



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 30.04.2015

C O R A M

THE HONOURABLE MR.JUSTICE P.R.SHIVAKUMAR
Criminal Appeal (MD) Nos.189 and 87 of 2014

Imthiyas Ahmed

... Appellant/Accused No.1
in Crl.A.(MD)No.189 of 2014

Selvakumar @ Kumar

... Appellant/Accused No.2
in Crl.A.(MD)No.87 of 2014

Vs.

The State through the
Intelligence Officer,
Narcotic Control Bureau, Chennai 90,
F.No.48/1/1/2005-NCB,
Chennai.

... Respondent/Complainant in both Crl.As.

Appeals filed under Section 374 Cr.P.C., to call for the entire records connected with the judgment in C.C.No.189 of 2006, dated 16.12.2013 on the file of the Additional District and Sessions Court/Special Court for Narcotic Drugs and Psychotropic Substances Act Cases, Pudukottai and set aside the same as illegal and acquit the appellants from the charges.

For Appellant : Mr.M.Daniel Manoharan
(In Crl.A.(MD)No.189 of 2014)
For Appellant : Mr.M.Jagadeesh Pandian for
(In Crl.A.(MD)No.87 of 2014) M/s.K.J.Associates
For Respondent : Mr.C.Arul Vadivel @ Sekar
Special Public Prosecutor.

Orders reserved on 19.08.2014
Orders delivered on 30.04.2015

COMMON JUDGMENT

Imthiyas Ahmed, who was prosecuted as Accused No.1 in C.C.No.189/2006 in the court of the Additional District and Sessions Court/Special Court for Narcotic Drugs and Psychotropic Substances cases, Pudukottai, found guilty and punished for offences under

- 1) Section 8(c) r/w penal provision 21(c),
- 2) Section 8(c) r/w penal provision 27(a),
- 3) Section 8(c) r/w penal provision 28 and
- 4) Section 8(c) r/w penal provision 29

of the Narcotic Drugs and Psychotropic Substances Act, 1985, has come forward with Crl.A.(MD) No.189 of 2014 against his conviction and sentence. He was sentenced to undergo 10 years rigorous imprisonment for each one of the four offences and to pay a sum of Rs.1,00,000/- with a default sentence of one year rigorous imprisonment for each one of the above said offences. The total fine imposed on him was Rs.4,00,000/- and total default sentence account for four years.

2. Selvakumar @ Kumar, who was prosecuted as Accused No.2 in C.C.No.189/2006 in the court of the Additional District and Sessions Court/Special Court for Narcotic Drugs and Psychotropic Substances cases, Pudukottai, found guilty and punished for offences under



- 1) Section 8(c) r/w penal provision 21(c),
- 2) Section 8(c) r/w penal provision 28 and
- 3) Section 8(c) r/w penal provision 29

of the Narcotic Drugs and Psychotropic Substances Act, 1985, has come forward with CrI.A.(MD) No.189 of 2014 against his conviction and sentence. He was sentenced to undergo 10 years rigorous imprisonment for each one of the four offences and to pay a sum of Rs.1,00,000/- with a default sentence of one year rigorous imprisonment for each one of the above said offences. The total fine imposed on him was Rs.3,00,000/- and total default sentence account for three years.

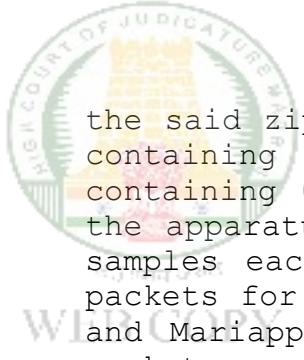
3. The substantive sentences imposed on both the appellants, who figured as A1 and A2 in the above said calendar case before the trial court, were directed to run concurrently, besides directing that the period of imprisonment already undergone by them to be set off under Section 428 of the Code of Criminal Procedure, 1973.

4. Including the appellants in these appeals, three persons were prosecuted before the trial court for offences punishable under Sections Section 8(c) r/w penal provision 21(c), Section 8(c) r/w penal provision 27(a), Section 8(c) r/w penal provision 28 and Section 8(c) r/w penal provision 29 of Narcotic Drugs and Psychotropic Substances Act, 1985. One Solai figured as third accused in the above said calendar case. However, after trial, the learned trial judge chose to hold him not guilty of the offences for which he was prosecuted and acquitted him. The appellants, who figured as A1 and A2 before the trial court, were convicted and punished as indicated above.

5. For the sake of convenience, the ranks of the parties referred to in this judgment shall be in accordance with their rankings before the trial court and at appropriate places for achieving more clarity the ranks of the appellants in the appeal shall also be referred to.

6. The prosecution case in brief can be stated as follows:

i) On 05.01.2005 at about 18.00 hours PW1-Thirumalai, Intelligence Officer, Narcotic Control Bureau, Chennai was on duty and at that point of time he received an information regarding the persons involved in purchase and transportation of narcotic drugs. He recorded the said information under Ex.P1, got necessary permission from his superiors under Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 to proceed further. A team of Narcotic Control Bureau, Chennai thereafter proceeded towards Tiruchirappalli in their department vehicle bearing Regn. No.TN-49 4177. The team reached Tiruchirappalli at 7.00 a.m on 06.01.2005. At Tiruchirappalli they took PW6-Alagu and one Mariappan along with them to be witnesses, reached Prema Lodge at Jawahar Street, Tiruchirappalli and knocked at the door of Room No.2. The second accused Selvakumar @ Kumar and the third accused Solai were found in the said room and they answered the description of the persons suspected of possessing heroin intended to be transported to Sri Lanka, as per the contents of Ex.P1. NCB Team members introduced themselves to A2 and A3 and informed them that they had got information regarding their involvement in transportation and possession of heroin. When asked whether they had got any contraband, the second accused Selvakumar @ Kumar pointed out a zipper bag and informed him that it contained the contraband herione. When the team of NCB, Chennai searched

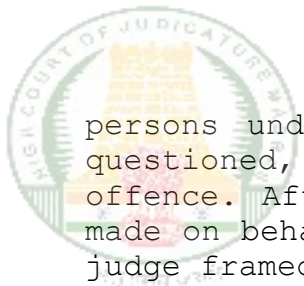


the said zipper bag, they found five packets wrapped in clothes each one containing 1.030 Kg powder and the sixth packet wrapped in cloth cover containing 0.30 Kg powder. When the NCB Team conducted a spot test with the apparatus they had taken with them, they found it to be heroin. Two samples each one weighing 5 grams were drawn from each one of the six packets for chemical analysis and were sealed in the presence of A6-Alagu and Mariappan. The samples as well as the remaining contraband in the packets were sealed. The samples drawn from the contraband allegedly seized in the place of occurrence have been produced as M.Os.10 to 21. The packets containing the remaining contraband were separately sealed and they have been produced as M.Os.1 to 6. The linen (cloth) wrapper used as the outer cover of each packet and the rexin bag used for keeping all the packets together were also seized and they have been produced as MOs.7 and 8 respectively. The mahazar evidencing the search, seizure and drawal of samples was attested by PW6-Alagu and Mariappan and the said Mahazar has been produced as Ex.P2. Thereafter, Selvakumar @ Kumar (A2) and Solai (A3) were arrested for possessing heroin without any licence or permit. PW1-Thirumalai prepared the said mahazar and the same has been produced as Ex.P4. The statements of Selvakumar @ Kumar (A2) and Solai (A3) were also recorded. Thereafter they were sent for remand.

ii) On 08.01.2005 at 6.00 p.m. PW1 received an information over phone to the effect that the first accused Imthiyaz Ahmed was also involved in the above said case in which about 5 Kgs of heroin had been seized at Tiruchy on 06.01.2005 and that the first accused Imthiyaz Ahmed was residing at 7th Main Road, M.G.R.Colony, near Shanthi Colony Central Excise Quarters. It was also intimated that the first accused Imthiyaz Ahmed would normally visit a nearest STD/PCO booth for making phone calls and that if the area was watched he could be secured for enquiry. The said information was recorded under Ex.P12. After getting necessary permission from superiors, PW1 and another Intelligence Officer by name Karthikeyan were watching for the movements of suspicious persons answering the description found in the information, from 1900 Hours to 2230 Hours on 08.01.2005, but they did not come across any such person. Again on 09.01.2005 from 6.00 Hours they continued the surveillance and at about 11.00 Hours they found the first accused Imthiyaz Ahmed answering the description found in the intimation came to the STD booth for making calls and arrested him under Ex.P21-Arrest Memo. After his statement was recorded, he was also sent for remand.

iii) One set of sample packets drawn from the contraband seized from Accused were sent to the Customs House at Rajaji Salai, Chennai for chemical analysis with Ex.P34 - requisition. PW4 analysed the contents of the sample packets by adopting recommended methods for testing heroin found in the manual for the use of National Nartotical Laboratories, United Nations. The result of such analysis was his finding that the substance was found to be Di-Acetyl Morphine heroin and he submitted a report under Ex.P35. PW5, the then Superintendent, NCB, Chennai conducted investigation, examined the witnesses and recorded their statements, got the chemical analysis report, completed the investigation and filed a complaint in writing on the file of the trial court.

7. The learned trial judge took the complaint on file as C.C.No.189 of 2006 and furnished copies of the materials sought to be relied on by the complainant/prosecution free of cost to the accused



persons under Section 207 of the Code of Criminal Procedure. On being questioned, the accused persons contended that they had not committed any offence. After considering the records and after hearing the submissions made on behalf of the prosecution and also the accused, the learned trial judge framed the following charges:

- 1) For an offence under Section 8(c) r/w penal provision 21(c) of the NDPS Act against A1 to A3;
- 2) For an offence under Section 8(c) r/w penal provision 27(a) of the NDPS Act against A1;
- 3) For an offence under Section 8(c) r/w Section 28 of the NDPS Act against A1 to A3; and
- 4) For an offence under Section 8(c) r/w Section 29 of the NDPS Act against A1 to A3

The trial court recorded the plea of the accused who claimed that they were not guilty of the offences. Consequently, a trial was conducted, in which six witnesses were examined as P.Ws.1 to 6 and 49 documents were marked as Exs.P.1 to 49, besides producing M.Os.1 to 23 on the side of the prosecution, in order to prove the charges against the accused. On completion of the evidence adduced on the side of the prosecution, the accused were given an opportunity to explain the incriminating materials found in the evidence adduced on the side of the prosecution by recording their statements under Section 313(1)(b) of Cr.P.C. They denied the evidence adduced on the side of the prosecution as false and contended that they were innocent. No defence witness was examined and no document was produced on the side of the accused.

8.The learned trial Judge, after hearing the arguments advanced on both sides, considered the evidence and upon such consideration, pronounced a judgment acquitting Solai, the third accused and holding the appellants/accused Nos.1 and 2 guilty of the offences for which they were prosecuted and sentenced to undergo punishment as indicated *supra*. The said judgment of the trial Court is challenged by the appellants/accused on various grounds set out in the appeal petition.

9. The point that arises for consideration in these appeals are as follows:-

"Whether the judgment of the trial Court convicting and sentencing the appellant Crl.A.No.189 of 2014/accused No.1 for the offences punishable under 8(c) r/w penal provision 21(c), Section 8(c) r/w penal provision 27(a), Section 8(c) r/w Section 28 of the NDPS Act against A1 to A3; and Section 8(c) r/w Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985, and convicting the appellant in Crl.A.No.87 of 2014/accused No.2 for offences under Section 8(c) r/w penal provision 21(c), section 8(c) r/w penal provision 27(a), section 8(c) r/w section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 suffers from any defect or infirmity requiring interference by this Court in respect of conviction or in respect of punishment?"

10. The arguments advanced by Mr.M.Daniel Manoharan, learned counsel appearing for the appellants in Crl.A.(MD) No.189/2014/accused (A-1), Mr.M.Jegadeesh Pandian, learned counsel appearing for the appellant in Crl.A.(MD) No.87 of 2014/accused (A-2) and Mr.C.Arul Vadivel



@ Sekar, learned Special Public Prosecutor for the respondent in both the criminal appeals were heard. The judgment of the trial Court and the materials available on record sent for from the Court below were also perused.

11. Out of the three persons prosecuted before the trial Court in C.C.No.189 of 2006, the third accused namely, Solai was found not guilty and hence was acquitted by the trial Court. As against such acquittal, no appeal or revision came to be filed. The two persons who were convicted are before this Court with these appeals. It is true that the appellants in both the appeals, who were the accused 1 and 2 before the trial Court, have challenged both the conviction as well as sentence pointing out a number of contradictions and improbabilities found in the prosecution evidence which, according to their perception, could have led to a conclusion that the prosecution had not proved its case beyond reasonable doubt. However, when the appeals came up for hearing, learned counsel appearing for the appellants submitted that they would give up the challenge made to the conviction and restrict their challenge made in the appeal to the quantum of default sentence alone, in view of the fact that the appellants/accused 1 and 2 had already undergone the entire substantive sentence imposed on them by the trial Court. Separate memos on behalf of the appellants/accused 1 and 2 have been filed and the same has been taken on file.

12. The trial Court that convicted the appellants/accused 1 and 2 besides imposing a substantive sentence of 10 years rigorous imprisonment for each offence as indicated supra, has also chosen to impose a fine of Rs.1,00,000/- for each offences. Thus the first accused Imthiyas Ahmed was imposed a fine of Rs.4,00,000/- and the second accused Selvakumar @ Kumar was imposed a fine of Rs.3,00,000/-. Since the fine was imposed on them at the rate of Rs.1,00,000/- for each offence, the trial Court chose to impose a default sentence of one year rigorous imprisonment for each of one such offences. Accordingly, for the default in payment of fine, the first accused has to undergo a total default sentence of four years rigorous imprisonment at the rate of one year rigorous imprisonment for each offence and the second accused has to undergo a total default sentence three years rigorous imprisonment at the rate of of one year rigorous imprisonment for each offence. Such default sentences shall not run concurrently.

13. The purpose of imposing default sentences is to see that the convicted person pays the fine promptly and no person possessed of the resources to pay the fine should escape without making payment of such fine, which will be a revenue to the Government. If the convicted persons are able to show that that they are not having the necessary resources for payment of fine, it shall not be justifiable that they should suffer incarceration for their poverty and consequential inability to make payment of fine amount. Of course, the fine imposed by the trial Court in respect of each offence is the minimum amount of fine prescribed under the respective penal provision. There cannot be any successful contention that the fine amount imposed was excessive or exorbitant. However, while awarding default sentence, it is mandatory on the part of the Court to take into consideration the financial status and capacity of the concerned convicted person to make payment of such a huge amount as fine. In case, the Court is satisfied that the financial condition of



the convicted person is not sound and he does not possess the fund to pay fine amount, the default sentence should be drastically reduced and minimised. The observation that in such an event, the default sentence should be reduced and minimised does not mean that the affluent person convicted for such offences, who are proved to have the resources to pay the fine and still refusing to make payment of fine amount, could approach the Court with such a plea for reduction of default sentence.

14. In the case on hand, there is no evidence on the side of the prosecution to show that the appellants/accused 1 and 2 are financially sound enough and that still they refused to pay the fine amount imposed on them. As such, we have to take it that the appellants herein/accused 1 and 2 are not in a sound financial position to pay the huge amount imposed on them as fine. Hence, on humanitarian grounds and on the acclaimed principle that one should not be punished for his poverty, the default sentences imposed on the appellants herein/accused 1 and 2 are to be reduced. Such a view was taken by a learned single Judge of this Court in his judgment dated 27.02.2012 in *Ramu and M.Mahesh Kumar Vs.Intelligence Officer, NCB South Zonal Unit, Chennai*. The said ratio is squarely applicable to the case on hand. By way of clarification, it is made clear that the above observation regarding the capacity of the appellants herein/accused to pay the fine, shall not be understood that the State cannot recover the fine from the available resources of the said persons.

15. Accordingly, this Court comes to the conclusion that while upholding the substantive sentence and the fine, the default sentence alone has to be interfered with and reduced. The appellants herein/accused 1 and 2 were directed to undergo substantive imprisonment of ten years. They were in prison from the date of their arrest i.e. 05.01.2005 till date. If remissions are taken into consideration, they would have completed the substantive sentences much earlier. As such, they have undergone a substantive period of default imprisonment. In the said circumstances, this Court is of the considered view that the default sentence can be reduced to the imprisonment already undergone by apportioning the said period equally towards each one of the offences for which the fine was imposed.

16. In the result, the Criminal Appeals are allowed in part and the default sentence alone is reduced to the imprisonment already undergone by the appellants herein/accused 1 and 2 as on the date of this judgment. As it is reported that the appellants/accused are in jail, they are directed to be released forthwith, unless their custody is required in connection with any other case. Consequently, M.P.(MD)No.1 of 2014 is closed.

Sd/-
Assistant Registrar (CO)

/True copy/

Sub Assistant Registrar

