

**Sampath Kumar Vs. The State Represented By**

**Sampath Kumar Vs. The State Represented By**

**SooperKanoon Citation :** [sooperkanoon.com/36640](http://sooperkanoon.com/36640)

**Court :** Chennai

**Decided On :** Jan-28-2015

**Judge :** M.Sathyannarayanan

**Appellant :** Sampath Kumar

**Respondent :** The State Represented By

**Judgement :**

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED :

28. 01.2015 CORAM THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN Criminal Appeal (MD)No.294 of 2006 Sampath Kumar ... Appellant/ A.2 Vs. The State represented by The Inspector of Police, NIB CID, Tuticorin. (Cr.No.30 of 2004) ... Respondent/ Complainant Prayer : Appeal filed under Section 374 of the Code of Criminal Procedure, against the judgment passed in C.C.No.518 of 2004, dated 29.05.2006, by the learned Special District and Sessions Judge, (NDPS Act and EC Act Cases), Madurai. !For Appellant : Mr.P.Saravanan Amicus Curiae ^For Respondent : Mrs.S.Prabha, Government Advocate (Crl.Side) :

**JUDGMENT**

The appellant is the second accused in C.C.No.518 of 2004 on the file of the Special District and Sessions Court (NDPS Act and EC Act Cases), Madurai. There were totally three accused before the trial Court. A.3 after trial, was

acquitted of the charges under Section 8(c) read with Section 25 of the Narcotic Drugs and Psychotropic Substances Act, 1985, (in short 'NDPS Act'). A.1 and A.2 stood charged, tried and convicted as follows: Accused Conviction Sentence A.1 U/s 8(c) r/w 21(b) of NDPS Act. To undergo rigorous imprisonment for two years and to pay a fine of Rs.50,000/- in default to undergo rigorous imprisonment for six months. A.2 U/s 8(c) r/w 18(c) of NDPS Act. To undergo rigorous imprisonment for five years and to pay a fine of Rs.1,00,000/- in default to undergo rigorous imprisonment for one year.

2. A.2 aggrieved by the conviction and sentence passed by the trial Court, vide judgment dated 29.05.2006, in C.C.No.518 of 2004, has filed this Criminal Appeal.

3. It is represented that A.1 has undergone the period of imprisonment and the appellant/A.2, at the time of pronouncement of the judgment by the trial Court, was not present and he continues to be absconded even today.

4. The case of the prosecution as culled out from the materials placed before this Court, is as follows:

4. 1. P.W.8 was the Inspector of Police attached to Narcotic Intelligence Bureau, Ramanathapuram and he was also in-charge of the Narcotic Intelligence Bureau, Tuticorin also. On 16.05.2004 at about 04.30 p.m., while he was in the Office of the Narcotic Intelligence Bureau, Tuticorin, he received a telephonic information from the informant and it was entered by him in the General Diary and subsequently, it was reduced into writing and was submitted to his immediate official superior, namely, the Deputy Superintendent of Police, Narcotic Intelligence Bureau and it was marked as Ex.P.18. The said official has instructed him to edit/get the information and give the details and further, to seize the contraband. P.W.4, who was the Inspector of Police attached to Narcotic Intelligence Bureau, Dindigul, along with his party, came to the Office of P.W.8.

4.2. P.W.8 after informing the contents of Ex.P.18 and requisitioned the services of two independent witnesses, namely, Kallathan (P.W.2) and Ramachandran (P.W.3) and all of them were proceeded to the spot as per the information given by the informant. It is the junction of Tuticorin - Madurai Road and Tuticorin New Harbour Road and they were mounting surveillance. At about 06.30 p.m., on

16.05.2004, a red colour Qualis car (M.O.4) was coming and it was halted. The Registration Number of the said vehicle is TN-37-X- 1156 and it tallied with the description of the vehicle given by the informant. In the vehicle, in the driver seat, one person was driving the vehicle and on the rear side, two persons were sitting.

4.3. P.W.8 has shown his identity card and also introduced the members of the policy party and the occupants of the car were individually examined and they were Rajpaul (A.1) and Sampath Kumar (appellant/A.2) and Selvakumar (A.3). All the occupants of the car were asked to alight from the car and P.W.8 informed that they received the information that narcotic and psychotropic substance, namely, Abin and Heroin are being smuggled and therefore, he wants to search them.

4.4. The above said three persons were also individually informed about their right to be searched in the presence of a Judicial Magistrate or a Gazetted Officer by means of three individual communications, marked as Exs.P.19, P.20 and P.21 respectively and they had told P.W.8 that it is not necessary that they should be searched in the presence of a Judicial Magistrate or a Gazetted Officer and P.W.8 himself can search them. The independent witnesses, namely, P.W.2 and P.W.3 had also subscribed their signatures in Exs.P.19, P.20 and P.21 respectively.

4.5. A.1 - Rajpaul was searched and from his belt, a small plastic bag was seized and on search, it contained the powder and the said powder was tested by using the Test Kit and the substance was found to be 'Heroin'. The samples were taken after observing the formalities for chemical analysis and those samples were put in separate covers and given numbers as S.1 and S.2 and the remaining contraband was sealed in a separate cover.

4.6. Similarly, from the appellant/A.2, a plastic bag was recovered and inside, there are two small black colour plastic pockets and it was found to be 'Abin', weighing 2.500 Kg. and from each pocket, 25 grams of sample was taken and four sample pockets were prepared and they were sealed in individual covers and given numbers as S.3, S.4, S.5 and S.6 and the remaining contraband was kept in a sealed cover. However, nothing was recovered from A.3 for the reason that A.3 had driven the car in which, A.1 and A.2 travelled.

4.7. A mahazar, in this regard, was prepared and marked as Ex.P.22 and thereafter, all the accused were taken to the Police Station, after informing individually the grounds of arrest, marked as Exs.P.23, P.24 and P.25 respectively. They were interrogated and they voluntarily came forward to give the confession statements.

The admissible portion of the confession statement of A.1 was marked as Ex.P.26. The admissible portion of the confession statement of A.2 was marked as Ex.P.27. The admissible portion of the confession statement of A.3 was marked as Ex.P.28.

4.8. At about 11.45 p.m., on 16.05.2004, P.W.8 has registered a case in Cr.No.30 of 2004 on the file of the Narcotic Intelligence Bureau, Tuticorin, against all the accused, for the commission of the offences under Sections 24(c), 18(c) and 25 of the NDPS Act and the F.I.R was marked as Ex.P.9. 4.9. P.W.8 also prepared a detailed report in terms of Section 57 of the NDPS Act, marked as Ex.P.30 and he has enclosed a copy of the F.I.R along with the said report and sent the same to the Deputy Superintendent of Police, Narcotic Intelligence Bureau. The witnesses were also examined on that day. 4.10. On 17.05.2004, the arrest of all the three accused were informed to their relatives and the telegrams were marked as Exs.P.31, P.32 and P.33 respectively. On 17.05.2004, the articles seized from the accused were depositing in the Court of jurisdictional Judicial Magistrate under Form 95 and the sample pockets of the contraband, were sent to the Special Court at Madurai, through Elavarasan - Sub Inspector of Police and Poovalingam - Head Constable. The sample pockets were also sent for chemical analysis, as per the orders of the Court and P.W.1 - Scientific Assistant attached to the Regional Lab at Salem, has given a report, marked as Ex.P.3 and as per the said report, the contraband seized from A.1 and A.2 respectively, were Heroin and Opium. 4.11. P.W.8, after completion of the investigation, filed the final report on 24.07.2004 on the file of the Special District and Sessions Court (NDPS Act and EC Act Cases), Madurai and the said Court took it on file in C.C.No.518 of 2004. 4.12. On appearance of the accused, the charge under Section 8(c) read with Section 21(c) of the NDPS Act was framed against A.1 and the charge under Section 8(c) read with Section 18(c) of the NDPS Act was framed against A.2 and the charge under Section 8(c) read with Section 25 of the NDPS Act was framed against A.3 and they were questioned and all the accused pleaded not guilty to the charges framed against them and prayed for trial of the case. 4.13. The prosecution in order to sustain their case, examined P.W.1 to P.W.8 and marked Exs.P.1 to P.33 and also marked M.O.1 to M.O.10. 4.14. All the accused were questioned under Section 313(1)(b) of the Code of Criminal Procedure, 1973, with regard to the incriminating circumstances made out against them in the evidence tendered by the prosecution

and they denied it as false. 4.15. On behalf of the accused, neither oral nor documentary evidence was let in. 4.16. The trial Court on consideration of the oral and documentary evidence, has convicted A.1 and A.2 and imposed the sentences as stated above and acquitted A.3 of the charges framed against him. No appeal has been preferred by the State challenging the acquittal of A.3. 4.17. Aggrieved by the conviction and sentence passed by the trial Court, A.2 has filed the present Criminal Appeal.

5. When this Criminal Appeal was listed for hearing on 21.01.2015, the learned Counsel for the appellant/A.2 filed a Memo withdrawing his appearance and it was taken on record and this Court appointed Mr.P.Saravanan, [Enrollment No.1005/11, Law Chamber No.82, Madurai Bench of Madras High Court, Madurai.], as Amicus Curiae, to assist the Court.

6. Mr.P.Saravanan, learned Amicus Curiae appearing for the appellant/A.2 made the following submissions:

6. 1. It is the submission of the learned Amicus Curiae that from the testimonies of the witnesses, it is not clear as to whether the contraband was recovered from the person of A.2 or from the plastic bag which was recovered. 6.2. Though according to the prosecution, the contraband was seized from the plastic bag/pocket in possession of A.2, the mahazar witnesses, namely, P.W.2 and P.W.3 turned hostile and therefore, it cannot be said that Section 50 of the NDPS Act has no application to the case on hand. 6.3. It is further submission of the learned Amicus Curiae that P.W.8 - Investigating Officer has also admitted about the said fact and since the prosecution has miserably failed to explain as to the recovery of the contraband from the person, namely, A.2 or from the plastic bag carried by him at the relevant point of time, Section 50 of the NDPS Act is having application. 6.4. Since there was a defect in compliance of Section 50 of the NDPS Act, the trial Court ought to have acquitted the appellant/A.2 also. 6.5. It is further submission of the learned Amicus Curiae that A.3 who was on similar footing was acquitted by the trial Court and the State did not prefer any appeal challenging the said order of acquittal. 6.6. Pointing out the infirmities in the case of the prosecution and by drawing the attention of this Court to the testimonies of witnesses and exhibits

marked by the prosecution, the learned Amicus Curiae would contend that in any event, the trial Court ought to have awarded the benefit of doubt and acquitted the appellant/A.2.

7. Per contra, Mrs.S.Prabha, learned Government Advocate (Criminal Side) for the respondent would vehemently contend that though the mahazar witnesses had turned hostile, in the mahazars marked as Exs.P.10 and P.17 respectively, the prosecution witnesses, namely, P.W.2 and P.W.3 had admitted their signatures and simply because the witnesses had turned hostile, it cannot be said that the seizure mahazars are invalid.

8. It is further submission of the learned Government Advocate (Criminal Side) for the respondent that the contraband was not seized from the person of the appellant/A.2 and it was seized from the plastic bag/pocket carried by him at the relevant point of time and therefore, Section 50 of the NDPS Act has no application to the case on hand.

9. It is further submission of the learned Government Advocate (Criminal Side) for the respondent that all the three accused were individually informed of their rights to be searched in the presence of a Judicial Magistrate or a Gazetted Officer and all of them had waived their rights and the documents were also marked as Exs.P.19, P.20 and P.21.

10. The sample drawn from the contraband in possession of the appellant/A.2 was also subjected to chemical analysis and as per the report of P.W.1, marked as Ex.P.3, the said contraband is Heroin and the oral testimony of P.W.1 - Scientific Assistant, also confirmed the same.

11. In sum and substance, it is the submission of the learned Government Advocate (Criminal Side) for the respondent that all mandatory procedures and formalities as contemplated under the NDPS Act, have been strictly complied with and the trial Court on a proper consideration of oral and documentary evidence, has correctly arrived at a conclusion to convict and impose sentence on the appellant/A.2 and prayed for the dismissal of this Criminal Appeal.

12. The learned Government Advocate (Criminal Side) for the respondent, in support of her submissions, placed reliance upon a judgment rendered by a Single Judge of this Court, dated 19.03.2010 made in CrI.A.Nos.1368 of 2004 and 238 of 2007.

13. This Court paid it's best attention to the rival submissions and also perused the oral and documentary evidence and the original records.

14. P.W.8, on receipt of the information as to the smuggling of the contraband from the informant, has reduced it into writing under Ex.P.18 and informed the same over phone to his immediate superior, namely, Deputy Superintendent of Police, Narcotic Intelligence Bureau.

15. P.W.4, the Inspector of Police attached to Narcotic Intelligence Bureau, Dindigul, along with his party, has also come to the Office of P.W.8 and they mounted surveillance in the junction of Tuticorin - Madurai Road and Tuticorin New Harbour Road and on noticing a red colour Qualis car (M.O.4), the police party halted the vehicle and after disclosing their identity, asked the occupants of the car to step down from the car.

16. P.W.8 also informed the occupants of the car, who are arrayed as A.1 to A.3 by giving individual communications, marked as Exs.P.19, P.20 and P.21 respectively, in terms of Section 50 of the NDPS Act, about their right to be searched in the presence of a Judicial Magistrate or a Gazetted Officer and they were not inclined to the same and asked P.W.8 to search them. All the three accused voluntarily came forward to give the confession statements and the admissible portions of their confession statements were marked as Exs.P.26, P.27 and P.28. The seizure mahazar was also prepared and was signed by P.W.2 and P.W.3. After following the formalities as contemplated under the NDPS Act, the samples drawn from the seized contraband were properly sealed and through the requisition, were sent to the Regional Forensic Lab, Salem and P.W.1, on examination of the same, has given the report marked as Ex.P.3, stating that the seized contraband are Heroin and Opium respectively.

17. No doubt, P.W.2 and P.W.3 had turned hostile and in their cross-examination, admitted that they had subscribed their signatures in the confession statements of A.1, A.2 and A.3 and the seizure mahazar and their signatures were also marked as Exs.P.10 and P.17.

18. It is the primordial submission of the learned Amicus Curiae that in the cross-examination, it was admitted by P.W.8 as well as in his report under Ex.P.30 submitted under Section 57 of the NDPS Act, it has not been indicated as to the recovery of the contraband from the person of the appellant/A.2 or from the plastic bag/pocket carried by him and there is a procedural violation. However, this Court is unable to accept the said submission for the reason that the seizure mahazar would clearly indicate that the contraband was not recovered from the person of the appellant/A.2, but from the plastic bag/pocket carried by the appellant/A.2 and therefore, Section 50 of the NDPS Act, has no application to the facts of the case on hand.

19. It is also to be pointed out at this juncture that all the three accused were individually informed of their right to be searched in the presence of a Judicial Magistrate or a Gazetted Officer, however, they were not inclined to do so and they asked P.W.8 to search them and those documents were also marked.

20. Ex.P.3 - Chemical analysis report coupled with the oral testimony of P.W.1 would also indicate that the seized contraband from the appellant/A.2 is Abin (Opium).

21. In the judgment relied on by the learned Government Advocate (Criminal Side) for the respondent, the judgments rendered by the Honourable Supreme Court in (i) Madan Lal v. State of H.P reported in (2003) 7 SCC465, (ii) Supdt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja reported in AIR 1980 SC52 and (iii) State of Punjab v. Ram Pal reported in 2009(5) SCC565 were considered as to the meaning of 'possession' and 'conscious possession' and it has been held in the said decision that unless the possession was coupled with the requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 of the NDPS Act was not attracted. It has been further held that 'Once possession is established,

the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge and Section 35 of the NDPS Act gives a statutory recognition of this position because of the presumption available in law and in terms of Section 54 of the NDPS Act, presumption is available to be drawn from possession of illicit articles.' 22. In the considered opinion of this Court, the prosecution has proved its case beyond any pale of doubt that the appellant/A.2 was in conscious possession of 2.500 Kg. of Opium and after observing the mandatory formalities as contemplated under the NDPS Act, the contraband was seized and the Chemical Analysis report would also indicate that it is a narcotic substance.

23. The trial Court has gone through the oral and documentary evidence in proper perspective and rightly arrived at a conclusion to convict the appellant/A.2.

24. As already stated above, the appellant/A.2 alone, has preferred the appeal and he continues to remain absconding.

25. This Court, on an independent application of mind to the oral and documentary evidence, is of the considered opinion that there is no error apparent in the reasons assigned by the trial Court to convict the appellant/A.2 and finds no merit in this appeal.

26. Therefore, this Criminal Appeal is dismissed, confirming the conviction and sentence passed in C.C.No.518 of 2004, dated 29.05.2006, by the learned Special District and Sessions Judge, (NDPS Act and EC Act Cases), Madurai. The respondent is directed to take immediate and necessary steps to arrest the appellant/A.2 and produce before the Court of Special District and Sessions Judge, (NDPS Act and EC Act Cases), Madurai, to undergo the sentence of imprisonment and default sentence, awarded by the trial Court.

27. This Court placed on record the valuable assistance rendered by Mr.P.Saravanan, learned Amicus Curiae and the High Court Legal Services Authority is directed to pay a sum of Rs.3,000/- (Rupees Three Thousand only) as remuneration to the learned Amicus Curiae. Index :Yes/No 28.01.2015 Internet :Yes/No rsb To 1.The The Inspector of Police, NIB CID, Tuticorin. 2.The Court of

Special District and Sessions Judge, (NDPS Act and EC Act Cases), Madurai. 3.Mr.P.Saravanan [Amicus Curiae]., Enrollment No.1005/11, Law Chamber No.82, Madurai Bench of Madras High Court, Madurai. 4.The High Court Legal Services Authority, High Court, Chennai. 5.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai. M.SATHYANARAYANAN,J.

rsb Criminal Appeal (MD)No.294 of 2006 28.01.2015

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**