
(2001) 07 MAD CK 0069
In the Madras High Court
Case No : Crl A. No. 661 of 1993

Mahalingam

APPELLANT

Vs

Inspector of Police NIB CID

RESPONDENT

Date of Decision : 24-07-2001

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 41, 42, 43, 57

Citation : (2002) 81 ECC 44 : (2001) 2 LW(Cri) 843

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M. Karpagavinayagam, J.—Mahalingam, the appellant herein had been convicted u/s 21 of the N.D.P.S. Act by the Special Court for N.D.P.S. Cases, Madurai for possession of 370 m.g. of heroine and sentenced to undergo R.I. for ten years and to pay a fine of Rs, 1,00,000, in default to undergo R.I. for two years by the judgment dt. 29.9.1993. Against the said conviction and sentence the appellant has preferred this appeal.

2. According to the prosecution the Sub-Inspector of Police P.W. 2 on 10.5.1992 while checking up the NDPS offenders along with his party in Madurai Town Hall area, he found the appellant and on suspicion, he conducted search on him. After getting his willingness for the search, even in the absence of Magistrate or a Gazetted Officer, it was found that he was having a match box containing a paper with heroine powder. Then the same was seized by him under Ex. P1, attested by the witness P.W. 1 Head Constable.

3. Thereafter the accused was arrested. After his arrest, he was taken to the police station and a case was registered u/s 21 of the N.D.P.S. Act. Ex. P. 2 is the printed F.I.R. P.W. 5, the Inspector of Police took up further investigation on receipt of report sent by the Sub-Inspector of Police u/s 57 of the N.D.P.S. Act. Then he sent the contraband for analysis through the Court. Ex.P. 3 is the

requisition. Then another Inspector of Police P.W. 6 took up investigation on 11-5-1992 and examined the witnesses. In the meantime, he received the report Ex.P. 5 from the analyst stating "diacetyl marfin" After finishing investigation, the charge sheet was filed on 12.11.1992 u/s 21 of the N.D.P.S. Act against the appellant.

4. In the trial, the prosecution examined P.Ws. 1 to 6 and filed Ex. P 1 to P5 and also marked M.O.I. Though the appellant, in 313 questioning, would state that he was innocent, the Trial Court convicted the appellant for the offence mentioned above and sentenced him to undergo R.I. for ten years and to pay a fine of Rs. 1,00,000, in default to undergo R.I. for two years. This is challenged in this appeal.

5. Mr. Malarvannan, learned Counsel for the appellant would mainly contend that investigation has been conducted only the Officers who are not competent as provided u/s 42 of the N.D.P.S. Act and as such, the search and seizure and consequent investigation becomes illegal and it vitiates the trial.

6. Mr. Srinath, learned Government Advocate, on the contrary, would submit that under G.O. Ms. No. 161/92 dated 12.8.1992, the Police Officer not below the rank of a Head Constable is the competent Officer to investigate the matter and as the charge sheet was filed on 12.11.1992, the investigation cannot be said to be illegal.

7. I have carefully considered the submissions made by the learned Counsel appearing for both parties.

8. On going through the evidence let in by the prosecution, it is clear that the seizure of the contraband was effected by the Sub-Inspector of Police on 10.5.1992 in public place, as contemplated u/s 43 of the N.D.P.S. Act. On the very same day, the report u/s 57 of the N.D.P.S. Act has been sent to P.W. 5, Sethuraman, the Inspector of Police. On that day, he took up further investigation and examined the accused and other witnesses. He immediately made arrangements for sending contraband through the Court by his requisition Ex.P 3.

9. Next day on 11.5.1992, P.W. 6 Krishnamurthy another Inspector of Police took up further investigation and examined other witnesses. He also collected Ex. P 5 analyst report dt. 17.8.1992. Thereafter, he filed a charge sheet on 12.11.1992. P.W. 5 would specifically state in the Chief examination that being an Inspector working in N.D.P.S. department, he was competent to investigate the N.D.P.S. cases as per G.O. Ms. No. 161/92 dt. 12-8-1992.

10. It is pointed out that the aforesaid G.O. provides that the Officers not below the rank of Head Constable is authorised to investigate the matter only from 12-8-1992 onwards. There is no dispute as held by this Court that G.O. Ms. No. 161 dt. 12.8.1992 will have only prospective effect. Thus it is clear that the statement made by P.W. 1 that he was competent to investigate the matter on

10.5.1992 is factually incorrect. Furthermore, it is noticed that the search and seizure was conducted by P.W. 2, the Sub-Inspector of Police.

11. In this context, in the decision rendered by the Supreme Court in State of Punjab Vs. Balbir Singh, with reference to the search and investigation conducted by the incompetent Officer, it is observed as follows:--

Therefore if an arrest or search contemplated under Sections 41 and 42 is made under a warrant issued by any other Magistrate or is made by any Officer not empowered or authorised, it would per se be illegal and would affect the prosecution case and consequently vitiate the trial.

12. This view has been reiterated by the Supreme Court in another recent judgment in Roy V.D. v. State of Kerala 2000 (7) SCC 430. In this case, nothing was produced by the prosecution to show that on the date of search and seizure, either the Sub-Inspector or Inspector of Police was competent to seize the contraband article and conduct the investigation.

13. Under the above circumstances, I am of the view that both arrest and seizure has not been effected by the Officer authorised or empowered. Therefore, it could be safely held that the same is illegal which would affect the prosecution and consequently entire trial is vitiated.

14. In the result, the Criminal Appeal is allowed setting aside the conviction and sentence imposed upon the appellant. The appellant is directed to be released forthwith.