



CRL.A(MD).Nos.733 and 857 of 2022 and 277 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 20.12.2023

Delivered on : 22.01.2024

CORAM

THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

CRL.A(MD).Nos.733 and 857 of 2022 and 277 of 2023

and

CRL.M.P(MD).Nos.5661 and 7309 of 2023

Ananthakumar

... Appellant/Accused No.4
in CrI.A.(MD).No.733 of 2022

Uthayavan

... Appellant/Accused No.2
in CrI.A.(MD).No.857 of 2022

Udhayakumar

... Appellant/Accused No.3
in CrI.A.(MD).No.277 of 2023

Vs.

State represented by
The Inspector of Police,
NIB-CID Police Station,
Madurai District.
Cr.No.13 of 2020

... Respondent/Complainant
(In all appeals)

Common Prayer : These Criminal Appeals are filed under Section 374(2) of Cr.P.C. to call for the records in C.C.No.155 of 2020 dated 29.08.2022 on the file of the learned I Additional Special Court for NDPS Act Cases, Madurai and set aside the same.

For Appellant : Mr.K.Saravana Bagavathy
in CrI.A(MD)No.733 of 2022.



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: Mr.M.Jegadeesh Pandian
in Crl.A(MD)No.857 of 2022.

: Mr.A.Jeyaram
in Crl.A(MD)No.277 of 2023.

For Respondent : Mr.T.Senthil Kumar,
Additional Public Prosecutor
(in all cases)

COMMON JUDGMENT

These appeals have been filed to set aside the conviction and sentence passed by the 1st Additional Special Court for NDPS Act cases, Madurai, in C.C.No.155 of 2020 dated 29.08.2022.

2.Since the appellants in all the appeals were arrayed as accused No. 2 to 4 in the same crime number, these appeals are taken up together for hearing and disposed by way of this common judgment.

3.The appellants and other two accused are said to have committed offence under Sections 8(C) r/w 20(b)(ii)(c), of Narcotic Drug Psychotropic Substances Act, 1985, (hereinafter, for the sake of brevity, referred to as “NDPS Act”). On 15.02.2020, at 05.00 a.m., when the appellants and other accused illegally transported 168 Kg., of Ganja in the



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car bearing registration No.TN-09-BW-5591, they were intercepted by the respondent police and made a search in the car. After the search, the said larger quantity of ganja was recovered as per the procedure stated in the NDPS Act. Thereafter, FIR was registered for the above alleged offence. Thereafter, they were produced before the Court along with the contraband and they were remanded to juridical custody. After completion of investigation, they filed final report in Crime No.13 of 2020 against the appellants and other accused for the offences punishable under Sections 8(c) r/w 20 (b) (ii) (c), 27 A, 29(1) and 25 of NDPS Act. After receipt of the final report, the learned trial Judge had taken cognizance in C.C.No. 115 of 2020, on the file of the 1st Additional Special Court for NDPS Act cases, Madurai.

4.The learned trial Judge after appearance of the accused served the copies under Section 207 Cr.P.C. Then, he framed necessary charges and questioned the accused. The accused denied the charges and pleaded not guilty and stood for trial.

5.To prove the case, the prosecution examined P.W.1 to P.W.5 and exhibited 22 documents as Ex.P.1 to Ex.P.22 and produced 34 material



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objects as M.O.1 to M.O.34. During the recording of the evidence, the fifth accused namely Ramesh absconded and hence, the case as against him was split up in C.C.No.161 of 2021. Thereafter, all the accused were questioned under Section 313 Cr.P.C proceedings for disclosing the incriminating evidence against them and they denied the same as false and thereafter, the case was posted for defence evidence. Neither the defence witness was examined nor documents were marked on the side of the appellants and other accused.

6.After considering the material adduced by the prosecution and also hearing the argument of the appellants and other accused, the trial Court acquitted A6 and convicted the appellants and other accused guilty for the offence under Sections 8(C) r/w 20(b)(ii)(c) of NDPS Act and sentenced them to undergo 10 years Rigorous Imprisonment each and to pay a fine of Rs.1,00,000/- each, in default to undergo one year Simple Imprisonment each. Aggrieved by the same, the present appeals have been filed.

7.The learned counsel appearing for the appellant/A4 in Crl.A.(MD).No.733 of 2022 made the following submissions:

7.1.The learned trial Court failed to consider that there is no strict



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compliance of Section 42 of NDPS Act. The Exhibits Proved the compliance of Section 42 of NDPS Act, is not true and the same was fabricated one. The learned trial Judge failed to consider that there was a discrepancy between the evidence of the P.W.1, 2 and 4 relating to the recovery of the contraband. P.W.2 specifically stated that after receipt of the secret information, he recorded and sent the same to one Gurusamy, Head constable attached to the Jurisdictional DSP namely P.W.4. The said Gurusamy was not examined. Exs.P1 to P7 were belatedly produced. The case of the prosecution is that he received secret information and on the basis of the Secret information, the recovery and arrest were made.

7.2.The learned counsel further submitted that a detailed report required under Section 57 of NDPS Act has not properly been submitted to the P.W.4. Normally, non compliance of Section 57 of NDPS Act, is not mandatory. But in view of the discrepancy in time and seizure of the recovery, the said infraction is the material in the present case.

7.3.The learned counsel further submitted that according to the P.W.2, he made the entry in the Case Diary relating to the information received by him. The same was not produced before this Court and hence



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his version that he received information and sent the same to the P.W.4 is not correct.

7.4.The learned counsel further submitted that before invoking presumption under Section 35 and 54 of the NDPS Act, foundational facts are to be proved by the prosecution. In this case, the prosecution witnesses are not believable to show that the recovery of the contraband from the appellants and hence, without proof of the recovery, the presumption could not arise.

7.5.The learned counsel further submitted that the learned trial judge acquitted A6 under Section 29 of NDPS Act and erroneously convicted the appellant under Section 8(C) r/w 20(b)(ii)(c) of NDPS Act, without any evidence to prove the conspiracy made between them.

7.6.He further submitted that the respondent police has not complied Section 49 of the NDPS Act. The witnesses have not corroborated the fact as to who drove the vehicle on the date of the occurrence. The learned trial judge has not considered explanation raised by the appellants under section 313 Cr.P.C. Hence, the conviction passed as against the appellant is liable



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to be set aside.

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8.The learned counsel appearing for the appellant/A3 in Crl.A. (MD).No.277 of 2023 reiterated the above submission and specifically stated that the fact of the prosecution that he drove the vehicle on the date of occurrence is not true. The learned trial judge has not considered his explanation under Section 313 Cr.P.C that the false case was registered.

9.The learned counsel appearing for the appellant/A2 in Crl.A. (MD).No.857 of 2022 made the following submission:

9.1.According to the learned counsel for A2, A2 has not travelled in the car. He proceeded in the two wheeler and behind the two wheeler, the said car was coming. It is also stated in the evidence of the officers namely P.W.2. A2 escaped from the scene of occurrence by driving his two wheeler, without stopping the vehicle. In the said circumstances, there is no evidence to prove that the two wheeler belonged to the Appellant/A2 in Crl.A.(MD).No.857 of 2022. Further, there is no evidence to prove that the cell phone seized from the custody of the remaining accused. Hence, the conviction of the appellant under Section 8(C) r/w 20(b)(ii)(c) of NDPS Act is not maintainable.



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9.2.The learned counsel further elaborated arguments that according to the prosecution, he escaped from the scene of occurrence. On 07.10.2020, he surrendered before the Court and there was no recovery from him. The investigating officer also admitted that except the confession of the co-accused, there was no other material to connect him. In the said circumstances, the learned counsel seeks for acquittal.

10.The learned Additional Public Prosecutor appearing for the respondent Police submitted that on 15.02.2020, after receiving the secret information, P.W.4 went to the occurrence place. The informer identified the car. Before the car, A2 was proceeding to watch the other circumstances and the car was followed by the two wheeler. When the team intercepted the two wheeler, the person travelled in the two wheeler escaped from the scene of occurrence. At that time, they only caught the car and thereafter, they conducted the search in the car. In the car, they found 168 Kgs of Ganja. A1 gave the confession and he produced their 21 kgs of Ganja. A2 similarly produced 21 kgs of Ganja. The A3 also Produced Ganja for both A2 and himself. The recovery of 42 Kgs of Ganja from the A3 shows A2's involvement in this case. The recovery was proved through the evidence of the P.Ws.1 and 2 without any discrepancy in their



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evidence. In the said circumstances, once recovery is proved through legal evidence, the presumption automatically steps in and the appellants did not produce any evidence to rebut the presumption and also there is no circumstance to rebut the presumption available on the record. The same was considered by the learned Trial Judge and correctly recorded the conviction.

10.1.He further submitted that Section 42 of the NDPS Act, was properly complied with and the same was clearly deposed by P.W.4, who is the immediate officer to the P.W.2. The document was produced. Mere belated production of the documents is not ground to disbelieve the compliance of Section 42 of NDPS Act. Further, in this case, the report under Section 57 of NDPS Act, also reached immediately before the higher officers. All the documents including the contraband and samples were produced before the Court on the same day without any delay. In the said circumstances, mere belated production of the documents, is not a matter to disbelieve the entire evidence of the prosecution. Section 57 of NDPS Act, was properly complied with and the same was deposed by the P.W.4. As per the report of the chemical analyst, there was no tampering of the seal and contraband. In the said circumstances, the prosecution clearly



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proved the case beyond reasonable doubt. The same was not considered by the learned trial Judge and recorded the conviction against the appellants.

11.This Court perused the records and the documents adduced by the prosecution and the grounds raised by the appellants and reply made by the learned Additional Public Prosecutor and also considered the precedents relied upon by them.

12.The question to be decided in this appeal is whether the conviction and sentence imposed by the trial Court as against the appellants can be sustained or not?

13.On 15.02.2020, at 05.00 a.m, P.W.2 received the secret information relating to the illegal transportation of the Ganja weighing 168 Kgs in the car bearing Registration No.TN 09 BW 5591. Immediately, he recorded the same and informed to one Gurusamy to the P.W.4. Thereafter, he obtained permission and thereafter, he proceeded the occurrence place. In the occurrence place, the two wheeler was driven by A2 followed by the car was identified by the informer. Immediately, the team intercepted the two wheeler and the car, the two wheeler escaped



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from the spot. Thereafter, search was made in the car. A1, A2, A3, A4 were inside the car. P.W.2 and his team informed by showing their identification card and made the search after compliance Section 50 of NDPS Act, by issuing the consent letter. Thereafter, A1 Vinoth disclosed that he is in possession of 21 Kgs of Ganja and the same was recovered under Ex.P.4 and he also identified the car. On the basis of the said confession, the contraband 21 kgs of Ganja was recovered and the car, cellphone and simcard were seized. From the seized items, samples were taken and the remaining contraband were also packed properly in two bags under M.Os.5 and 21 (P1 and P.2). Similarly, A2 disclosed that he is possession of 21 Kgs of Ganja and the same was also recovered under Ex.P5 and the sample was taken and the remaining contraband were produced. Two cell phones, Aadhar Card and driving licence were seized from him. A3 disclosed that he is possession of 42 Kgs of Ganja including the Ganja meant for the A2. The cell phones were also seized from him. All the accused disclosed that they purchased the said contraband from A5, who absconded. A6 is wife of Suresh and car stands in her name and her car was used in the said occurrence. After seizure of the above contraband, P.W.2 recovered the contraband and produced before the trial Court along with the accused and the case was registered in Crime No.13 of 2020. After registration of the



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case, P.W.2 sent the detailed report to P.W.4 and the accused were produced before the learned Judicial Magistrate along with the contraband and material documents. The learned Judicial Magistrate, after accepting the contraband and verification directed to produce before the learned I Additional Special Court for NDPS Act Cases, Madurai. Thereafter, the contraband was produced before the Court on the same day. The learned trial judge acquitted the A6 stating that there was no evidence to prove the conspiracy between her and the remaining accused. The learned counsel for the appellant submitted that there was no compliance of Section 42 of NDPS Act. P.W.2 received the information on 15.02.2020 at 05.00 a.m, and he deposed that he recorded the said information and sent a communication to P.W.4 through one Gurusamy. The document was marked as Ex.P.12. The same was produced before this Court along with the remand on 17.02.2020. Further, P.W.4, who received the said information also corroborated the said receipt of the information furnished by P.W.2. In the said circumstances, the case of the appellants is that the documents was created subsequently, the same cannot be accepted. As per the Section 42 of the NDPS Act, P.W.2 is duty bound to get permission from the superior, upon receipt of the information. In the said circumstances, the case of the appellants that non compliance of Section 42



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of the NDPS Act, is not accepted. P.W.2 after recovery of the contraband, arrested the accused and registered the FIR and prepared the detailed report under Section 57 of the NDPS Act. The same was submitted to the P.W.4 on the same day. As per Section 57 of NDPS Act, the report shall be submitted to the higher officers within 48 hours. But in this case, it has reached the officer much earlier. Further, the report also produced before the concerned Court on 15.02.2020 itself. The P.W.4 also deposed that he received the said information. In this aspect, the evidence of the prosecution witness are cogent and the compliance of Section 57 of NDPS Act is proved.

14.P.Ws.1 and 2 clearly deposed about the recovery of the contraband from the A1, A3, A4. The corresponding Athatchi are Exs.P.4 to P.6. The samples taken from the contraband are S1 to S16. The remaining contraband packed separately and the same was also produced before the Court. The remaining contraband marked as M.Os.5, 10, 21, 22, 27, 28, 33 and 34 and also the samples along with the car and recovered cell phones were produced before the court on the same day itself under Ex.P.20 to 22 under Form 91. The learned judicial Magistrate perused the same and received the entire contraband and directed to



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produce before the Special Court. The prosecution produced the entire contraband before the Special Court on 18.02.2020. The samples were sent for chemical analysis. The expert specifically stated in the report that he conducted chemical examination after removing the said seal, and hence there was no tampering of the seal also. There was no dispute with regard to the above aspect. Hence, this Court held that the prosecution proved the recovery of the contraband from the A1, A3 and A4. The evidence of P.W. 1 and 2 in this aspect are cogent and trustee worthy. This Court found that the prosecution proved the fundamental facts to draw the presumption under Sections 35 and 54 of the NDPS Act. In view of the above, the presumption under Section 54 of the NDPS Act, comes into operation. As per Section 34 of the NDPS Act, the accused is bound to dispel the same beyond reasonable doubt. The Section 35 of the NDPS Act reads as follows:

"35. Section 35 in The Narcotic Drugs and Psychotropic Substances Act, 1985

35. Presumption of Culpable mental state.

(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he has no such mental state with respect to the act charged as an offence in that prosecution.

Explanation: In this section culpable mental state



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includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this Section, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability”

15. As per Section 35 of the NDPS Act, the accused should prove their case beyond reasonable doubt. The same was not proved by the prosecution, as per Section 35 of the NDPS Act. Further submission of the learned counsel for the A3 and A4 is that there is some contradiction between P.W.1 and 2 relating to the place of occurrence. This Court perused the evidence of P.W.1 and 2 and does not find any contradiction between the evidence relating to the place of occurrence. Further, on reading the entire evidence of P.W.1 and 2 relating to the interception of the vehicle, which carried the contraband and recovery of the contraband and arrest of the accused and production before the Court of the recovered contraband are all cogent and there is no material contradiction between them. The learned counsel appearing for the A3 and A4 submitted that the learned trial judge committed error in convicting under Section 29 of the NDPS Act without evidence to prove the conspiracy is not accepted. In this case, all the persons travelled in the car and possessed 168 Kgs of Ganja.



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The said circumstance itself shows that there is a conspiracy between the accused to illegally transport the contraband. As held by the Honourable Supreme Court that it is impossible to prove the conspiracy by direct evidence. All the accused jointly travelled in the car with the conscious possession of the contraband. Hence, this Court confirms the conviction and sentence passed against A3 in Crl.A.(MD).No.277 of 2023 and A4 in Crl.A.(MD).No.733 of 2022. Accordingly, the conviction and sentence passed by the I Additional Special Court for NDPS Act Cases, Madurai, in C.C.No.155 of 2020 dated 29.08.2022, is hereby confirmed and the Criminal Appeals filed by A3 in Crl.A.(MD).No.277 of 2023 and A4 in Crl.A.(MD).No.733 of 2022 are dismissed.

16.The learned counsel appearing for the appellant in Crl.A.(MD).No.857 of 2022 namely A2 made a specific submission that there was no material either to convict the appellant under Section 29 or under Section 8(c) r/w 27 (ii) (c). The said submission of the learned counsel appearing for the appellant, is accepted by this Court. According to the prosecution, he has not travelled in the car. He proceeded before the car by driving two wheeler. Upon interception by P.W.1 and 2, he escaped from the scene of the occurrence. Thereafter, the recovery was made on the



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basis of the confession of the A1, A3 and A4. From the above evidence, A2's presence is not proved in the scene of the occurrence. In the absence of the recovery from the A2, only available evidence against the A2 is the confession of the co-accused. Even the P.W.4, the DSP who investigated the matter specifically admitted that there was no evidence except the confession of the co-accused.

17. The A2 specifically took a defence stated that “ கேள்வி: இந்த வழக்கு பற்றி நீர் ஏதெனும் கூற வேண்டுமா? இந்த வழக்கிற்கும் பைக்கிற்கும் எனக்கும் எந்த சம்பந்தமும் இல்லை. இந்த வழக்கில் என்னை பொய்யாக சேர்த்துள்ளார்கள். The two wheeler also was not recovered as per the evidence of P.W.4. The evidence of P.W.4 deposed as follows:

2ம் எதிரி வந்ததாக சொல்லப்படும் எமகா ஏஇசட் டிஎன் 58 ஏயு 8898 என்ற வாகனத்தை கைப்பற்றவில்லை என்றால் சரிதான். அந்த வண்டியின் உரிமையாளர் யார் என்பதை காட்ட ஆவணங்கள் பெறவில்லை என்றால் சரிதான். செல்போன் கைப்பற்றப்பட்டுள்ளது. அந்த செல்போனுடைய சிம் கார்டு இணைப்பு விவரங்கள் மற்றும் கால் விவரங்கள்



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அடங்கிய குறிப்புகள் எதுவும் நான் பெறவில்லை
என்றால் சரிதான்

The Evidence of the P.W.5 deposed as follows:

2ம் எதிரி வந்த வாகனத்தில் உரிமையாளர் யார் என்று விசாரித்தேனா என்றால் விசாரிக்கவில்லை. ஏதிரி வினோத் எடுத்து கொடுத்ததாக சொல்லப்படும் கருப்புக்கலர் செல்போன் யாருடையது என்றும் அதில் உள்ள சிம்கார்டு யார் பெயரில் உள்ளது என்றும் நான் விசாரிக்கவில்லை என்றால் ஆய்வாளர் மற்றும் துணைக்கண்காணிப்பாளரிடம் விசாரித்தேன். விசாரணையில் அந்த சிம்கார்டு 2ம் எதிரி பெயரில் உள்ளது என்று என்னிடம் சொன்னார்களா என்றால் ஆமாம். 1ம் எதிரியின் வாக்குமூலத்தை தவிர 2ம் எதிரி இந்த வழக்கில் இணைக்கக்கூடிய ஆவணங்கள் எதுவும் தாக்கல் செய்யவில்லை என்றால் சரிதான்.

18. A2 surrendered before the Court on 07.10.2020. After his surrender, no incriminating materials were recovered from him. Even though, the cell phone was seized from one of the accused alleging that the same belongs to the appellants, the investigating agency has not investigated the matter by collecting the call details of the A2 to prove his contact with the A1, A3,A4.

19.From the above evidence it is seen that there is no evidence to convict the A2 under Section 8(C) r/w 20(b)(ii)(c), of NDPS Act. The



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Honourable Supreme Court held that the conviction of the accused on the basis of the confession of the co-accused without any of other substantive evidence is not sustained and the same is fortified by the following judgment of the Hon'ble Supreme Court.

In Surinder Kumar Khanna v. Directorate of Revenue Intelligence, (2018) 8 SCC 271 at Page 280.

13.In the present case it is accepted that apart from the aforesaid statements of co-accused there is no material suggesting involvement of the appellant in the crime in question. We are thus left with only one piece of material that is the confessional statements of the co-accused as stated above. On the touchstone of law laid down by this Court, such a confessional statement of a co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be used or utilised in order to lend assurance to the Court.

20.In the result, the conviction and sentence passed by the 1st Additional Special Court for NDPS Act cases, Madurai, in C.C.No.155 of 2020, dated 29.08.2022, is hereby set aside and the appeal filed by the A2 in CrI.A.(MD).No.857 of 2022 is allowed. Hence, the trial Court is



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hereby directed to release the appellant forthwith, unless his presence is required in any other case.

21.Criminal Appeals in Crl.A.(MD).Nos.733 of 2022 and 277 of 2023 are dismissed by confirming the conviction and the sentence of imprisonment imposed as against the accused Nos.3 and 4, in C.C.No.155 of 2020 dated 29.08.2022 by the learned Judge, I Additional Special Court for NDPS Act cases, Madurai.

Consequently, the connected miscellaneous petitions are closed.

22.01.2024

NCC : Yes/No
Index : Yes / No
Internet : Yes / No
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Note: Issue order copy on 22.01.2024



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To

1. The 1st Additional Special Court for NDPS Act cases,
Madurai.
2. The Inspector of Police,
NIB-CID Police Station,
Madurai District.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
4. The Section Officer,
Criminal Section(Records),
Madurai Bench of Madras High Court, Madurai.



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K.K.RAMAKRISHNAN,J.

vsg

Order made in
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