

**Chellappa Vs. The State Represented By**

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**Court :** Chennai

**Decided On :** Mar-04-2015

**Judge :** M.Sathyanarayanan

**Appellant :** Chellappa

**Respondent :** The State Represented By

**Judgement :**

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED :

04. 03.2015 CORAM THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN Criminal Appeal (MD)No.411 of 2007 Chellappa ... Appellant/ Accused Vs. The State represented by The Inspector of Police, NIB CID Police Station, Theni. (Cr.No.237 of 2000) ... Respondent/ Complainant Prayer : Appeal filed under Section 374(2) of the Code of Criminal Procedure, against the judgment passed in C.C.No.50 of 2001, dated 31.07.2007, by the learned Special District and Sessions Judge, (NDPS Act Cases), Madurai. !For Appellant : Mr.B.Chandra Mohan ^For Respondent : Mrs.S.Prabha, Government Advocate (Crl.Side) :

**JUDGMENT**

The accused, who stood charged and tried for the commission of the offences under Sections 8(c) read with 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985, (in short 'NDPS Act') and suffered a conviction and

sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.25,000/- with a default sentence of rigorous imprisonment for six months, vide judgment dated 31.07.2007, passed in C.C.No.50 of 2001, by the learned Special District and Sessions Judge, (NDPS Act Cases), Madurai, is the appellant.

2. The facts leading to the filing of this appeal, are briefly narrated, as follows:

2. 1. P.W.5 is the Sub-Inspector of Police attached to the respondent Police Station and he received an information through the informant on 13.00 hours on 19.10.2000, with regard to the transportation of ganja. P.W.5 reduced it into writing, marked as Ex.P.1 and has sent it to the immediate superior in compliance of Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act, 1985, (in short 'NDPS Act'), marked as Ex.P.12 and took the informant along with the police party and reached Aundipatty bus stand. 2.2. P.W.5 requested the independent witnesses, namely, Pandi, son of Sivamani and Gopal, son of Velu, to act as independent witnesses and they were not inclined to do so. At about 16.00 hours, on that day, the informant identified the persons, namely, Chellappa, son of Andi, Thangam, son of Singamuthu and Andithevar, son of Paramasamy and all of them were carrying the bags. The police party chased them and surrounded them and P.W.5 has introduced himself as well as other members of the police party and in the presence of P.W.4 - Head Constable and Mahendran - Police Constable, informed all the accused of their right to be searched in the presence of a Judicial Magistrate or a Gazetted Officer and they told him that he himself can search and in this regard, a consent letter was also obtained, signed by all the accused, marked as Ex.P.1. The search of the bags carried by all the accused, revealed that each of them carried 5 Kg. of ganja and it was done without any permission or licence. 2.3. P.W.5 has drawn the samples from each of the pockets and assigned numbers as S.1 to S.6 on the seals and the balance contraband was assigned numbers as B.1 to B.3 and was recovered under a cover of mahazar, marked as Ex.P.2. The relatives of the accused were also informed of their arrest and all the accused were brought to the Police Station and thereafter, the cases in Cr.Nos.237, 238 and 239 of 2000, came to be registered for the commission of the offence under Section 20(b)(i) of the NDPS Act. The events that took place were also reduced into writing by P.W.5 and a report was sent to the immediate superior

in compliance of Section 57 of the NDPS Act. P.W.4 also took necessary steps to send the samples for chemical analysis. The printed F.I.R was marked as Ex.P.14. 2.4. P.W.6, who took up the investigation, has examined the witnesses and after receipt of the chemical analysis report, marked as Ex.P.7, filed the report charging the appellant/accused for the commission of the offences under Sections 8(c) read with 20(b)(i) of the NDPS Act and filed the charge sheet on the file of the Court of the Special District and Sessions Judge, (NDPS Act Cases), Madurai, which took it on file in C.C.No.50 of 2001. 2.5. The trial Court has issued the summons to the appellant/accused and on his appearance, furnished with him the copies of documents under Section 207 Cr.P.C. and after granting sufficient time, questioned him and framed the charges under Sections 8(c) read with 20(b)(i) of the NDPS Act. The appellant/accused pleaded not guilty to the charges framed against him. 2.6. The prosecution in order to sustain their case, examined P.W.1 to P.W.6 and marked Exs.P.1 to P.16 . 2.7. The appellant/accused was questioned under Section 313(1)(b) of the Code of Criminal Procedure, 1973, with regard to the incriminating circumstances made out against him in the evidence tendered by the prosecution and he denied it as false. 2.8. On behalf of the accused, no oral evidence was let in, however, Ex.D.1 - Form 95 was marked. 2.9. The trial Court on consideration of the oral and documentary evidence, has convicted and imposed the sentences as stated above. 2.10. Aggrieved by the conviction and sentence passed by the trial Court, the appellant/accused has filed the present Criminal Appeal.

3. The learned Counsel for the appellant has drawn the attention of this Court to the testimonies of P.W.4 and P.W.5 and would submit that though the samples have been drawn on seizure of the contraband, the pre-seizure formalities have not been properly complied with and thereby, a doubt has been created as to whether the contraband has been seized at all and the samples drawn from the contraband have been sent for chemical analysis.

4. It is also contended by the learned Counsel for the appellant/accused that the balance of seized contraband assigned numbers as B.1 to B.3, have not been marked as material objects and therefore, the entire case projected by the prosecution has fallen into the ground.

5. It is further submission of the learned Counsel for the appellant/accused that Sections 42(2) and 57 of the NDPS Act have not been complied with in letter and spirit and hence, prayed for setting aside the impugned judgment passed by the trial Court and prays for honourable acquittal.

6. Per contra, Mr.S.Prabha, learned Government Advocate (Criminal Side) for the respondent would contend that Sections 42(2), 50 and 57 of the NDPS Act have been complied with and would further add that as per the judgments rendered by the Honourable Supreme Court, even in respect of Section 42(2) of the NDPS Act, substantial compliance is enough and invited the attention of this Court to the testimonies of P.W.1, P.W.4 and P.W.6 and would submit that the mandatory duty cast upon the investigating agency has been complied with in letter and spirit.

7. It is further contended by the learned Government Advocate (Criminal Side) for the respondent that no doubt, the balance of the seized contraband has not been marked as material object and de hors the said lapse, the prosecution has amply proved the guilt on the part of the appellant/accused beyond any reasonable doubt and prays for the dismissal of this appeal.

8. This Court has carefully considered the rival submissions and perused the oral and documentary evidence and other materials and also the original records.

9. This Court while suspending the sentence has noted the fact that the material object has not been marked and therefore, called for explanation from the said Presiding Officer of the Court of the Special District and Sessions Judge, (NDPS Act Cases), Madurai and an Official Memorandum dated 06.09.2007 was also issued to him and in response to the same, the Presiding Officer has sent an explanation stating that the contraband was seized under a cover of mahazar in Form 95 which has been marked as Ex.P.16 and on the ground only, the conviction was granted.

10. P.W.1, a member of the police party which intercepted the accused and seized the contraband, in the cross-examination, would admit that after drawing the sample, the balance contraband was not marked as a material object.

11. P.W.2 is the official attached to the Court of Special District and Sessions Judge, (NDPS Act Cases), Madurai and he speaks about the deposit of the contraband and sending of the samples for chemical analysis.

12. P.W.3 - chemical analyst, after examining the samples, has opined that the contraband is 'ganja'. In the cross-examination, P.W.3 would state that in Ex.P.5 - requisition letter of P.W.5, did not contain the sample seal and also did not contain the weight of the sample and the names of the witnesses who had attested the seal put on the sample.

13. He would further state in Ex.P.5, the history of the case and the name of the father of the appellant/accused had also been corrected and so also, crime number. He would further state that in Ex.P.7, the name of P.W.4 - Jeyaraj, is mentioned as one of the witnesses and also the name of Gandhi and it was signed by P.W.6 - Inspector of Police, NIB CID.

14. P.W.4 - Head Constable, who also formed part of the riding party, in the cross-examination, would admit that in Exs.P.1 to P.4, the name of the accused has been corrected and he did not number the exact date and in the sample, he and the Police Constable - Mahendran, did not sign it.

15. P.W.5, in his cross-examination, would admit that in the mahazar marked as Ex.P.2, it has not been clearly mentioned about the drawing of the sample from the concerned accused and he would further admit that on 20.10.2000, under Form 95, the contraband was deposited and it was returned and once again, it was re-deposited on 31.10.2000 and in the interregnum, the seized contraband was in the custody of the Writer of the Police Station, namely, Subbiah. He would further admit that the mistake has occurred in putting NIB seal in S.1 and S.2 and in all the documents, the crime number has been altered. He would further admit that at the time of effecting the seizure, the Observation Mahazar and the Rough Sketch, have not been prepared.

16. P.W.6, the Officer, who completed the investigation and filed the report, in the cross-examination, would admit that the statements recorded during the investigation has been sent along with the final report on 02.01.2001 and further

would admit that he has not conducted the investigation as to the custody of the contraband between 20.10.2000 and 31.10.2000.

17. The learned Counsel for the appellant/accused has drawn the attention of this Court to Ex.P.6 and would submit that admittedly, immediately after the seizure, it was deposited under Form 95 and it was returned and it was only re-deposited on 31.10.2000 and in between, the seized contraband was continued to be in the custody of NIB CID and the requisition for sending the samples for chemical analysis was made only on 31.10.2000 and hence, there is a likelihood of tampering and there are corrections in all the relevant documents, with regard to the name of the father of the appellant/accused as well as crime number and other particulars.

18. The learned Counsel for the appellant/accused, drawing further attention of this Court to Ex.P.7 - the chemical analysis report, would submit that the relevant seal number has not been mentioned and the seizure mahazar was signed by P.W.4 and thus, it is contrary to their own testimony and in the absence of the seal number effected from the appellant/accused, the chemical analysis report would not come to the aid of the prosecution to sustain their case that the seized contraband was a narcotic substance, namely, 'ganja'.

19. It is once again reiterated by the learned Counsel for the appellant/accused that Sections 42(2) and 50 of the NDPS Act, have not been complied with in letter and spirit.

20. This Court, on going through the testimonies of the witnesses and the materials, is of the view that the respondent has complied with Sections 42(2) and 50 of the NDPS Act, as evidenced by Exs.P.1 and P.12.

21. No doubt, the name of the immediate official superior has not been mentioned and in the considered opinion of this Court, the same would not come to the aid of the appellant/accused for the reason that it may not be mandatory to name the immediate official superior and the series of the judgments rendered by the Honourable Supreme Court, have laid down the proposition that the substantial compliance of Section 42(2) of the NDPS Act, is enough.

22. Insofar as the submission made by the learned Counsel for the appellant/accused that the discrepancies have occurred while drawing and sealing the sample contraband and non-marking of the balance contraband, this Court finds considerable force.

23. This Court in the earlier paragraphs, has pointed out that the testimonies of the official witnesses would clearly indicate that the corrections made with regard to the father of the appellant/accused as well as the crime number and P.W.5 in his cross-examination, has clearly admitted that it has not been clearly indicated as to the samples were drawn from the respective accused. It is also strengthened by the fact that in Ex.P.7, the particular number given assigned to the sealed sample contraband has not been given.

24. It is pertinent to point out at this juncture that even according to the prosecution, three accused were arrested and the appellant/accused is one among them.

25. The learned Government Advocate (Criminal Side) for the respondent, for want of instructions from the respondent, is unable to give any information as to the fate of the investigation conducted by the respondent in respect of other two accused, namely, Thangam and Andithevar.

26. In *Gurbax Singh v. State of Haryana* reported in (2001) 3 Supreme Court Cases 28, the scope of Sections 50, 52, 55 and 57 came up for consideration and it has been held that the provisions of Sections 52 and 57 are directory and the violation thereof would not ipso facto violate the trial or conviction and the Investigating Officer cannot totally ignore these provisions and failure on his part will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. It is relevant to extract paragraph 9 of the said decision, thus: "9. The learned counsel for the appellant next contended that from the evidence it is apparent that the IO has not followed the procedure prescribed under Sections 52, 55 and 57 of the NDPS Act. May be that the IO had no knowledge about the operation of the NDPS Act on the date of the incident as he recorded the FIR under Sections 9/1/78 of the Opium Act. In our view, there is much substance in this submission. It is true that provisions of Sections 52 and 57 are directory.

Violation of these provisions would not ipso facto violate the trial or conviction. However, IO cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. In the present case, IO has admitted that seal which was affixed on the muddamal article was handed over to the witness PW1 and was kept with him for 10 days. He has also admitted that the muddamal parcels were not sealed by the officer in charge of the police station as required under Section 55 of the NDPS Act. The prosecution has not led any evidence whether the chemical analyser received the sample with proper intact seals. It creates a doubt whether the same sample were sent to the chemical analyser. Further, it is apparent that the IO has not followed the procedure prescribed under Section 57 of the NDPS Act of making full report of all particulars of arrest and seizure to his immediate superior officer. The conduct of panch witness is unusual as he offered himself to be a witness for search and seizure despite being not asked by the IO, particularly when he did not know that the substance was poppy husk, but came to know about it only after being informed by the police. Further, it is the say of the Panch witness that muddamal seal used by the PSI was a wooden seal. As against this, it is the say of PW2SI/IO that it was a brass seal. On the basis of the aforesaid evidence and faulty investigation by the prosecution, in our view, it would not be safe to convict the appellant for a serious offence of possessing poppy husk."

27. In the above said paragraph, it has been stated that '... The prosecution has not led any evidence whether the chemical analyser received the sample with proper intact seals. It creates a doubt whether the same sample were sent to the chemical analyser. ...'.

28. As already pointed out, P.W.5 has admitted that he cannot tell as to the sample number of the sample contraband drawn immediately after the seizure, though specific number has been assigned to each of the sample drawn from the contraband in possession of the respective three accused.

29. In Ex.P.7 - chemical analysis report also, the seal number has not been mentioned. In the light of the said fact, the chemical analysis report marked as Ex.P.7 is also of no use for the prosecution for the reason that unless a particular

sample with seal number is relatable to the concerned accused, it cannot be said that the contraband carried by the accused was 'ganja'.

30. Moreover, the balance of the seized contraband has not been marked as a material object, though Form 95 has been marked as Ex.P.16. No plausible explanation has been offered by the prosecution as to the non-marking of the material object, i.e. the balance of the seized contraband.

31. In the considered opinion of this Court, the above said infirmities would definitely vitiate the case of the prosecution and hence, the appellant/accused is entitled to benefit of doubt. The trial Court has not properly appreciated the materials placed before it in proper perspective and therefore, the same warrants interference.

32. In the result, this Criminal Appeal is allowed and the judgment passed in C.C.No.50 of 2001, dated 31.07.2007, by the learned Special District and Sessions Judge, (NDPS Act Cases), Madurai, is set aside and the appellant is acquitted of the charges framed against him. The bail bonds executed by the appellant shall stand terminated. The fine amount, if any, paid by the appellant, is directed to be refunded to him. Index :No 04.03.2015 Internet :Yes rsb To 1.The Inspector of Police, NIB CID Police Station, Theni. 2.The Court of Special District and Sessions Judge, (NDPS Act Cases), Madurai. 3.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai. M.SATHYANARAYANAN,J.

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