

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.06.2017

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THE HONOURABLE MR.JUSTICE C.T.SELVAM

Criminal Appeal No.564 of 2015

Michael Odinnaka @ Michael Okeke
S/o.Mbanude

.. Appellant/Accused

Vs.

State by
The Inspector of Police,
Narcotics Control Bureau,
Chennai.

(NCB F.No.48/1/1/12012-NCB/MDS) .. Respondent/Complainant

Criminal Appeal preferred under Section 374(2) of the Code of Criminal Procedure against the judgment of learned Additional District Judge, Presiding Officer, Special Court for Essential Commodities Act Cases, Coimbatore, passed in C.C.No.104 of 2012 on 29.07.2015.

For Appellant : Mr.M.S.Charles

For Respondent : Mr.N.P.Kumar,
Special Public Prosecutor (NCB cases)

J U D G M E N T

This appeal arises against the judgment of learned Additional District Judge, Presiding Officer, Special Court for Essential Commodities Act Cases, Coimbatore, passed in C.C.No.104 of 2012 on 29.07.2015.

2. Prosecution case is that appellant along with other accused entered into a criminal conspiracy during 2011 and 2012 to finance, procure, possess, transport and attempt illegal export of heroin from India to Australia and Holland. Pursuant thereto, they exported heroin to Nigeria. On 14.01.2012, appellant was found in possession of 388 grams of heroin and the same was seized at DHL Express India Pvt. Limited, Erode, when appellant attempted to export the contraband to Australia and Holland. A case was registered in NCB F.No.48/1/1/12012-NCB/MDS on the file of respondent. Upon completion of investigation, a

charge sheet was filed informing commission of offences u/s.29, 8(c) r/w 21(c), 8(c) r/w 23(c) and 8(c) r/w 28 of the NDPS Act, 1985 and NDPS (Amended) Act, 2001. As non-bailable warrants against two other accused were pending, the case against them was split up. The case against appellant/accused was tried in C.C.No.104 of 2012 on the file of learned Additional District Judge, Presiding Officer, Special Court for Essential Commodities Act Cases, Coimbatore.

3. Before trial Court, prosecution examined 6 witnesses and marked 42 exhibits and 7 material objects. None were examined on behalf of defence nor were any exhibits marked.

4.1. PW-1, Intelligence Officer, has spoken to arrest of appellant/accused at DHL Courier Office, Erode, upon information received from such office that one Nigerian national booked two parcels to Australia and Holland without proof of identification. PW-1 has deposed that on enquiry, appellant/accused admitted that he was attempting to smuggle narcotic drugs out of the country under a different name and one Mr.Aravind, Intelligence Officer, seized the parcels. A summon dated 14.01.2012 was served on appellant/accused and his voluntary statement u/s.67 of NDPS Act, 1985, was recorded in the early hours of 15.01.2012. PW-1 has spoken to filing of Ex.P2, special report, based on which a First Information Report was registered against three African nationals under the Foreigners Act in Crime No.47 of 2012. Thereafter, appellant/accused was arrested and remanded to judicial custody.

4.2. PW-2, Sales Executive at the office of DHL Express India Ltd., Erode, has spoken to booking two parcels at the instance of appellant/accused and since appellant/accused did not provide any ID proof, she has not sent the parcels. PW-2 has deposed that on the instructions of superior officers, she opened the parcels, found some powder and informed the same to superior officers. PW-2 has also spoken to identifying appellant/accused to police at the Courier office.

4.3. PW-3, Superintendent, NCB, Chennai, has spoken to obtaining information regards illegal transportation of heroin, of instructing NCB officials to take necessary action, of perusing the report u/s.57 of the NDPS Act, of attesting the same and of handing over investigation in the case to PW-5.

4.4. PW-4, Chemical Examiner, has spoken to receiving samples in sealed covers towards testing the same for ascertaining the presence of heroin. PW-4 has spoken to presence of heroin and diacetyl morphine in the samples and of submitting a test report along with samples to PW-5, Intelligence Officer, NCB, on 22.06.2012.

4.5. PW-5, Intelligence Officer, has spoken to forwarding second sample to CFSL, Hyderabad and filing of complaint in C.C.No.104 of 2012.

4.6. PW-6, Intelligence Officer, has spoken to search, seizure, arrest and investigation in the case.

5. On appreciation of materials before it, trial Court, under judgment dated 29.07.2015, convicted appellant/accused for offences u/s.29, 8(c) r/w 21(b), 8(c) r/w 23(c) and 8(c) r/w 28 of NDPS Act and sentenced him to 7 years R.I. and fine of Rs.25,000/- i/d 3 years R.I. for each of the offences. There against, the present appeal has been filed.

6. Heard learned counsel for appellant and learned Special Public Prosecutor for NCB cases.

7. In arriving at a finding of conviction, Court below has found as follows:

(i) It was the contention of appellant/accused that the accused's voluntary statement, Ex.P1, u/s.67 of NDPS Act, was recorded in the early hours of 15.01.2012 as per the evidence of PW-1, which is in violation of Section 67 of NDPS Act and PW-2, independent witness, has also left the office by 06.30 p.m. on 14.01.2012 itself. Further, Ex.P1, voluntary statement and Ex.P41, seizure mahazar, could not have been prepared in the presence of PW-2 and the confession statement was not prepared as per the provisions of Section 67 of the NDPS Act. Such contention was rejected on the reasoning that the confession statement informed the entire continuous process of appellant/accused and hence, the contention of recording of voluntary statement in the early hours of 15.01.2012 is in violation of section 67 of NDPS Act could not be accepted. Apart from that, the voluntary statement Ex.P1 was signed only by PW-1 and accused, not by PW-2. The evidence of PW-2 shows that she has gone through the mahazar and then signed it. She has signed the mahazar at 23.00 hours on 14.01.2012 itself. PW-2 was cross-examined about the working hours of courier office only and not about the date and time of affixing her signature in the mahazar. Under these circumstances, the voluntary statement cannot be held to be involuntary as per section 67 of NDPS Act.

(ii) The contention of learned counsel for appellant/accused that while PW-2, independent witness, deposed that they did not use courier office weighing machine, computer and printing machine, PW-6, deposed that he used computer and printer only to prepare mahazar and hence, seizure and mahazar were not reliable was negated by Court below on the reasoning that whether there was any discrepancy regards search, seizure and

arrest of accused and prosecution has proved its case beyond reasonable doubt could be decided only by Court and whether PW-6 used the Computer and Printing Machine of the courier office or not was irrelevant in the case.

(iii) The contention of accused that while it was the prosecution case that the contraband was sealed in such a manner and cannot be seen without opening the entire package, it was the evidence of PW-2 that as soon as she opened the parcels, she has experienced different smell and it was the evidence of PW-6 that those two parcels were intact while he opened it and hence, there was no corroboration between the evidence of PW-2 and PW-6 was rejected on the reasoning that PW-2 has opened the package as per the direction of her superior officers and the evidence of PW-6 clearly revealed that he has seized two parcels booked by accused, one to Australia containing 193 grams of heroin and another to Holland containing 195 grams of yellow colour powder without heroin. While the evidence of PW-6 clearly proved that he has opened the parcels which were intact, not much importance could be given to the evidence of PW-2 in this regard.

(iv) A combined reading of PWs. 1, 3, 5 and 6 revealed that after following due procedure, a search was conducted and the contraband were seized and the evidence of PW-4 confirmed that the contraband is Heroin. In the instant case, the heroin seized was 193 grams which comes under intermediate quantity.

On the above reasoning, Court below found that the accused was guilty u/s. 29, 8(c) r/w 21(b), 8(c) r/w 23(c) and 8(c) r/w 28 of NDPS Act, 1985 and amended Act, 2001.

8. Even while confirming the finding of conviction, this Court modifies the sentence of 7 years R.I. to one of 5 years R.I. for each offence. Sentence is to run concurrently. Fine imposed for each offence is confirmed. Default sentence of 3 years R.I. is modified to one of 1 month R.I. on each count. In the result, the appellant has already undergone both substantive and default sentence as presently modified. Appellant is directed to be released forthwith, if his detention is not required in any other case.

The Criminal Appeal is disposed of with the above modification.

Sd/-
Assistant Registrar (CS VI)

//True Copy//

Sub Assistant Registrar

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To

1.The Additional District Judge,
Presiding Officer,
Special Court for Essential Commodities Act Cases,
Coimbatore.

2.-Do-Thro The Principal District Judge, Chennai

3.The Inspector of Police,
Narcotics Control Bureau,
Chennai.

4.The District Collector, Chennai

5.The Director General of Police,
Mylapore, Chennai

6.The Superintendent
Central Prison, Puzhal, Chennai.

7.The Special Public Prosecutor (NCB Cases),
High Court, Madras.

Copy to:The Section Officer,
Criminal Section,
High Court, Madras.

GJ(CO)
sm:2.4.2018

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