

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.09.2017

Pronounced on : 23.10.2017

CORAM:

THE HONOURABLE MR. JUSTICE M.S.RAMESH

Crl.O.P.No.872 of 2017
and Crl.M.P.Nos.649 & 650 of 2017

Mohamed Amanullah Dhathani .. Petitioner /Accused-2

Vs.

State rep. by
The Deputy Superintendent of Police,
Organised Crime Unit-I,
Crime Branch C.I.D.,
Chennai. ... Respondent/Complainant

Prayer: Criminal Original Petition filed under Section 482 Cr.P.C. praying to call for the records pertaining to the charge sheet in C.C.No.52 of 2016 on the file of the learned Judicial Magistrate-III, Vellore and to quash the same as against the petitioner.

For Petitioner : Mr.N.R.Elango, Sr. Counsel
for Mr.A.M.Venkatakrisnan

For Respondent : Mr.P.Govindarajan
Additional Public Prosecutor

WEB COPY

O R D E R

Heard Mr.N.R.Elango, learned Senior counsel for the petitioner and Mr.P.Govindarajan, learned Additional Public Prosecutor appearing for the respondent.

2.The case of the prosecution is as follows:

The petitioner herein is the second accused in C.C.No.52 of 2016 on the file of the learned Judicial Magistrate-III, Vellore. The case against the petitioner/A2 is that he purchased spurious drug namely, Taxim 0.200 mg tablets and Glucose Forte tablets from the third accused a few months back i.e., in the month of February 2010 and after selling a

large quantity to the public, had kept the balance of 13,000 tablets and 50,000 tablets respectively, at the residence of the first accused, in the month of February 2010 with a request to keep the stock in order to avert the seizure of those drugs since the CBCID and CCB police had already arrested him and there was every possibility for searching the house of the petitioner for spurious drugs. The complainant, while inspection of the unlicensed premises of the first accused, had seized the aforesaid drugs whose total value was arrived at Rs.16,527,400/- and accordingly, had booked the petitioner as well as other two accused for offences under Section 18(c) and 18(a)(1) r/w.27(b)(ii) and 27(c) of the Drugs and Cosmetics Act, 1940 together with Section 109, 120-B IPC. Challenging the charges framed against the petitioner/A2, the present petition has been filed.

3.The submissions of Mr.N.R.Elango, learned Senior counsel for the petitioner is three fold:

1)Firstly, it is submitted that no seizure was effected from the petitioner and that the materials seized from the first accused does not implicate the petitioner as having involved in either manufacture or sales of spurious drugs and therefore, Section 27 of the Drugs and Cosmetics Act is not attracted.

2)Secondly, the seizure was pursuant to the confession of co-accused namely, the first accused and since the confession of co-accused is inadmissible in the Evidence Act, for the purpose of framing charges, the impugned proceedings is vitiated.

3)Thirdly, the cognizance of the present proceedings has been taken on the file of the learned Judicial Magistrate and since the Court of Sessions is the Competent Court to take cognizance, the impugned proceedings are liable to struck off.

4.Mr.P.Govindarajan, learned Additional Public Prosecutor appearing for the respondent controverted the submissions made by the learned Senior counsel for the petitioner and submitted that from the materials available on record, it has been clearly revealed that the offence are made out under Section 27 of the Drugs and Cosmetics Act. Further, the learned Additional Public Prosecutor submitted that pursuant to the confession of the first accused, the recovery was made from the residence of the first accused, which drug was handed over to him by the petitioner and therefore, there was no illegality in implicating the petitioner based on the confession of the first accused. The learned Additional Public Prosecutor also submitted that though it is the Court of Sessions which can take cognizance of the present proceedings, it was always open to the learned Judicial Magistrate to commit the proceedings before the concerned

Sessions Court at any stage.

5.I have given careful consideration to the submissions made by the respective counsels.

6.The learned Senior counsel for the petitioner submitted that since no seizure was effected from the petitioner and that the materials seized from the first accused does not indicate that the petitioner was involved in manufacture or sales of those spurious drugs which are in possession of the first accused, no offence is committed under Section 27 of the Drugs and Cosmetics Act. In this regard, the learned Senior counsel relied on the judgment in Mohd. Shabir V. State of Maharashtra reported in 1979 (1) SCC 568. Before analysing the submission of the learned Senior counsel, it would be appropriate to take a glance on Section 27 and 27(a) of the Drugs and Cosmetics Act.

"27.Penalty for manufacture, sale, etc., of drugs in contravention of this Chapter.- Whoever, himself or by any other person on his behalf, manufactures for sale or for distribution, or sells, or stocks or exhibits or offers for sale or distributes,-

a)any drug deemed to be adulterated under Section 17-A or spurious diagnosis, treatment, mitigation, or prevention of any disease or disorder is likely to cause his death or is likely to cause such harm on his body as would amount to grievous hurt within the meaning of Section 320 of the Indian Penal Code (45 of 1860), solely on account of such drug being adulterated or spurious or not of standard quality, as the case may be, shall be [punishable with imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine which shall not be less than ten lakh rupees or three times value of the drugs confiscated, whichever is more: -substituted by the Drugs and Cosmetics (Amendment) Act, 2008 (26 of 2008), S.6(i)(B), for "punishable with imprisonment for a term which shall not be less than five years but which may extend to a term of life and with fine which shall not be less than ten thousand rupees;" (w.e.f. 10.08.2009)].

7.Section 27 of the Drugs and Cosmetics Act, 1940 came to be substituted by Act 68 of 1982 w.e.f. 01.02.1983. Prior to the amendment, Section 27 commences with the following phrases:

"Whoever himself or by any other person on his behalf manufactures for sale, sells, stocks or exhibits for sale or distributes"

8. The Section, as it stood prior to the amendment Act 68 of 1982, came to be interpreted by the Hon'ble Supreme Court in Mohd. Shabir V. State of Maharashtra reported in 1979 (1) SCC 568, holding that stocking the spurious drugs for the purpose of sale is indivisible and should be read as one category. The relevant portion is as hereunder:

"4. On an interpretation of section 27, it seems to us that the arguments of Mr. Singh is well founded and must prevail. The words used in section 27, namely, "manufacture for sale", sells, have a comma after each clause but there is no comma after the clause "stocks or exhibits for sale". Thus the section postulate three separate categories of cases and no other. (1) manufacture for sale; (2) actual sale; (3) stocking or exhibiting for sale or distribution of any drugs. The absence of any comma after the word "stocks" clearly indicates that the clause "stocks or exhibits for sale" is one indivisible whole and it contemplates not merely stocking the drugs but stocking the drugs for the purpose of sale and unless all the ingredients of this category are satisfied, section 27 of the Act would not be attracted. In the present case there is no evidence to show that the appellant had either got these tablets for sale or was selling them or had stocked them for sale. Mr. Khanna appearing for the State, however, contended that the word "stock" used in section is wide enough to include the possession of a person with the tablets and where such a person is in the possession of tablets of a very huge quantity, a presumption should be drawn that they were meant for sale or for distribution. In our opinion, the contention is wholly untenable and must be rejected. The interpretation sought to be placed by Shri Khanna does not flow from a true and proper interpretation of section 27. We, therefore, hold that before a person can be liable for prosecution or conviction under section 27 (a) (i) (ii) read with section 18 (c) of the Act, it must be proved by the prosecution affirmatively that he was manufacturing the drugs for sale or was selling the same or had stocked them or exhibited the articles for sale. The possession simpliciter of the articles does not appear to be punishable under any of the provisions of the Act. If, therefore, the essential ingredients of Section 27 are not

satisfied the plea of guilty cannot lead the Court to convict the appellant."

9. Probably, in view of the aforesaid judgment that the parliament thought it fit to amend Section 27 through the amendment Act 68 of 1982, whereby the opening phrase came to be amended by inserting the conjunction 'or' after each word in the said phrase, so as to include every act of manufacture, sale, distribution, selling, stocking, exhibiting and offering for sale or distribution of spurious drugs as punishable.

10. It is the categorical case of the prosecution that the petitioner has handed over the spurious drugs to the first accused requesting him to keep and stock them to avert seizure from the petitioner, since he was amenable to search and seizure from the CBCID and CCB who have registered similar cases against him. Moreover, there were ample materials before the prosecution that these spurious drugs were in possession of the petitioner/second accused prior to handing over of the drugs to the first accused. Therefore, the submission that the seizure made from the first accused's house were not the materials stocked by this petitioner for the purpose of sale, cannot be countenanced. Whether or not the petitioner handed over the drugs to the first accused, is a mixed question of fact and needs to be established through trial and the instant petition under Section 482 of Cr.P.C., will not be an appropriate remedy to be invoked at this stage.

11. The second ground that the confession of the co-accused is inadmissible under the Indian Evidence Act is concerned, the learned Senior counsel submitted that implicating the petitioner on the basis of the confession of the first accused is illegal. I am unable to comprehend the proposition in view of the Section 30 of the Indian Evidence Act.

12. According to the petitioner/second accused, he was implicated with the charges based on the confession of the first accused. Admittedly, the petitioner and the first accused are being tried jointly for the same offence which is not opposed to Section 30 of the Indian Evidence Act, since Section 30 categorically enables the Court to take into consideration, the confession of A1 as against the petitioner/second accused also. In other words, the legal position is that such testimony can be used to corroborate another accused.

13. The learned Senior counsel relied on the judgments reported in Kashmira Singh V. The State of M.P., [AIR 1952 SC 159(1)] and Mohammed Ashan V. The Senior Intelligence Officer, Directorate of Revenue Intelligence, Chennai-17 [2008 (1) L.W. (Cr.) 287] for the aforesaid propositions. The relevant portions of the said judgments are as follows:

i)AIR 1952 SC 159(1):

The confession of an accused person is not evidence in the ordinary sense of the term as defined in S.3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshall the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to set on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to land assurance to the other evidence and thus, fortify himself in believing what without the aid of the confession he would not be prepared to accept."

ii)2008 (1) L.W. (CrI.) 287:

As per the provisions contained in Section 30 of the Indian Evidence Act, as the petitioner had admittedly not been jointly tried along with the other accused, the statement recorded from the co-accused/A1, cannot be used as against the petitioner-If the statement of A1 is excluded, no other material is available on record to frame charges as against the petitioner.

When there is no other material available on record to frame any charge against the petitioner, if the court below is permitted to continue with the proceedings as against the petitioner, the entire proceedings will be an exercise in futility-It is true that the petitioner can approach the Court below and seek for discharge is concerned, but it cannot be a ground for rejecting the above petition filed under Section 482 Cr.P.C.- Section 482 Cr.P.C. is meant for not only to prevent abuse of process of the Court, but also to secure ends of justice-When it is not the case of the prosecution that there are materials available on record, which warrant framing of any charge against the petitioner, no meaningful purpose will be served by directing the petitioner to approach the

Court below and seek discharge."

14.To further explain as to the scope of Section 30 of the Evidence Act with regard to the validity of a confession statement of the co-accused, the learned Senior counsel relied upon another Hon'ble Apex Court judgment in Suresh Budharmal Kalani @ Pappu Kalani V. State of Maharashtra reported in 1998 (7) SCC 337 has held as follows:

"6.Thus said, we may turn our attention to the confession made by Dr. Bansal and Jayawant Suryarao. Under Section 30 of the Evidence Act a confession of an accused is relevant and admissible against a co-accused if both are jointly facing trial for the same offence. Since, admittedly Dr. Bansal has been discharged from the case and would not be facing trial with Kalani his confession cannot be used against Kalani. The impugned order shows that the Designated Court was fully aware of the above legal position but, surprisingly enough, it still decided to rely upon the confession on the specious ground that the prosecution was not in any way precluded from examining Dr. Bansal as a witness in the trial for establishing the facts disclosed in his confession. This again, was a perverse approach of the Designated Court while dealing with the question of framing charges. At that stage the court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence and not upon further evidence (dehors those materials) that the prosecution may, adduce in the trial, which would commence only after the charges are framed and the accused denies the charges. The Designated Court was, therefore not at all justified in taking into consideration the confessional statement of Dr. Bansal for framing charges against Kalani."

15.In the present case in hand, it is not in dispute that the first accused and the petitioner are jointly facing trial for the same offence. Section 30 of the Indian Evidence Act exclusively enables the confession of the co-accused to be used against another accused in a joint trial and therefore, there is no impediment to use the evidence of the co-accused against the petitioner who is facing a joint trial. Above all, the seizure of the spurious drugs came to be made based on the confession of the first accused and there are sufficient materials to show that the petitioner/second respondent had stocked the spurious drugs in the residence of the first accused during the month of February 2010 and that

the same was in possession of the second accused/petitioner prior to stocking it in the A1's residence.

16. Thus, the second ground raised by the learned Senior counsel is answered against him.

17. The third ground raised by the learned Senior counsel for the petitioner is that the learned Judicial Magistrate is incompetent to take cognizance of the case also is unfounded. Section 323 of the Code of Criminal Procedure empowers the Magistrate to commit a case to a Court of Sessions at any stage after commencement of enquiry or trial, if it appears to him that the proceedings are to be tried only by a Court of Sessions. The said provision, which is extracted herein under are self explanatory.

323. Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed- If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions herein before contained [and thereupon the provisions of Chapter XVIII shall apply to the commitment so made (inserted by Act 45 of 1978, S.26 w.e.f 18.12.1978)].

18. Though it is not in dispute that the present proceedings have to be tried only by a Court of Sessions, there is no impediment for the proceedings to be transferred to the Court of Sessions at any stage before signing the judgment and therefore, the present impugned proceedings will not be vitiated just because it is now been tried by the learned Judicial Magistrate.

19. For the aforesaid reasons, I do not find any grounds to interfere with the impugned proceedings so as to invoke Section 482 Cr.P.C., for the purpose of quashing it. Consequently, Criminal Original Petition stands dismissed. Connected Miscellaneous Petitions are closed.

Sd/--

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

DP

To

1.The Judicial Magistrate-III, Vellore.

2.The Deputy Superintendent of Police,
Organised Crime Unit-I,
Crime Branch C.I.D.,
Chennai.

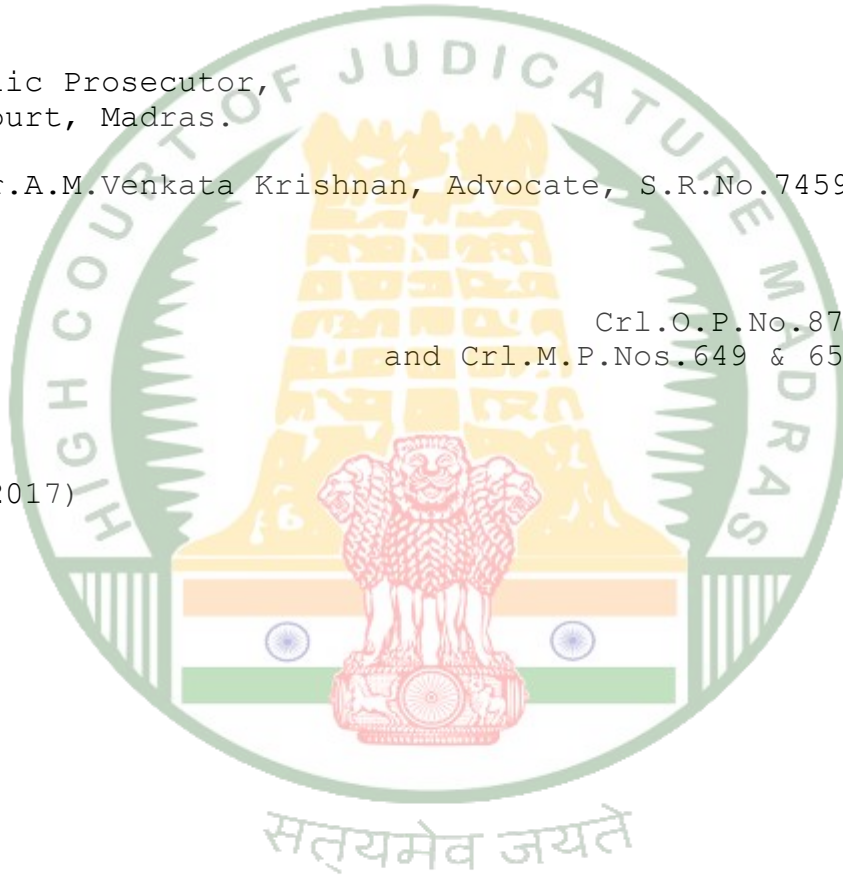
3.The Chief Judicial Magistrate,
Vellore.

4.The Public Prosecutor,
High Court, Madras.

+lcc to Mr.A.M.Venkata Krishnan, Advocate, S.R.No.74590

Crl.O.P.No.872 of 2017
and Crl.M.P.Nos.649 & 650 of 2017

RV(CO)
GN(10/11/2017)



WEB COPY