03.2007 and 8.30 a.m.Of course, it can be taken as one referring to the time of registration of the FiRs.Information Report.

16.Apart from the said minor discrepancy regarding the time of receiving the information in the police station, which may be disregarded as a mistake committed during the preparation of the FIR and a trivial discrepancy, there are more vital aspects, as contended learned counsel for the appellant/accused that will make inroads into the probabilities of the prosecution version and will cause very serious doubt on the prosecution story.

According to P.W.1, he obtained the permission of P.W.3 before the proceeding to the place of occurrence after recording Ex.P.1-information and got the permission of P.W.3 to do so.

No such order granting permission was obtained in writing as pointed out supra.

Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act, 1985 simply states that when the information is taken down in writing, the Officer doing so should send a copy thereof to his immediate official superior.

There is nothing in the provision that permission to proceed should be obtained in writing.

However, P.W.1 asserts that he got permission from P.W.3 over phone.

But the evidence of P.W.1 regarding his getting permission over phone from P.W.3 has not been supported by P.W.3.

17.Though there were only three witnesses (all police personnels) who witnessed the occurrence, except P.W.1 who was the head of the raiding party, other witnesses were not examined.

No acceptable explanation is forthcoming from the prosecution for the same.

Two Head Constables are projected to be the witnesses who attested the consent letter for search and seizure mahazars and the arrest report, for the reasons best

known to the prosecution, none of them came to be examined.

The non-examination of such persons will be detrimental to the prosecution case, as it could be construed as a device adopted by the prosecution to avoid contradictions being elicited from them.

As rightly contended by the learned counsel for the appellant/accused, when the witnesses are all official witnesses, despite the fact that the independent persons could have been asked to be the witnesses for the preparation of the mahazar and the other documents in the place of occurrence, the non-examination of even the official witnesses will be viewed with suspicion.

Moreover, the evidence of P.W.3 shall not help the prosecution to prove its case regarding the occurrence.

He has simply forwarded the contraband for chemical analysis examined the witnesses who were official witnesses and submitted a final report.

For the proof of the alleged occurrence, we do have no other witness except the testimony of P.W.1, whose evidence has to be approached with utmost care and caution as he could be even stated to be an interested witness in the light of the fact that his evidence that he obtained oral permission from P.W.3 was not supported by P.W.3.

His evidence becomes unreliable and it shall not be safe to base a conviction on the basis of such uncorroborated testimony of P.W.1.

The learned trial Judge, as rightly pointed out by the learned counsel for the appellant/accused, failed to appreciate his evidence in proper perspective and such a failure on the part of the Court below has led to an erroneous finding holding the charge against the appellant/accused for the offence punishable under Sections 8(c) r/w 20(b)(11)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 to have been proved by the prosecution beyond reasonable doubt.

The said finding according to the considered view of this Court, is defective and erroneous, if not perverse, and thus is liable to be set aside.

18. For all the reasons stated above, this Court comes to the conclusion that the judgment of the trial Court convicting the appellant/accused herein for the offence punishable under Sections 8(c) r/w 20(b)(11)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985 holding him guilty of the said offence cannot withstand the scrutiny of this Court and the same is liable to be interfered with, reversed and set aside, with the result that the appellant/accused is entitled to be acquitted holding that the prosecution failed to prove the charge beyond reasonable doubt.

19. In the result, the Criminal Appeal is allowed.

The judgment of the trial Court convicting the appellant/accused is reversed and the conviction recorded by the trial Court is set aside.

The appellant/accused is acquitted of the offence with which he stood charged.

The fine amount, if any, paid by him shall be refunded.

As it is reported that the appellant/accused is on bail, the bail bond shall stand cancelled.

To The Additional District and Sessions Court, Special Court for E.C. Act and NDPS Act, Pudukkottai.

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