

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.10.2015

Pronounced on : 19-01-2016

Coram :

THE HONOURABLE MR. JUSTICE B. RAJENDRAN

Criminal Revision Case Nos. 724 and 725 of 2015

The Intelligence Officer
Narcotics Control Bureau
Chennai Zonal Unit
Chennai - 600 077

.. Petitioner in both the
Criminal Revision Cases/Petitioner
Complainant

Versus

S. John

.. Respondent in both the
Criminal Revision Cases/Respondent/
Accused.

Criminal Revision Cases filed under Section 397 and 401 of Criminal Procedure Code against the order dated 15.06.2015 passed in CrI.M.P. No. 1084 of 2015 and CrI.M.P. No. 1083 of 2015 respectively in C.C. No. 48 of 2012 on the file of the II Additional Special Court under NDPS Act, Cases, Chennai.

For Petitioners : Mr. N.P. Kumar
Special Public Prosecutor for NDPS
Cases
in both the Criminal Revision Cases

For Respondents : Mr. R. Vijayakumar
in both the Criminal Revision Cases

COMMON ORDER

Both these Criminal Revision Cases are filed by the prosecution questioning the correctness of the separate orders, both dated 15.06.2015, passed by the learned II Additional Special Court under NDPS Act Cases, Chennai in CrI.M.P. Nos. 1084 and 1083 of 2015 respectively in C.C. No. 46 of 2012 refusing to mark the confession statement of a co-accused in C.C. No. 46 of 2012 and also to order for joint trial of the cases sought for by the prosecution.

2. The respondent is the first accused in C.C. No. 48 of 2012. There are three accused in the case filed by the prosecution in C.C. No. 48 of 2012. The respondent herein was arrested on 10.06.2012 in connection with the case in C.C. No. 48 of 2012 and he is in custody till date. The other two

accused viz., Bharathi and Deshmukh were absconding. Therefore, the trial court split up the case against the respondent herein and the other two accused. The split up case against the other two accused was numbered as C.C. No. 62 of 2013. As far as the case against the respondent herein in C.C. No. 48 of 2012, it was taken up for trial to try him for the alleged offences punishable under Sections 22, 23, 27-A, 28 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (in short NDPS Act).

3. It is the case of the prosecution that the third accused in the case namely Deshmukh has supplied psychotropic substances namely 28 kilograms of Ketamine to the respondent/accused and to this effect the statement of the third accused was obtained under Section 67 of the NDPS Act by the Narcotic Control Bureau, Mumbai. Such statement made by Deshmukh came to light only during the course of trial in C.C. No. 48 of 2012. It also came to light that the other accused in this case namely Deshmukh/A-3 was arrested by the Narcotic Control Bureau, Mumbai for possessing 83.430 kilograms of Ketamine and he was arrested and remanded to judicial custody and lodged in the Central Prison, Aurangabad, Maharashtra. It is the further case of the prosecution that during the course of investigation by the Narcotic Control Bureau, Mumbai, the statement of Deshmukh/A-3 was recorded under Section 67 of the NDPS Act in which he has stated that he supplied 28 kilograms of Ketamine to the accused/respondent herein. It is further stated by Deshmukh that he was the supplier of Ketamine and the accused/respondent herein is the buyer. Such statement made by respondent/accused was also marked as Ex.P10 in the present case. On coming to know about the statement given by Deshmukh before the officials of Narcotic Control Bureau, Mumbai, the prosecution has filed an application in Crl.M.P. No. 1084 of 2015 under Section 173 (8) of Criminal Procedure Code (in short Cr.P.C.) praying to permit the prosecution to file the statement of Deshmukh/A-3 recorded under Section 67 of NDPS Act as an additional document.

4. The accused/respondent has filed a counter in Crl.M.P. No. 1084 of 2015 contending that the application under Section 173 (8) of Cr.P.C. is not maintainable. According to the accused/respondent, the admissibility of statement made under Section 67 of NDPS Act is the subject matter of reference to a larger bench of the Honourable Supreme Court of India. In fact, the Division Bench of the Honourable Supreme Court in the case rendered in Tufensingh vs. State of Tamil Nadu reported in 2014 (2) Madras Weekly Notes held that the earlier decision rendered in Kanniyalal vs. Union of India (2008 (4) SCC 668 is doubtful and therefore the issue was referred to a larger bench. While so, the reliance placed by the prosecution on the statement recorded under Section 67 of NDPS Act by the Narcotic Control Bureau, Mumbai to implicate the accused/respondent is legally not sustainable. Further, in the statement made under Section 67 of the NDPS Act by Deshmukh/A-3, there is nothing to

implicate the accused/respondent except the word "John". Therefore, according to the accused/respondent, the statement made by Deshmukh/A-3 under Section 67 of the NDPS Act cannot be used against the accused/ respondent in this case. It is further stated that the petition to mark the additional document has been filed by the prosecution at the fag end of trial and it will only delay the trial in the case. It is further stated that the accused/respondent herein is confined in jail from 10.06.2012 and any further delay in completing the trial will adversely affect the right of the accused/respondent herein. Therefore, the accused/respondent prayed for dismissal of the petition.

5. The prosecution has also filed CrI.M.P. No. 1083 of 2015 in C.C. No. 48 of 2012 for joint trial of C.C. No. 48 of 2012 against the accused/respondent herein and C.C. No. 62 of 2013 against Deshmukh/A-3. According to the prosecution, as per Section 30 of the Evidence Act, when more persons other than one are being tried jointly for the same offence and a confession made by one accused is relevant for proving the case against the other accused, the Court may take up both the cases for joint trial. It is further submitted that confession of a co-accused is admissible in evidence as against the other accused. Therefore, prosecution sought for joint trial of C.C. No. 48 of 2012 and C.C. No. 62 of 2013.

6. The accused/respondent has filed a counter in CrI.M.P. No. 1083 of 2015 contending interalia that joint trial of both the cases will only delay the trial as against the accused/respondent. It is specifically contended by the accused/ respondent that he filed CrI.OP No. 25150 of 2013 before this Court seeking bail and while dismissing the petition, this Court directed the trial court to complete the trial within two months. However, the time frame fixed by this Court could not be adhered to. Subsequently, the time granted by this Court was extended by another one month for completion of the trial. According to the accused/respondent, the prosecution examined 12 witnesses. Thereafter, all the witnesses were examined in chief and also cross-examined. The prosecution also made arguments and the accused side also submitted their oral as well as written arguments. At this stage, the prosecution has filed the instant application seeking joint trial. According to the accused/respondent, the prosecution has knowledge of the arrest of Deshmukh by the Narcotic Control Bureau, Mumbai on 27.08.2012. For three complete years, prosecution has not taken any steps. When the arguments on both sides were completed, the prosecution has come forward with the present application seeking joint trial belatedly. It is further stated that this Court has issued a direction to expedite the trial and to complete it within a time frame, however, the time frame could not be adhered to because of the laxity on the part of the prosecution in conducting the case. Further, Deshmukh/A-3 was arrested on 27.08.2012 and he has not given any confession in connection

with the case in C.C. No. 48 of 2012. It is further contended that as per Section 223 of Cr.P.C. when a co-accused is arrested during the course of investigation in a particular case and given a confession statement relating to a particular case, the case against the accused and co-accused could be tried jointly. If the case against an accused and co-accused is split up, the provisions of Section 223 of Cr.P.C. cannot be pressed into service. It is further stated that no conviction can be awarded to an accused by relying upon the confession of a co-accused especially when the confession of the co-accused is unreliable and untrustworthy. At the most, the confession of the co-accused can be used, if proved, as a supportive evidence. Therefore, if joint trial is ordered in the case, the trial as against Deshmukh/A-3 has to be conducted from the beginning and it will adversely affect the right of the accused/respondent herein who is in jail from 10.06.2012. Therefore, the accused/respondent prayed for dismissal of the petition for joint trial.

7. The trial court dismissed both the applications filed by the prosecution mainly on the ground that this Court has given an ultimatum to complete the trial in the case and to dispose of the calendar case within a time frame.

8. As regards CrI.M.P. No. 1084 of 2015 for marking additional document, the trial court has pointed out that even though PT warrant was issued for production of Deshmukh/A-3 before the trial court, till date, the prosecution has not produced Deshmukh/A-3 before it. The trial court also pointed out that the accused/respondent was arrested on 16.06.2012 and the case against the accused/respondent and other accused was split up on 07.10.2013 as C.C. No. 62 of 2013. It is further stated that the prosecution has not taken any steps to execute the non-bailable warrant issued against A-2 and A-3 in this case for a long time even though it was issued on 06.06.2013. Thereafter, on 25.11.2013, charges were framed against the accused/A-1/respondent herein. Even though this Court granted an ultimatum to complete the trial, the trial could not be completed and the trial Court has written several letters to this Court for extension of the time. Lastly, the trial court has written a letter on 16.02.2015 and this Court granted three months time for disposal of C.C. No. 48 of 2012. Further, on perusal of the records, it was found that the alleged statement of Deshmukh/A-3 recorded under Section 67 of the NDPS Act was in connection with some other case registered by the Narcotic Control Bureau, Mumbai. Further the prosecution has only produced xerox copy of the statement of Deshmukh/A-3, which is inadmissible in evidence. As the prosecution has preferred this case belatedly at the fag end of the trial, the trial court dismissed the petition to mark additional document.

9. As far as ordering joint trial is concerned, the trial court pointed out that in C.C. No. 48 of 2012, 12 witnesses were examined and 81 documents have been marked. In the split

up case in C.C. No. 62 of 2013, even though non-bailable warrant was issued, it was not executed and the accused Deshmukh/A-3 was not produced before it. It is further pointed out that in C.C. No. 48 of 2012, arguments have been completed, both oral and written and at this stage, the petition for joint trial has been filed. In the split up case, in C.C. No. 62 of 2013, even charges were not framed. If joint trial is ordered, the trial against Deshmukh/A-3, the other accused, has to be commenced afresh and in such event, the directions issued by this Court to expedite and complete the trial in C.C. No. 48 of 2012 could not be adhered to. Therefore, the trial court dismissed the application for joint trial.

10. The learned Special Public Prosecutor for NDPS Cases would contend that admittedly, Deshmukh is arrayed as A-3 in the case registered by the prosecution and as he was absconding, the case against him was split up as C.C. No. 62 of 2013. Subsequently, the prosecution alleged that Deshmukh/A-3 was arrested by the Narcotic Control Bureau, Mumbai before whom he has given a statement under Section 67 of the NDPS Act. In such statement, the accused/ respondent was indicated as the buyer of the psychotropic substance. Such statement was relied on by the prosecution to establish that Deshmukh/A-3 has supplied the psychotropic substance to the accused/respondent herein and such confession statement of Deshmukh is vital to prove the case against the accused/respondent herein. Therefore, the confession statement of respondent/accused was marked as Ex.P10 in the case in C.C. No. 48 of 2012. In such circumstances, the prosecution has filed the application to mark the confession statement of Deshmukh as an additional document, but it was dismissed on the ground that only a xerox copy of the document was marked and it was not a certified copy. According to the learned Special Public Prosecutor, the prosecution ought to have been given some more time to produce the certified copy of the document instead of dismissing the application. As far as joint trial is concerned, the learned Special Public Prosecutor would contend that the statement recorded by Officers attached to Narcotic Control Bureau are admissible in evidence and it can be relied on against the accused/respondent herein. In such circumstances, joint trial is desirable and refusing to try both the cases jointly will cause irreparable loss to the prosecution to establish the case against the accused.

11. On the other hand, the learned counsel appearing for the accused/ respondent would vehemently oppose the plea of the prosecution to mark additional document and to order for a joint trial, especially at the fag end of trial in C.C. No. 48 of 2012. According to the learned counsel for the accused/respondent, the accused/respondent is in jail from 10.06.2012. The trial in the case was completed and the oral as well as written arguments were made by both sides. Therefore, having regard to the above facts, the trial court has rightly dismissed both the applications filed by the prosecution. As

regards the admissibility of the confession statement recorded under Section 67 of the NDPS Act, the learned counsel for the accused/respondent would contend that the issue relating to admissibility of such confession statement is the subject matter of reference before a larger bench of the Honourable Supreme Court. Further, the confession statement must have been obtained in the same case. In this case, the confession statement of Deshmukh/A-3 was obtained by Narcotic Control Bureau, Mumbai in connection with some other case and it was recorded by a different officer at a different point of time. Further, the prosecution has not marked the certified copy of the confession statement of Deshmukh/A-3 but only a xerox copy of the same was marked, which is inadmissible in evidence. As regards joint trial, the learned counsel for the accused/respondent would contend that in the case against the accused/respondent herein, trial was over, arguments on both sides was completed, whereas, as against the split up case against Deshmukh/A-3, even charges were not framed. Having regard to the above position, the trial court has rightly dismissed the plea of the prosecution for joint trial and it does not call for any interference by this Court.

12. I heard the counsel for both sides and carefully examined the contentions put forth by them. I have also gone through the materials placed on record. The prosecution came to be launched on 09.06.2012, on the basis of the tip off received by the investigation agency relating to drug trafficking. Acting on the basis of such tip off, the prosecution arrested the accused/respondent on 10.06.2012. According to the prosecution, two other accused who are involved in the case were absconding. Therefore, to secure the presence of the other two accused, at the instance of prosecution, non-bailable warrants were issued, but they could not be executed. Therefore, the case against the accused/respondent/A-1 was taken up as C.C. No. 48 of 2012 and as against the absconding accused/A-2 and A-3, it was split up by the trial court on 07.10.2013 as C.C. No. 62 of 2013. On 25.11.2013, charges were framed against the accused/respondent. As far as the case against the accused/respondent/A-1 is concerned, trial was conducted in which 12 witnesses were examined and 81 documents were marked. It has to be pointed out that during the course of trial, the accused/respondent herein has filed Crl.OP No. 25150 of 2013 before this Court seeking bail. On 10.11.2013, the petition for bail was dismissed by this Court with a direction to the trial court to expedite the trial and to complete it within a period of two months. Subsequently, the accused/respondent/A-1 filed another petition seeking bail in Crl.O.P. No. 12439 of 2014 which was also dismissed on 03.07.2014 and a direction was issued to the trial court to complete the trial within a month.

September 2012, as per Ex.P52 filed before the trial court. Further, the statement of John/respondent herein was recorded by the prosecution and it was also marked by the prosecution as Ex.P10. However, the prosecution has not taken any steps to bring forth Deshmukh/A-3 before the trial court, even though the trial court has issued P.T. warrant for his production during May 2015. The fact remains that till date, prosecution has not produced Deshmukh/A-3 before the trial court. Therefore, this court finds force in the submission of the learned counsel for the accused/respondent that the accused/respondent is in jail from 10.06.2012, the trial in this case is over and at this stage, if joint trial is ordered, it will prejudice the accused/respondent. Further, as far as the case against Deshmukh/A-3 is concerned, even charge was not framed till date by the trial court, while so, if joint trial is ordered, the trial as against Deshmukh/A-3 has to be commenced afresh and it will prolong the trial in this case. As rightly pointed out by the trial court, this Court has given an ultimatum to complete the trial in the calendar case, but it could not be completed due to laxity on the part of the prosecution. This Court is also of the view that the prosecution has not acted with vigilance in producing Deshmukh/A-3 before the trial court. Merely because a statement under Section 67 of the NDPS Act was obtained from Deshmukh/A-3 by the Narcotic Control Bureau, Mumbai, that too in another case, it will not be a ground for the prosecution to seek for joint trial in this case. Of course, according to the prosecution, the quantum of Ketamine seized from the accused/respondent herein as well as his confession corroborates with the confession statement given by Deshmukh/A-3 before the Narcotic Control Bureau, Mumbai. According to the prosecution, in the statement given by Deshmukh/A-3, he has categorically implicated the accused/respondent herein namely John as a buyer and that he was the supplier of the psychotropic substance.

14. Yet another point for consideration is the prosecution has not produced the certified copy of the statement of Deshmukh/A-3. What was produced before the trial court is only a xerox copy of the same. The prosecution ought to have been prudent to produce the certified copy of the confession statement, but it has not taken any effective steps in this direction. Such photocopy of the confession statement of Deshmukh/A-3, as rightly pointed out by the trial court, is inadmissible in evidence. Therefore, I am of the view that the objection raised by the trial court to entertain the xerox copy of the confession statement is legally sustainable. However, having regard to the nature of the case projected by the prosecution, the trial court ought to have given some more time or fixed a time limit to enable the prosecution to produce the certified copy of the confession statement of Deshmukh/A-3 in compliance with principles of natural justice.

<https://hcservices.ecourts.gov.in/hcservices/>

15. As regards ordering joint trial, the learned counsel for the accused/ respondent relied on the decision of

the Rajasthan High Court in the case of Narcotic Control Bureau vs. Harnath Singh and others) 1995 CrL. Law Journal 2770 to contend that when the trial against the accused is completed, a denovo trial at the instance of the prosecution as against Deshmukh/A-2 is unsustainable. In that case, it was held by the learned single Judge of Rajasthan High Court in para No.7 as follows:-

7. Respondents 1 to 9 are in custody since January 1992 and the trial in their Special Case No. 86 of 1992 is almost at its fag end. If both the cases are now ordered to be consolidated then the respondents 1 to 9 shall face the de novo trial, which will take considerable time. For the inaction and laches on the part of the petitioner-department, respondent No.1 to 9 should not be subjected to de novo trial. Under Section 223 (a), Cr.P.C. persons accused of the same offence committed in the course of the same transaction, may be charged and tried together, but in this case, since the trial against the respondent Nos. 1 to 9 is at its fag end, it will not at all be in the interest of justice to consolidate the delayed criminal complaint filed against respondent Gul Anwar and to order for de novo trial. In my considered opinion, the impugned order also does not tantamount to abuse of the process of the Court. The learned Special Judge has given valid reasons for rejecting petitioner-Department's application. It is not at all a fit case for invoking inherent powers of this Court for setting aside the impugned order.

16. In the present case against the accused/respondent also, it is pending for reply argument of the Special Public Prosecutor for NDPS Case. As far as C.C. No. 62 of 2013 is concerned, it is pending for execution of Non-bailable warrant against the accused Deshmukh/A-3 and Bharathi/A-2. Further, in C.C. No. 62 of 2013, even charge has not been framed. As stated earlier, the trial court has also issued P.T. warrant but inspite of the same, the accused Deshmukh/A-3 has not been produced before the trial court. Therefore, at this stage, the prosecution is not justified in seeking to order for joint trial of both the cases. If it is ordered, it will only result in conducting de-novo trial and it will certainly prejudice the accused/ respondent herein. Further, this Court has issued direction for completing the trial against the accused/respondent, not once, but twice, however, the ultimatum fixed by this Court could not be complied with till date. Therefore, at this stage, if joint trial is ordered, it will take away the valuable right of the accused/respondent to see that the trial is completed at the earliest. Therefore, I am of the view that the trial court is justified in refusing to ordering joint trial and I do not find any reason to interfere with the same.

17. In the result, Criminal Revision Case No. 724 of 2015 is allowed by setting aside the order dated 15.06.2015 passed in Crl.M.P. No. 1084 of 2015 in C.C. No. 48 of 2012 on the file of the learned Principal Special Judge, II Additional Special Court under NDPS Act, Chennai and the matter is remanded back to the trial court to the limited extent of affording an opportunity to the prosecution to produce the certified copy or the original of the statement recorded under Section 67 of NDPS Act by the Narcotic Control Bureau, Mumbai from Deshmukh/A-3 in this case, and shall pass appropriate orders in that petition in accordance with law dehors any observation made by this Court in this order. As far as the plea of the prosecution for joint trial in Crl.M.P. No. 1083 of 2015 is concerned, the order passed by the trial court is confirmed and Crl.R.C. No. 725 of 2015 is dismissed. Consequently, connected M.P. No. 1 of 2015 is closed.

Sd/-
Assistant Registrar(J)

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Sub Assistant Registrar

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To

1) The II Additional Special Court under NDPS Act Cases
Chennai.

2. Special Public Prosecutor,
High Court, Madras.

+2 ccs to Mr.R.Vijayakumar, Advocate, sr.2892 & 2893

CrlRC. No. 724 & 725/2015

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