

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

**Muthu Vs. State Rep. by Narcotic Control Bureau, South Zonal Unit, Chennai**

**Muthu Vs. State Rep. by Narcotic Control Bureau, South Zonal Unit, Chennai**

**SooperKanoon Citation : [sooperkanoon.com/809773](http://sooperkanoon.com/809773)**

**Court : Chennai**

**Decided On : Jan-31-2002**

**Reported in : 2002CriLJ3725**

**Judge : M. Karpagavinayagam, J.**

**Acts : NDPS Act - Sections 8 and 21**

**Appeal No. : Crl. Appeal Nos. 513 and 1056 of 1998**

**Appellant : Muthu;intelligence Officer, Narcotics Control Bureau, South Zonal Unit, Chennai**

**Respondent : State Rep. by Narcotic Control Bureau, South Zonal Unit, Chennai;A. Chellamuthu**

**Advocate for Def. : P.N. Prakash, Spl. P.P. in CA 513/98 and ;Ashok Viswanath, Adv.**

**Advocate for Pet/Ap. : P.N. Prakash, Spl. P.P. in CA 1056/98 and ;S. Samuel Rajapandian, Adv.**

**Judgement :**

**M. Karpagavinayagam, J.**

1. Muthu, the second accused was convicted for the offence under Section 8(c) r/w 21 of the NDPS Act and was sentenced to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs. 1 lakh, in default, to undergo Simple Imprisonment for one year. Challenging the said conviction and sentence, he has filed Criminal Appeal No.513 of 1998.

2. The Intelligence Officer, Narcotics Control Bureau has filed Criminal Appeal No.1056 of 1998, against the acquittal of one Chella Muthu, respondent herein, A-1 in respect of the charge under Section 8-C read with Sections 21 and 29 of the NDPS Act.

3. Since both these appeal arise out of a single case, a common judgment is being rendered through this.

4. The short facts leading to the filing of these appeals could be summarized as follows:

' (a) The complainant, Intelligence Officer, Narcotic Control Bureau, is PW-1. On the basis of the information received by him, an auto rikshaw, bearing registration No.TMA 4113 was intercepted by him along with PW-5 and other officers and independent witness PW-2, on 27.6.1991 at about 4 pm, near Kottivakkam towards Mahabalipuram side. In the said auto, three passengers were seated. On enquiry, it was revealed that one of them is A-1 Chella Muthu and another is Muthu A-2 and A-3 is Raja Mohan Das. At that time, A-2 Muthu was carrying a Kakhi bag MO-1 with him.

b) After observing formalities, the bag was searched and it was found to contain two transparent polythene bags, MO-2 and MO-3 containing brown powder. A-1 and A-2 said that the kakhi cloth bag belonged to A-3 Raja Mohan Das. After seizure, a magazar was prepared and during the course of preparation of the magazar, Raja Mohan Das escaped from the scene and ran away. Despite best efforts to nab him, he was not available. Exs.P-18 and P-4 statements were recorded from A-1 and A-2 respectively. Then on the basis of the statement of A-1 and A-2, houses of Raja Mohan Das and Chellamuthu were searched and nothing was recovered.

(c) After arrest, A-1 and A-2 were produced before court, which in turn ordered remand. Sample of the narcotic drug was sent for Chemical examination and PW-4 sent a report Ex.P-14 stating that the powder was Diacetyl Morphine (Heroin). After completion of the investigation, PW-1 filed complaints against A-1 and A-2 showing Raja Mohan Das as absconding.

(d) During trial, on behalf of the prosecution, Pws 1 to 5 were examined and Exhibits P-1 to P-21 and Material objects MO-1 to MO-7 were marked. On the side of defence, D.W.-1 was examined and Ex.D-1 was marked.

(e) On an analysis of the materials placed before court and also on the basis of the statement of the accused, the trial Court convicted the appellant Muthu, A-2 for the offence under section 8-C r/w 21 of the NDPS Act and acquitted A-1. Hence, the two appeals by respective parties.'

5. Challenging the conviction imposed upon the appellant Muthu, Mr. Samuel Rajapandian, learned counsel for the appellant would contend that the conviction is not valid inasmuch as the mandatory provisions, Section 42 and 50 had not been complied with. He would refer to various decisions and point out the relevant portions in order to substantiate his plea.

6. On the other hand, Mr. Prakash, learned Spl. Public Prosecutor, appearing for the respondent would submit that the said provision of Section 42 has been complied with and Section 50 would not apply to the facts of the present case and as such, the reasonings of the trial court for imposing conviction upon the appellant are valid.

7. I have carefully considered the submissions made by the counsel on either side.

8. As correctly pointed out by the counsel for the appellant, PW-1 admitted both in chief and cross examination that prior to the date of search and seizure, namely 27.6.1991, he got the information that the first accused is a trafficker in narcotics drugs and was asked to keep surveillance on him. It has been specifically admitted by PW-1 during both chief and cross examination that he did not record the said information on the basis of the admission.

9. It is contended by the counsel for the appellant that the mandatory provision contained under Section 42(1) has not been complied with and the said non compliance would vitiate the entire proceedings. But, the fact remains, as pointed out by the learned counsel for the respondent, that the said information, which was obtained by PW-1 two days prior to the date of seizure, did not lead to the search or seizure. Moreover, the said information, as referred to by PW-1 both in chief and cross examinations, would not refer about the offence being committed by giving the clear details.

10. Section 42(1) would refer about the recording of information by the Officer competent to search, which shall lead to search and seizure. A reading of Section 42(1) would make it clear that if the officer concerned has reason to believe from personal knowledge or information given by any person should take down in writing that any narcotic drug in respect of which an offence is punishable under IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept concealed in any building, conveyance or closed place, may enter such places and effect search and seizure. Therefore, Section 42(1) would require the specific information with reference to the offence being committed and the place where the narcotic drug is kept or concealed.

11. A reading of deposition of PW-2 would make it clear that particulars, as required under Section 42(1) have not been given to PW-1 by the informant two days prior to the date of the seizure. It may be true that A-2 was identified, while he was sitting in the Auto rickshaw earlier. But, it does not mean that the requirements as contemplated under Section 42(1) have been complied with, for the purpose of searching the person or conveyance on that date. But on the other hand there is a clear evidence from PW-1 that he got specific information on 26.1.1997 from the informant and the same was recorded as required under Section 42(1) and was sent to Superior officers as required under Section 42(2).

12. In fact, Ex P-1 would refer about the earlier information and also the identification of Muthu to PW-1. A reading of Ex.P-1 would further make it clear that there is a specific information with regard to the offence being committed by Muthu and two of his associates by carrying contraband in an auto rickshaw

proceeding towards Injambakkam. This specific information according to the prosecution, led PW-1 and other officers to go to the spot to search A-2 and consequently, the seizure of the contraband was effected.

13. In the light of the said facts, the learned counsel for the appellant cited 2000 SCC (Cri) 496 (Abdul Rashid Ibrahimmansuri VS. State of Gujraj) wherein it is held that when an officer has reason to believe from proper information that the offence has been committed or kept concealed in any building etc, it is imperative that the officer should take it down in writing.

14. In view of the fact that 42(1) has been complied with on the information received by PW-1 on 27.6.1991 as the said information conveys clear details of the particulars of the offence being committed by the appellant and others. The first point raised by the learned counsel for the appellant would fail.

15. Secondly, it is strongly contended that Section 50 has not been complied with. As per the decision of the Supreme Court in 2000 SC 1407 (Ahmed v. State of Gujrat), while searching a person, it is obligatory for the prosecution to inform the accused of his right to be searched before a gazetted officer or before a Magistrate, as provided under Section 50 of the NDPS Act.

16. In this case, though the question was asked whether he has to be taken to Magistrate or before Gazetted Officer, in presence of whom he could be searched, the right conferred under Section 50 has not been conveyed. The facts of the case in 2000 SCC Cri1407 would show that even though the officer who was participating in the raid was a gazetted officer, he would not be competent to search, since the accused himself demanded that he must be searched in the presence of Magistrate or some other gazetted officer, he should be taken to the nearest gazetted officer other than the raiding officer.

17. In the said decision, it has been spelt clearly that mere asking him whether he is required to be searched in the presence of Magistrate or before the gazetted Officer would not suffice. But, the said right must be conveyed to him. As rightly pointed out by the learned counsel for the appellant, the question which had been put by PW-1 to accused does not show that the right to be conveyed to the

accused under section 50 has been conveyed to him. If Section 50 has not been complied with, it will naturally vitiate the trial.

18. But, the aspect which remains to be considered in this case as pointed out by Mr.Prakash Spl.P.P. appearing for the other side is that, the facts of the present case would not show that Section 50 would get attracted as the facts of the case would not relate to the search of a person. Admittedly, in this case, the second appellant was carrying a kaki bag in his hand. When he was searched, the kaki cloth bag was found tied with jute strings. On opening the same, they found two transparent polythene bags containing brown colour powder. Therefore, the kaki bag which was carried by the accused was alone searched and that cannot be stated to be search of the person.

19. The judgment reported in : 2000 CriLJ507 (Kaleema Thumba v. State of Maharashtra) and : AIR 2000 SC3626 (Bira Kishore Kar v. State of Orissa), rendered by the Supreme Court following the decision of the Constitutional Bench reported in 1999 (3) Cri 147 (State of Punjab v. Baldev Singh) would specifically hold that the search of a bag would not attract Section 50 of the Act.

20. In these circumstances, this ground urged by the learned counsel for the appellant cannot be stated to be a valid ground to hold that the conviction imposed upon the appellant is wrong. Consequently, the findings with regard to the conviction and sentence are liable to be confirmed, and accordingly confirmed and the appeal in Cri.A.No.513 of 1998 is dismissed.

21. As far as Criminal Appeal No.1056 of 1998 is concerned, Mr.Prakash, appearing for the appellant, Intelligence Bureau would contend that the reasoning given by the trial Court for acquitting A-1 Chella Muthu is not justifiable inasmuch as there is evidence to show that he was also considered to be a person involved in the conspiracy.

22. Admittedly, it is the case of the prosecution that kaki cloth bag was carried by A-2 Muthu. It is also the case of the prosecution that the first accused was taken to his house and the house was searched but nothing was recovered from his house. A perusal of the statement, Ex.P-18 would not show that respondent Chella

Muthu, the first accused, was also a party to the conspiracy and he was getting any gain out of the said transaction. On the other hand, the statement of A-2, Ex.P-4, would show that Raja Mohan Das is the main man at whose instance, the first accused accompanied the said Raja Mohan Das and the second accused for the purpose of disposing the contraband. It is also stated in the statement as well as in the magazar that the drug belonged to Raja Mohan Das.

23. Under these circumstances, the respondent (A-1) cannot be placed on the same footing either that of A-2 or Raja Mohan Das. Therefore, I am unable to hold that the finding rendered by the trial court in respect of the first accused is wrong. Hence, the appeal in C.A. No.1056 OF 1998 fails and the same is dismissed.

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