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**(1997) 10 MAD CK 0101**

**In the Madras High Court**

**Case No :** Criminal Appeal No's. 725 of 1993 and 134 of 1994

Prabhakaran and Another

APPELLANT

Vs

State by Inspector of Police, N.I.B.C.I.D., T. Nagar, Ms-17.

RESPONDENT

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**Date of Decision :** 16-10-1997

**Acts Referred:**

**Citation :** (1997) 10 MAD CK 0101

**Hon'ble Judges :** K. Gnanaprakasam, J

**Bench :** Single Bench

**Advocate :** T. Sudanthiram for C.A. No. 725/93. and V. Sambamurthy for C.A. No. 134/94, for the Appellant; N. Sethilkumar Public Prosecutor, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

K. Gnanaprakasam, J.—These two Appeals were filed separately by Chidambaram (Appellant/First Accused in C.A. No. 134 of 1994) and Prabhakaran (Appellant/Second Accused in C.A. No. 725 of 1993), directed against the common conclusions, but orders were pronounced on 30.09.1993 against the first accused viz., Chidambaram (Appellant in C.A. No. 134 of 1994) and on 05.10.1993 against the second accused viz., Prabhakaran (Appellant in C.A. No. 725 of 1993) in C.C. No. 2 of 1993 by the Additional Special Judge, Madras Division, in which, the Appellants/accused were found guilty of the offence u/s 8(c) read with 21 of the N.D.P.S. Act 1985, and they were sentenced to undergo Rigorous Imprisonment for ten years each and also to pay a fine of Rs. 1,00,000/- each, in default further shall undergo R.I. for two years.

2. Though these two appeals were filed separately and argued by two different advocates, these two appeals may be clubbed together and a common order may be passed, as it arises from a common judgment passed by the Trial Court, involving a common and same set of facts. Hence, both the appeals were taken together and a common order has been passed. The advocates for the Appellants also agree for the same.

3. The case of the prosecution, as stated, was that on 25.08.1992 in the evening Pakyaraj, P.W.3, Sub-Inspector of Police, N.I.B.C.I.D., Madras had received an oral and confidential information stating that some Sri Lankans, whose names and addresses were not known, usually transporting Part 4 195 heroin to Kattan Kuppam, Madras in the early hours between 3.00 am. and 5.00 a.m. The said information was reduced into writing and the same was marked as Ex.P.6. In pursuance of the said information, P.W.3, Pakiaraj along with the raiding party were having a watch on 26.08.1992, 04.00 am. (early hours) at the later junction of Chennai Kamaraj Salai, Nattam Kuppam. At that time, two persons viz., Chidambaram (Appellant in C.A. No. 134 of 1994) and Prabhakaran (Appellant in C.A. No. 725 of 1993) were crossing that side. They were intercepted and informed that they have got to be searched in respect of trafficking of narcotic drugs and psychotropic substances and also informed whether they were willing to be searched before the Judicial Magistrate nearby or before the Gazetted Officer. They had waived the said offer and Chidambaram (First Accused) had produced a parcel with brown colour paper and Prabhakaran (Second Accused) had also produced another parcel with a brown colour paper. Both the parcels were containing "heroin" in a polythene packet and they were weighing 60 grams and 190 grams respectively. Out of these two packets, 5 grams were taken from each packets as samples for chemical analysis and the rest of them were repacked and tied. N.I.B. Seal was also affixed, Then, P.W.3, Packiaraj informed them that they were in possession of "Heroin" without any valid licence or permission granted by the Government and arrested them. The contraband was seized under a cover of mahazar and the same was marked as Ex.P.1. P.W.3, Packiaraj registered a case against them in N.I.B. Crime No. 92 of 1993 u/s 8(c) read with 21 of the N.D.P.S. Act 1985. He also sent a Special report to the Inspector of Police, N.I.B.C.I.D., Madras-17 and the same was marked as Ex.P.4. He had also prepared the printed First Information Report which was marked as Ex.P.5.

4. S. Jayaraman, Inspector of Police P.W.4, had received the information from Sub-Inspector of Police on 25.08.1992. Then, on 26.08.1992, at about 6.30 am., he had received the First Information Report and the special report sent by P.W.3, Packiaraj and took up further investigation. He had examined P.W.1, Civil and P.W.3, Packiaraj and also witnessed the scene of occurrence. The, he sent the Appellants/accused to the Court along with the seized contraband. He had also given a requisition to the Court, to send the samples for chemical analysis and the same was marked as Ex.P.7. Accordingly, the Court sent the samples along with a letter to the Director, Tamil Nadu Forensic Science Laboratory, Madras-5, for chemical analysis. The said letter was marked as Ex.P.2. After having analysed the samples sent by the Court. Kamala Krishnamoorthy, P.W.2 had given a report stating that the samples sent for chemical analysis contained Diacetyl Morphine and the said report was marked as Ex.P.3. After completing the investigation, P.W.4, S. Jayaraman, Inspector of Police filed the charge sheet against the Appellants/accused.

5. The prosecution had examined four witnesses and also marked. Exs.P. I to 7. M.O. series 1 to 3 were also marked.

6. The trial Court, after taking into consideration all the facts in the case had come to the conclusion that the Appellants/accused were found guilty and sentenced them to undergo Rigorous Imprisonment for ten years each and also to pay a fine amount of Rs. 1,00,000/-, each in default further shall undergo R.I. for two years. As against the orders passed by the Trial Court, the Appellants preferred the present appeals.

7. The learned advocates appearing for the Appellants made a vehement attack on the case of the prosecution that it had not chosen to examine any independent witness for the search and seizure and that therefore, according to them, the entire trial was vitiated. They had pointed out that P.W.3, Packiaraj received the information on 25.08.1992 in the evening and the same was reduced in to writing which was marked as Ex.P.6. In the cross examination, P.W.3, Packiaraj had further admitted that he had received the said information by 8.00 p.m. on 25.08.1992 and the offence is said to have taken place within the city limits of Madras. P.W.3, had enough time to secure independent and responsible witnesses for the search and the seizure of the accused. But, in evidence, he was not even fair enough to establish that he made any effort to secure independent witness and about their non availability. But, on the other hand, he had chosen to form a raiding party consisting of his own personnel without resorting to have any independent witness, and such a search and seizure cannot be safely relied upon. To substantiate their submission, they had relied upon the judgment reported in Shri Shiv Kumar Ashok Mishra Vs. Special Judge of N.D.P.S. Court, Mapusa-goia State, wherein it was held that: "It is not always possible to contend that the evidence of the police needs corroboration by one independent witness. But in a narcotic case where the search and seizure are the pivotal portions of the investigation, the statement of the official witness should have been corroborated at least by one independent witness.

8. They further contended that the conviction based on recovery made as a result of search not witnessed by independent and respectable persons when investigating officer had time, opportunity and means at his hands, should not be upheld. To strengthen their case, they relied upon the judgment reported in 1996 (3) Cri 379 (Jagai Singh v. State of Punjab) wherein the Court held that

The Court will be extremely reluctant to uphold the prosecution case which is solely based on recovery made as a result of search not witnessed by independent and respectable persons unless it was unreasonable and improbable to procure the presence of such witnesses. In this case also, the prosecution had not established that they made an into of effort to procure independent and respectable witnesses and their non-availability.

9. It was also argued that if search and seizure were not made in the presence of independent and responsible witnesses, notice u/s 50 of the N.D.P.S. Act has to

be given, for which they relied upon the decision reported in 1995 (3) Cri 661 (Munni Lai v. State) wherein it has been held that

Though there is no requirement of law that the notice u/s 50 of the N.D.P.S Act has to be given in writing but in cases where there is no public witness, in that event the notice u/s 50 ought to be in writing in order to land credibility to the prosecution version.

It appears that there is some force in the arguments of the learned Advocates for the Appellants.

10. The learned advocates appearing for the Appellants submitted that P.W.3, Packiaraj did not inform to the Appellants about their right to be searched before the Gazetted Officer or a Magistrate as contemplated u/s 50 of the N.D.P.S. Act 1985. No doubt, it is stated in the F.I.R. that such a question was put to the Appellants and they had waived the same.

11. On the contrary, the learned advocate Mr. N. Senthil Kumar representing the learned Public Prosecutor had submitted that by reason of Section 54 of the N.D.P.S. Act, the burden was on the Appellants to prove that they had not committed the offences under the N.D.P.S. Act and this they had failed to do so in this case. In the alternative, he submitted that the act of informing to the accused of their right to be searched in the presence of a Gazetted Officer or a Magistrate u/s 50 of the Act was an official act to be performed by a Police Officer and the Court should raise a presumption under the provisions of Section 114, Illustration (3) of the Indian Evidence Act, 1872 to the effect. These aspects of the case were discussed in the judgment reported in 1995 S.C.C (Cri.) 564 (Saiyad Mohd. Saiyad Umar Saiyad and Ors. v. State of Gujarat) wherein the Apex Court held that "There is no room for such presumption because the possession of illicit articles under the N.D.P.S. Act has to be satisfactorily established before of the Court." The way in which, the search and seizure said to have been made in this case are not satisfactory and they were not done as contemplated under the statute and hence I am unable to concur with the findings of the Trial Court, in the said aspect of the case.

12. Hence, I am not inclined to accept the case of the prosecution on the ground that it had not chosen to call for an independent witness for the search and seizure and also the mandatory provisions of Section 50(I) was not complied with. Hence, the findings of the Trial Court has got to be set aside and the same is hereby set aside.

13. In result, the appeals are allowed, the findings of the Trial Court are set aside, the fine amount, if any paid by the Appellants, shall be refunded to them.