
(2008) 12 MAD CK 0239
In the Madras High Court
Case No : Criminal A. No. 286 of 2005

Shanmugam

APPELLANT

Vs

Inspector of Police, NIB - CID

RESPONDENT

Date of Decision : 18-12-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 — Section 41(1)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 2, 3, 41, 42

Citation : (2008) 12 MAD CK 0239

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : T.S. Sasikumar, for the Appellant; R. Muniapparaj, Govt Advocate (Crl. Side), for the Respondent

Judgement

P.R. Shivakumar, J.—The sole accused in C.C. No. 11 of 1995 on the file of the Additional Special Judge for NDPS Act, Chennai who stood charged and found guilty as per the charge for an offence punishable u/s 8(c) read with Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and was awarded a sentence of rigorous imprisonment of 10 years and a fine of Rs. 1,00,000/- with a default sentence of one year rigorous imprisonment by the said judge, vide judgment dated 03.05.2002, has come forward with this appeal challenging the conviction recorded against him and the sentence imposed on him.

2. The case of the prosecution, in brief, can be stated as follows:

a) P.W.4 - Thiru.Packiaraj, the then Sub-inspector of police, NIB-CID, Chennai received a secret information from an informant from Choolaimedu, Chennai at 7.30 p.m on 02.07.1994 to the effect that a person named Shanmugam, residing at No. 59, 14th West cross street, Mahakavi Bharathiyar Nagar, Chennai (the appellant/accused) was proceeding towards his residence after purchasing 2 Kgm of Opium from an unidentified person at Vadapalani, Chennai.

b) Immediately thereafter P.W.4 prepared Ex.P5 - Intimation and sent it to the Inspector of Police, NIB-CID, Chennai and proceeded towards 14th West cross street, Mahakavi Bharathiyar Nagar, Chennai along with his police party and was waiting there for the arrival of the accused. He had also taken along with him an independent witness, namely P.W.2 to the said place to be a witness for arrest, if any and for attesting the documents that might be prepared. While, P.W.4 was waiting at the 14th West cross street, Mahakavi Bharathiyar Nagar, Chennai along with the police party and the above said witness, at 9.00 p.m on the said date, namely 02.07.2004, the accused Shanmugam came there carrying a gunny bag in his hand inscribed with letters in Hindi language in green ink on either side. P.W.4 and the police party which included P.W.2 - Subbiah, the then Head constable, stopped the accused and informed him that they wanted to effect a search for Narcotic drugs and that if he wished he would be taken to the place of a Gazetted officer or a Magistrate in whose presence the search would be made and that he had as he had a right to make such a demand. However, the accused informed the police party that search could be made at the place of occurrence itself and there was no need to take him to a Gazetted officer or a Magistrate. Consequently, P.W.4 got the gunny bag and inspected the same and he found two parcels bundled in an English newspaper using a thread. On examination of those packets in the presence of P.W.2 and 3, P.W.4 found them to contain opium in conformity with the secret information received by him. He weighed it with the help of instruments he had taken along with him and found the weight of opium contained in each packet to be 1 Kgm. At the rate of two samples from each one of the packets, totally four samples were drawn, bundled and sealed separately in the presence of P.W.2 and 3 under Ex.P3 - Mahazar. P.W.2 and 3 attested the said Mahazar. The samples were drawn by ensuring each sample weighed 10 grams.

c) Thereafter, P.W.4 came back to NIB police station at about 10.30 p.m, prepared Ex.P6 - First Information Report and registered a case against the appellant/accused for an offence punishable u/s 8(c) read with Section 18 of the Narcotic Drugs and Psychotropic substances Act, 1985 in crime No. 35 of 1994 in the said police station. Pursuant to the registration of the said case he prepared a Special Report - Ex.P7 and submitted the same along with the First Information Report to P.W.5 - Jayaraman, the then Inspector of Police, NIB-CID, Chennai-600 017 for investigation.

d) P.W.5 during the course of examination submitted the samples to the court along with a requisition - Ex.P8 to send two samples to the Forensic Lab, Mylapore for examination and to retain the other two samples in the court. Two of the samples were sent to the Forensic Laboratory and were examined by P.W.1, the then Scientific Assistant-Grade I attached to the Tamil Nadu Forensic Science Department, Narcotic Drugs Wing. She found each one of the samples contained Morphine @ 2.23% and Opium at 22.3% and Mechonic acid. As a result of the chemical examination, she issued the Chemical examination Report - Ex.P2, counter signed by the Scientific Officer and the Assistant Director,

certifying the same to be Opium, a Narcotic drug. The investigating officer, namely P.W.5, during the course of investigation recorded the statements of witnesses, collected necessary documents, completed the investigation and submitted a final report against the appellant/accused alleging commission of an offence punishable u/s 8(c) read with Section 18 of the Narcotic Drugs and Psychotropic substances Act, 1985.

e) The trial court took it on file as C.C. No. 11 of 1995 and framed necessary charge u/s 8(c) read with Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Pursuant to the denial of charge and plea of innocence made by the appellant/accused, the case was tried and in the trial, in order to substantiate the charge made against the appellant/accused, P.W.1 to 5 were examined and Ex.P1 to P8 were marked. Two samples retained by the court, the remaining contraband and the returned covers after chemical examination were produced as M.O.1 to 6. when the accused was examined u/s 313(i)(b) Cr.P.C regarding the incriminating part of the evidence adduced on the side of the prosecution, he denied them as false. Though he had stated that he had witnesses to be examined on his side, thereafter he did not examine anybody as witness on his side. No document was marked and no material object was produced on his behalf.

3. The court below heard the arguments advanced on either side, considered the evidence in the light of the said arguments advanced on either side and upon such a consideration, held the appellant/accused guilty of the offence with which he stood charged and tried, convicted him for the said offence and sentenced him as indicated supra.

4. Challenging the conviction recorded and the sentence imposed by the court below, the appellant/accused has come forward with the present appeal citing various grounds enumerated in the Criminal Appeal petition.

5. Advancing arguments on behalf of the appellant, Mr. T.S. Sasikumar, advocate contended that the prosecution had failed to comply with the mandatory provisions of Section 42(1), 50(1) and 57 of the Narcotic Drugs and Psychotropic Substances Act, 1985 which fact was not properly appreciated by the court below; that u/s 42(2) of the NDPS Act, only on the authorisation given by the authorised officer, the search and seizure could be effected, that too, only between sunrise and sunset; that P.W.4 who is said to have received secret information at 7.30 p.m had proceeded towards the place of occurrence without the authorisation of P.W.5 and hence the entire exercise made by P.W.4 was against the statute and vitiated; that as per Section 51 of the Narcotic Drugs and Psychotropic Substances Act, 1985, a person to be searched had a right to be informed that he could demand the search to be made before a Gazetted officer or a Magistrate; that though there were parole evidence to the effect that he was informed of such right, the same was not incorporated either in the First Information Report or the statement of P.W.4 recorded u/s 161 Cr.P.C., that failure to give such an option u/s 50(1) to the accused in writing, would vitiate

the entire proceedings and that hence the prosecution case should have been rejected. It is the further contention of the learned Counsel for the appellant that the failure on the part of the independent witness examined as P.W.3 to support the prosecution case shall falsify the case of the prosecution; that the conviction based on the evidence of other witnesses examined on the side of the prosecution, who were very much interested in implicating the accused was defective, in the light of the fact that though the place of occurrence is said to be in a residential area, none of the persons residing adjacent to the place of occurrence had been cited as witness and that hence the judgment of the trial court and order of sentence should be set aside holding them to be defective and infirm.

6. The learned Counsel for the appellant contended further that the court below failed to appreciate and apply correctly the structured sentence introduced by the amendment made to the Narcotic Drugs and Psychotropic Substances Act by Act in 2001; that as per the amended Section 18, the offence for the purpose of sentencing should be classified into three categories based on the quantity of opium possessed, namely 1) small quantity, 2) commercial quantity and 3) in-between quantity; that so far as the first category, namely small quantity is concerned, no minimum sentence had been prescribed; that minimum sentence had been prescribed only for the second category, namely commercial quantity and not for the other categories; that the fact that the case of the appellant fell under the third category, namely in-between quantity, was not properly considered by the court below in awarding sentence; that award of the maximum sentence prescribed u/s 18(c) of the said Act was not warranted in the case of the appellant and that for that reason alone, the appeal should be allowed and the sentence should be rationalised by reduction.

8. This court heard the submissions made by Mr. R. Muniapparaj, learned Government Advocate (Crl.Side) in reply to the above said contentions raised by the learned Counsel for the appellant and paid its anxious considerations to the same.

9. The first limb of the arguments advanced by the learned Counsel for the appellant is to the effect that the charge levelled against the accused as if he had committed an offence punishable u/s 8(c) read with Section 18 of the Narcotic Drugs and Psychotropic Substances Act has not been proved beyond reasonable doubt as the only independent witness (others being official witnesses), namely P.W.3 did not support the prosecution case regarding arrest, recovery and his attesting the Mahazar - Ex.P3. Of course, it is true that P.W.3 alone happened to be an independent witness and while he was examined before the court below, he turned hostile and did not support the prosecution version regarding the arrest and seizure. On the other hand, he would simply stated that police took him to their office on the date of occurrence and obtained his signature as a witness. He also pleaded ignorance of any other fact. He also denied having gone to the place of occurrence along with the police party and witnessed the

occurrence, namely arrest of the accused, seizure of the contraband and drawing of samples. However, he has admitted his signature found in Ex.P3 - Mahazar and hence the signature has been marked as Ex.P4. When such an independent witness has betrayed the prosecution and turned hostile, the same shall not be enough to totally disbelieve the official witnesses and reject the case of prosecution. What is to be done in such an event is to apply the test of careful scrutiny. In this case P.W.2 is the other attesting witness who has clearly spoken about the interception of the accused, arrest of the accused, seizure of the contraband and drawing of the samples. A strenuous attempt made by the learned Counsel for the appellant before the court below to elicit contradiction and thus show him not to be a trustworthy witness, has ended in utter failure. In fact the learned Counsel for the appellant was not able to elicit any contradiction in the evidence of P.W.2, 4 and 5 and the contradictions pointed out on behalf of the accused are either not contradictions at all or insignificant.

10. In this regard the attention of this court was drawn by the learned Government Advocate to the judgment of the Hon''ble Supreme Court made in P.P. Fathima v. State of Kerala reported in 2004 SCC (Cri) 1. In the said judgment the Hon''ble Supreme Court expressed the view that the fact that the independent Mahazar witness for seizure of the contraband did not support the prosecution case, would not make the prosecution case any less acceptable, if the court was otherwise satisfied from the materials on record and from the evidence of the seizing authority that such seizure was genuinely made. The relevant paragraph found in the judgment is reproduced below:

The learned Counsel then contended that in view of the fact that the panch witness to the seizure has not supported the prosecution case, the seizure cannot be accepted. We have repeatedly held that the mere fact that a panch witness does not support the prosecution case by itself would not make the prosecution case any less acceptable, if otherwise the court is satisfied from the material on record and from the evidence of the seizing authority that such seizure was genuinely made. In the instant case also we are satisfied that from the evidence of PWs 1 and 2 the seizure has been proved by the prosecution. Therefore, this argument also fails.

The said observation made by the Hon''ble Supreme court provides a complete answer to the first submission made by the learned Counsel for the appellants to the effect that in view of the betrayal on the part of the P.W.3 and his failure to support the prosecution case, the prosecution case supported only by other witnesses who are officials should not be accepted. This court is of the considered view that the above said contention raised by the learned Counsel for the appellant does not contain any substance in it and hence the same deserves rejection.

11. The second limb of the argument advanced by the learned Counsel for the appellant that the mandatory provisions found in Sections 42(1), 42(2), 50(1) and 57 of the Act were not complied with and hence the prosecution case is

vitiated, also does not merit acceptance as there is no substance in the same. So far as Section 57 is concerned it enjoins a duty on the officer effecting arrest or seizure of the contraband under the Narcotic Drugs and Psychotropic Substances Act to make a full report of all the particulars of such arrest or seizure to his immediate official superiors within 48 hours. In this case, P.W.4 who effected arrest and seizure of the contraband at about 9.00 p.m on 02.07.1994, immediately sent Ex.P7 - Special Report u/s 57 to his immediate superior, namely P.W.5 - the Inspector of Police along with First Information Report, who received it within two hours thereafter, namely at 11.00 p.m on 02.07.1994 itself as evidenced by Ex.P7 and the testimony of P.W.5. Therefore, this court is not in a position to accept the contention of the learned Counsel for the appellant that there was violation of the mandate provided u/s 57 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

12. So far as Section 42(2) of the Narcotic Drugs and Psychotropic Substances Act, 1985 is concerned, there is no violation in the instant case. P.W.4 got the information at 7.30 p.m that the accused was proceeding towards his residence at No. 59, 14th West cross street, Mahakavi Bharathiyar Nagar, Chennai after purchasing 2 Kgms of Opium from a person at Vadapalani, Chennai. The said information was taken down by P.W.4 and sent to his immediate superior, namely the Inspector of Police, NIB-CID, Chennai which was received by him at 8.00 p.m on the very same day as revealed by the endorsement found in Ex.P5. Sub-section 2 of Section 42 enjoins a duty on the officer who receives such information to take down the information and to send a copy thereof to his immediate official superior within 72 hours. In this case, the information taken down by P.W.4 was sent immediately to his official superior, namely the Inspector of Police and the Inspector of police received it within 2 1/2 hours. Therefore there is no violation of Section 42(2) as contended by the learned Counsel for the appellant.

13. So far as Section 42(1) is concerned, it says when the authorised officer not below the rank of peon, sepoy or constable believes on information or from personal knowledge that any illegally acquired property or any document or other article which may furnish evidence of holding any narcotic drug or psychotropic substances or controlled substances in respect of which an offence punishable u/s 3 of the Act has been committed or any document or such an article which may furnish evidence of the commission of such an offence or any illegally acquired property which is liable for seizure, freezing or forfeiture is kept or is concealed in any building, conveyance or enclosed place, may between sunrise and sunset, enter into and search any such building, conveyance or place. It proceeds that in case of resistance, such officer may break open any door and remove any obstacle to such entry; seize drug, substance and all materials and documents etc., or detain, search and arrest any person whom he has reason to believe to have committed any offence. A proper consideration of the above said provision will show that the restriction to exercise such powers between sunrise and sunset is confined to entering into and searching any

building, conveyance or enclosed place and in case of resistance, breaking open any door and removing any obstacle to such entry and search. Such a restriction provided in Section 42(1) is not applicable to the arrest of a person possessing the contraband at a public place.

14. Section 43, which deals with an arrest of any offender and seizure of contraband in any public place or in transit, does not qualify such a power with a condition that it is to be exercised only between sunrise and sunset. Furthermore, the proviso (1) to Section 41 provides that if the officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for concealment of evidence or facility for the escape of the offender, he may even enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the ground of his plea. Therefore, even the restriction for having entry into the building, conveyance or enclosed place for the purpose of conducting search or seizure between sunset and sunrise is not absolute. The officer concerned can do so between sunset and sunrise after recording his belief that the warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or for the escape of the offender. The entire context of Section 42(1) will show that it applies only for entering into and having any search in any building, conveyance or closed place. A proper construction of Section will show that the Section 42(1) will not be applicable for effecting arrest and seizure in public place either during day time or night time.

15. So far as the alleged violation of Section 50(1) is concerned, there is no substance in the argument advanced by the learned counsel. Section 50(1) reads as follows:

(1) When any officer duly authorised u/s 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

In this case there is no evidence to show that the appellant/accused wanted him to be produced before a Gazetted officer or Magistrate before conducting a search of his person. Of course the said right given to an accused is a valuable right which cannot be whistled down without making it known to the accused that he is having such an option. In this case, clear evidence has been adduced through P.W.2 and 4 that the accused was informed of his right to demand for his production before a Gazetted officer or the nearest Magistrate before a search of him could be conducted and that despite such a disclosure, he opted to be searched by police officer at the place of occurrence itself. The learned Counsel for the appellant pointed out the admission made by P.W.4 that he did not state before the Inspector of Police in his statement u/s 161 Cr.P.C. that he informed the accused of his option to have the search conducted before a Gazetted officer or the nearest Magistrate. The omission to state the same in the statement u/s

161 Cr.P.C. in detail shall not be a material contradiction. P.W.2 also has deposed clearly that the Sub-Inspector informed the accused that he had an option to have the search conducted before a Gazetted officer or Magistrate and that the accused replied he would prefer to be searched by the police at the place of occurrence itself without being produced before a Gazetted officer or Magistrate for that purpose. In this regard the learned Counsel for the appellant/accused, who appeared before the court below, was not able to elicit any contradiction between his testimony and his statement u/s 161 Cr.P.C. Therefore, the above said contention raised by the learned Counsel for the appellant deserves to be rejected. The court below, on a proper appreciation of evidence, has come to a correct conclusion that the prosecution was able to prove possession of 2 Kgms of Opium by the appellant/accused without proper license or permit for having such possession and that hence he was guilty of an offence punishable u/s 8(c) read with Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985. This court is not able to find any defect or infirmity in the above said finding warranting an interference with the same by this court in this appeal. The conviction recorded by the court is on a sound footing and hence it does not warrant any interference and on the other hand, the same deserves to be confirmed.

16. The last limb of the argument advanced by the learned Counsel for the appellant relates to the rationality of the punishment awarded by the court below. The said argument was advanced based on the amendment introduced to Section 18 by the Amending Act of 2001, (Act 9 of 2001) which came into effect on 02.10.2001. Prior to amendment there was no classification of the offence u/s 18 based on the quantity of Opium and Opium poppy. The unamended Section 18 was as follows:

18. Punishment for contravention in relation to opium poppy and opium. - Whoever, in contravention of any provision of this Act or any rule or order made or condition of license granted thereunder cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses opium shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

17. By the above said amendment introduced in 2001, punishment was rationalised by classifying the offence u/s 18 into three categories based on the quantity of contraband. The offence was classified into: (a) contravention involving small quantity, (b) contravention involving commercial quantity and (c) any other case referring to contravention involving quantity in between small quantity and commercial quantity. The amended Section 18 reads as follows:

18. Punishment for contravention in relation to opium poppy and opium - Whoever, in contravention of any provision of this Act or any rule or order made or condition of license granted thereunder cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses opium shall be punishable,-

(a) where the contravention 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;

(b) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees which may extend to two lakh rupees;

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees;

(c) in any other case, with rigorous imprisonment which may extend to ten years and with fine which may extend to one lakh rupees.

18. By the amended section, no minimum sentence has been prescribed for categories (a) and (c), namely contravention involving small quantity and contravention involving in-between quantity, namely more than small quantity and less than commercial quantity. Only in respect of category (b) - commercial quantity, a minimum sentence of 10 years rigorous imprisonment and a minimum fine of Rs. 1,00,000/- have been provided. So far as category "C" is concerned, the minimum sentence prescribed for (b) is provided as the maximum sentence. It is quite obvious that the court below, without advertent to the classification of the offence u/s 18 into three categories, has chosen to award a sentence of 10 years rigorous imprisonment and a fine of Rs. 1,00,000/- with a direction to undergo one year rigorous imprisonment in case of default in payment of fine as a default sentence. When the reasons assigned by the court below for awarding such sentence is taken into consideration, it will make it abundantly clear that the court below did not take into account the amendment brought by Act 9 of 2001 rationalising punishment based on the quantity of contraband. The court below has made an observation to the effect that it decided to award minimum sentence and hence awarded the sentence as indicated above. It shows the court below was of the view that in all cases that come u/s 18, the minimum sentence of 10 years rigorous imprisonment and a fine not less than Rs. 10,000/- was to be awarded. Challenge made to the above said sentence awarded by the court below is on sound principle.

19. As per the amended table provided in the notification issued under Sub Clause (VIIa) and (XXIIIA) of Section 2 of the Narcotic Drugs and Psychotropic Substances Act, namely Notification No. S.O.527(E) dated 16.07.1996, Opium is listed as item No. 92. Upto 25 gms is described to be small quantity and 2.5 Kgs and above is described to be commercial quantity. Admittedly, the contraband

found in possession of the appellant/accused and seized by P.W.4 was only of 2 Kgms. Therefore, it is quite obvious that it falls under category "C" mentioned in Section 18, namely quantity in between small quantity and commercial quantity.

20. In this regard, the learned Government Advocate (Crl.Side) drew the attention of this court to the judgment of the Hon''ble Supreme Court in Basheer alias N.P. Basheer v. State of Kerala reported in 2004 Supreme Court Cases (Cri) 1107 which upheld the virus of the amendment introduced by Act 9 of 2001 rationalising the punishment. In the said judgment also, the Hon''ble Supreme Court held that the amendment was made applicable by Section 41(1) of the amending Act, namely Act 9 of 2001, applicable to all cases pending before the courts as on 02.10.2001 or under investigation. The proviso which excluded cases in which the accused were convicted by the trial courts and their appeals were pending before the respective high courts. When the said exclusion was challenged as discriminatory and violative of Article 14, the challenge was turned down stating that the classification was reasonable. In the said judgment, the Hon''ble Supreme Court made it clear that though the offence might have been committed before the said amendment coming into force, the amended provisions alone would be applicable to such cases if such case was pending before the trial court. The said amendment came into effect on 02.10.2001. The judgment of the trial court in this case was pronounced on 03.05.2002. Therefore, it is quite obvious that the amended provisions alone shall be applicable to the case on hand. The court below seems to have lost sight of the said amendment and imposed a punishment of 10 years rigorous imprisonment and a fine of Rs. 1,00,000/- with a default sentence of one year rigorous imprisonment on the erroneous assumption that the same was the minimum punishment that can be awarded. This court, without any hesitation whatsoever, holds that the judgment of the trial court so far as the imposition of punishment is concerned, is infirm and that the same should be corrected by this court in exercise of its appellate power.

19. So far as contravention involving minimum quantity specified in Section 18(a) is concerned, the maximum punishment prescribed therein is six months rigorous imprisonment or with fine which may extend up to Rs. 10,000/- or with both. So far as the contravention involving quantity in between minimum quantity and commercial quantity is concerned, as per Section 18(c) the maximum punishment is 10 years rigorous imprisonment and with fine which may extend to Rs. 1,00,000/-. Taking into account all the facts and circumstances of the case and the fact that the quantity possessed by the appellant was a little less than the commercial quantity, this court is of the considered view that the ends of justice shall be met with by reducing the sentence of imprisonment and fine to one of rigorous imprisonment of seven years and a fine of Rs. 25,000/- and a default sentence of six months rigorous imprisonment in case of default in payment of fine.

20. Accordingly, the appeal is allowed in part, conviction is confirmed and the

sentence is modified to the extent indicated above. The period of imprisonment already undergone as under trial prisoner and after conviction by the court below shall be set off.