

(2012) 11 MAD CK 0289

Madras High Court (Madurai Bench)

Case No: Criminal A. (MD) No. 252 of 2011

Saravanan

APPELLANT

Vs

State

RESPONDENT

Date of Decision: Nov. 19, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 304, 313, 428
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 20, 20(b), 20(b)(i)(a), 20(B)(ii)(A), 42
- Penal Code, 1860 (IPC) - Section 57

Citation: (2013) 1 MLJ(Cri) 575

Hon'ble Judges: M. Venugopal, J

Bench: Single Bench

Advocate: S. Durairaj and S. Balaji, for the Appellant; P. Kandasamy, Government Advocate (Criminal Side), for the Respondent

Final Decision: Dismissed

Judgement

M. Venugopal, J.

The appellant/accused has projected the present Criminal Appeal as against the conviction and sentence dated 6.3.2007 passed in C.C. No. 1755 of 2003 by the Learned Special District and Sessions Judge (for NDPS Act Cases), Madurai. The case of the prosecution is that the appellant/accused on 11.6.2003, at about 17.50 hours, after being produced before the Thoothukudi Assistant Sessions Judge from Palayamkottai prison and on return, when he was handed over to the jail authorities, at that point of time, he was in possession of 130 grams of Ganja without any permission or licence in his chappal and under these circumstances, he is said to have committed offences as per Section 8(c) read with 20(b)(ii)(A) of The Narcotic Drugs and Psychotropic Substances Act.

2. The appellant/accused is a Life Convict in a Criminal Case and on 11.6.2003, he was taken to Assistant Sessions Judge Court at Kovilpatti in connection with a different case trial along with three others and these persons were taken by Thoothukudi Armed Reserve Constables Ramamurthy 1865, Sathankulam Vincent 1645 and they were duly produced before the Court and when they returned on 11.6.2003 near the main entrance of the prison, the appellant/accused was searched by Gate Keeper Dharmalingam and another Policeman Muthukumar and it was found out that the appellant/accused had hidden a Ganja packet inside his chappal and when it was weighed, it was about 130 grams. Immediately, the chappal worn by the appellant/accused and the Ganja found hidden in the chappals were handed over to Perumalpuram Police Station by preparing a complaint petition viz., Exhibit P-4.

3. The transit pass xerox copy was marked as Exhibit P-5. The Ganja packet seized from the appellant/accused was marked as M.O. 1 and a pair of chappal was seized from the appellant/accused was marked as M.O. 2.

4. P.W. 4 working as Head Constable at Perumalpuram Police Station, received the complaint through P.W. 2 along with one pair of chappals and Ganja and registered a case in Perumalpuram Police Station in Crime No. 910 of 2003 u/s 8(c) read with 20(b)(ii)(A) of The Narcotic Drugs and Psychotropic Substances Act. Exhibit P-6 was the First Information Report. In Form 95, the seized chappals from the appellant/accused and the Ganja were handed over and sent to Court.

5. P.W. 5 Inspector took the investigation of the case from P.W. 4, who registered the case and he examined P.Ws. 2 and 3 (Jail Warden), Armed Reserve Police (Personnel). Later, he transmitted the case properties and the appellant/accused to the Court for judicial custody. Further, the seized Ganja was sent for forensic examination.

6. On the basis of accusation made against the appellant/accused, the trial Court had framed necessary charges u/s 8 (c) read with 20 (B) (ii) (A) of The Narcotic Drugs and Psychotropic Substances Act, 1985 and the same were read over and explained to the Accused by stating that a false case was foisted on him. The appellant/accused denied the charges and demanded a trial to be conducted.

7. To prove the case of the prosecution, witnesses P.Ws. 1 to 5 were examined and Exhibits P-1 to P-6 were marked. Also, M.Os. 1 and 2 were marked. On the side of the appellant/accused, no one was examined as a witness and no document was marked.

8. When the appellant/accused was questioned u/s 313 of the Code of Criminal Procedure, in regard to the incriminating circumstances appearing in evidence against him, he denied his complicity in the commission of offences.

9. The trial Court, upon appreciation of entire oral and documentary evidence available on record had found the appellant/accused guilty u/s 20(b)(ii)(A) of The Narcotic Drugs and Psychotropic Substances Act, convicted and sentenced to undergo a rigorous imprisonment for a period of six months and also imposed a fine of Rs. 500/- in default to suffer rigorous imprisonment for a period of one month.

10. The Learned counsel for the appellant/accused submits that the judgment of the trial Court in C.C. No. 1755 of 2003 dated 6.3.2007 was contrary to law, weight of evidence and broad probabilities of the case.

11. According to the Learned counsel for the appellant/accused, there were procedural irregularities in regard to the seizure of a contraband from the appellant/accused and in fact, the search made in the present case was not in accordance with The Narcotic Drugs and Psychotropic Substances Act, viz., the witnesses are officials.

12. For a fuller and better appreciation of the merits of the case, it is useful for this Court to refer to the evidence of P.Ws. 1 to 5.

13. The evidence of P.W. 1 (Scientific Officer of the Regional Forensic Science Laboratory, Madurai) was to the effect that on 18.6.2003, a paper packet concerned in Perumalpuram Police Station Crime No. 19 of 2003 was received by their Office along with Courts letter, coupled with requisition of the Inspector of Police and that the Court's seals were intact at the time of reception of the said packet for the purpose of examination. The gross weight of the paper packet was 115 grams. On an examination, cannabis was found and a report that Ganja was submitted and after examination, the remaining 100 grams properties with their office seal was sent back to the Court. The Inspector's Requisition was marked as Exhibit P-1 dated 18.6.2003. The copy of the Courts letter Exhibit P-2 was dated 18.6.2003. Exhibit P-3 was the Chemical Report dated 4.7.2003.

14. P.W. 2 (Jail Official) had deposed that he knew the appellant/accused, who was a jail inmate bearing No. 4873 undergoing life imprisonment because of his involvement in a murder case and further that, on 11.6.2003, the appellant/accused along with other three persons (in all four persons) were taken to the Assistant Sessions Court at Kovilpatti in connection with a different case by an Escort Constable belonging to Thoothukudi Armed Reserve, viz., Ramamurthy 1865 and Sathankulam Vincent 1645, in the morning and brought them back in the evening for handing over them to the jail authorities and at the entrance of the jail, when they came near the main entrance of the jail, they would be taken inside usually after conducting a search on them and the Gate Keeper at the entrance and the Constable Muthukumar 120 searched four persons and when the appellant/accused was searched, it was found out that the Ganja weighing 130 grams was hidden in the chappals worn by him and immediately the same was seized along with

chappals and with a complaint petition, they were handed over at Perumalpuram Police Station and the Complaint Petition was Exhibit P-4. (Kadavu cheetu) xerox copy was Exhibit P-5 and that Exhibit P-4 complaint copy was sent to Perumalpuram Police Station through Vincent and Ramamurthy. The Ganja packet was marked as M.O. 1. One pair of chappals worn by the appellant/accused was marked as M.O. 2. In M.O. 2 one pair of chappals in between the upper and lower portion, the Ganja was kept and the said pair of chappals were in open position.

15. According to the evidence of P.W. 3 (Grade - I Head Constable of Palayamkottai prison), he knew the appellant/accused, who was a life convict and on 11.6.2003, the appellant/accused along with three others in the morning were taken to Kovilpatti Assistant Sessions Judge Court for their production and the appellant/accused along with three others were handed over to the Reserved Police Constable Ramamurthy and Constable Vincent Sathankulam and when they returned to the prison at that time, a search on the appellant/accused body was made and it was found out that in the lower portion of the chappals worn by the appellant/accused, Ganja was kept, which fact he informed to P.W. 2 who sent a Complaint Petition about this matter to the Perumalpuram Police Station along with seized Ganja and the chappals.

16. The evidence of P.W. 4 (Head Constable of Perumalpuram Police Station) proceeds to the effect that on 11.6.2003 at about 21.30 hours, he was incharge of the Police Station and at that time, from Palayamkottai Central Prison/Jail official V. Subramanian handed over a packet containing Ganja wherein 150 grams together with one pair of chappals and with a Complaint Petition, which he received and registered a case u/s 8(c) read with 20(b)(i)(a) of the Narcotic Drugs and Psychotropic Substances Act in Police Station Crime No. 910 of 2003. Exhibit P-6 was the printed form of First Information Report. Further, he transmitted the First Information Report together with complaint of the Court along with the seized Ganja packet and with a pair of chappals. Also he transmitted the copy of FIR and other documents to the Inspector and concerned higher officials.

17. P.W. 5 (Retired Inspector of Police) in his evidence had deposed that while he was serving as the Inspector of Police attached to Thirumalpuram Police Station on 11.6.2003, he took up the investigation of the case concerned in Police Station Crime No. 910 of 2003 u/s 8(c) read with 20(b)(i)(a) of the Narcotic Drugs and Psychotropic Substances Act and enquired the concerned witnesses like Subramaniam (Jail Official), Dharmalingam (Jail Constable), Muthukumar (Jail Constable), Sahib Khan (Head Constable) and Armed Reserved Police Ramamurthy of Thoothukudi and another Constable Vincent of Sathankulam and obtained independent, separate statements from them and later, he sent the appellant/accused and the property for judicial custody. Later, he gave requisition for chemical examination of the seized article and since the appellant/accused was inside the prison because of his involvement in a murder case, for his production, he obtained P.T. warrant and the subsequent Inspector Sankaralingam, after obtaining the chemical report filed a

charge sheet against the appellant/accused on 7.10.2003.

18. Significantly, the appellant/accused had not cross-examined the witnesses P.Ws. 1 to 5. At this juncture, this Court deems it appropriate to sight Section 8(c) of the Narcotic Drugs and Psychotropic Substances Act, which reads hereunder:

knowingly acquire, possess or use any property which was derived from an offence committed under this Act or under any other corresponding law of any other country.

19. Similarly, Section 20(b) which run thus:

(b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable -

(i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extent to ten years and shall also be liable to fine which may extend to one lakh rupees; and

(ii) where such contravention relates to sub-clause (b)-

(A) and involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine, which may extend to ten thousand rupees, or with both.

20. It is to be noted that for an offence u/s 8/20 of the Narcotic Drugs and Psychotropic Substances Act, the punishable factor to be taken note by a Court of Law is one of possession and not of ownership. The term "possession" has two elements:

(i) Corpus (Physical Control)

(ii) Animus (intent)

21. Therefore, the possession involves an element of physical control and Animus or intent with such control is exercised. It cannot be brush aside that it is the conscious possession which is contemplated by penal statute which penalises possession of any contraband of the article or thing.

22. As far as possession is concerned, if Animus is established, it does not matter whether the possession is actual or constructive, as opined by this Court. In fact, what is required to be proved is the proof which is beyond reasonable doubt, so as to connect the accused person with the offences charged. Added further, in criminal law, possession is very much necessary for conviction of offences for possession of contra band or control substances. It is both elementary and essential to prove that the accused had both dominion and control over the contraband.

23. It is the well settled principle of criminal jurisprudence that more the seriousness of the offences alleged against the accused, the stricter, degree of proof, viz., a

higher degree of assurance is required to convict the accused in the considered opinion of this Court. To put it differently, the proof for possession of Ganja is very much essential for ordering conviction as per Section 8 of the Narcotic Drugs and Psychotropic Substances Act, inasmuch as the term "possession" admittedly employees dominion and control.

24. No wonder, the offence/offences under the NDPS Act is/are grave in nature. Procedural safeguards have been provided under the statute which require a strict compliance. By reason of the relevant provisions of the Narcotic Drugs and Psychotropic Substances Act has reposed confidence on the Gazetted Officers.

25. As far as the present case is concerned, the evidence of P.Ws. 1 to 5 coupled with Exhibits P. 1 to P. 6 and M.Os. 1 and 2 marked on the side of the prosecution were cogent, consistent and reliable one, in the considered opinion of this Court. Strangely, the appellant/accused has not cross-examined P.Ws. 1 to 5 witnesses and as such their evidence on record remained unimpeachable and also not challenged in the manner known to law, which in turn is certainly an adverse circumstance against the appellant/accused.

26. Indeed, one cannot ignore a vital fact that one's poverty or richness etc., has no consideration or significance when the accused has been found to be in possession of Ganja.

27. At this juncture, this Court worth recalls the decision in *Raj Singh v. State of Haryana* (2003) Cri.L.J. 1586, at special page No. 1587, wherein at paragraph Nos. 10 to 13, it is observed and held thus:

10. Point No. 2: The learned counsel for the appellant submitted that P.W. 1 has put the cart before the horse in the matter of the questioning u/s 50 of the N.D.P.S. Act. He searched the waist of the accused: took out the Ganja and then only questioned the accused whether he wanted body search to be done in the presence of a Gazetted Officer or a Magistrate.

11. Though the above argument would look plausible at the first blush, there is no actual merit therein insofar as this is not a case where the police party went to detect the offence based on any prior information coming u/s 42 of the Act. P.W. 1 was making routine patrol. It is clear from his evidence that at the time when the accused was stopped, his suspicion, on finding that something protruding at the waist, was only that he was hiding some stolen property, and not that it was something coming under the purview of the N.D.P.S. Act. It was therefore, that he proceeded to seize the item from the waist portion and proceeded to examine it. Once he found that the contends was Ganja, he decided to make thorough body search of the accused for which he questioned the accused with regard to the option to be searched u/s 50 of the NDPS Act. The fact that he was questioned as above is clear from Exhibit P-1 seizure mahazar as also Exhibit P-2 FIR both of which have reached the learned Special Judge on 28.2.1997 itself.

12. That failure to comply with Section 50 does not justify acquittal in cases where the detecting officer is unaware that there was possibility of contraband under the N.D.P.S. Act being available with the accused is clear from the decision in [Gurbax Singh Vs. State of Haryana](#). That was a case where the Sub-Inspector of Police on duty at the railway platform noticed that in the train that arrived at the relevant time the accused was sitting in a compartment and that he became panicky on seeing the police party. He left the train towards the side of engine carrying a gunny bag on his left shoulder. On suspicion, he was chased and nabbed in the presence of the witnesses and when the bag was opened it was found that he was carrying poppy straw weighing 7 kg, therein. It was contended before the Apex Court that the seizure of the said item was violating Section 50 of the NDPS Act insofar as the search was not done after alerting the accused of his rights u/s 50 of the NDPS Act and after getting his option. The contention was not accepted.

13. Compliance with Section 50 would be attracted once the officer gets suspicion that the contraband under the NDPS Act might be available with the suspect and not in a case of accidental exposure without any such foresight. In view of the said position, I do not find any merit in the contention of the appellant that the appellant is entitled to get acquittal on the ground of violation of Section 50 of the NDPS Act.

28. Also, this Court aptly points out the decision of the Honourable Supreme Court in [Kartar Singh and Others Vs. State of Haryana](#), wherein it is held as follows:

Section 428, Cr PC does not apply to those convicted for "imprisonment for life". It is applicable only in cases of accused persons who have on conviction been sentenced to imprisonment for a term and the Penal Code as well as the Code of Criminal Procedure make and maintain a clear distinction between "imprisonment for a term" and "imprisonment for life" in that the former means imprisonment for a definite or fixed period while the latter means imprisonment for the remainder of the natural life of the convict. The periods of life term mentioned in Section 57, IPC or the remission rules contained in Jail Manuals (e.g. Para 516 -- B of Punjab/Haryana Jail Manual) are irrelevant in this context.

29. Furthermore, in the decision K. Mallikharjuna Rao v. State of A.P., Sub-Inspector of Police, Kandahar (1980) 1 MLJ (Crl.) 196 which is held that "the accused has ready to argue his own case. No one can be appointed if accused is not willing to have any Pleader and it cannot be said there is violation of Section 304 Cr.P.C."

30. In view of the fact that Section 428 of Cr.P.C., does not apply to the appellant/accused convicted for imprisonment for Life imprisonment in a murder case, the contention put forward on the side of the appellant/accused that the appellant/accused is entitled to get the remission of sentence is unsustainable in law.

31. On going through the judgment of the trial Court, this Court is of the considered view that the trial Court has rightly held the appellant/accused guilty under Sections

8(c) read with Section 20(b)(ii)(A) of the Narcotic Drugs and Psychotropic Substances Act. In view of the qualitative and quantitative discussions mentioned supra, there is nothing on record for this Court to view the impugned judgment differently or to alter the same in different manner. Consequently, the appeal fails. In the upshot of discussions, as aforesaid, the Criminal Appeal is dismissed in furtherance of substantial cause of justice. Resultantly, the conviction and sentence passed in C.C. No. 1755 of 2003 dated 6.3.2007 passed by the Learned Special District and Sessions Judge for Essential Commodities Court, Madurai are affirmed by this Court for the reasons assigned in this Appeal. Consequently, the connected Miscellaneous Petition is also dismissed.