

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved On : 07.02.2017

Judgment Pronounced On : 17.04.2017

CORAM

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Cr1.A.No.1351 of 2004

Intelligence Officer
Narcotics Control Bureau,
South Zonal Unit,
C3A, Rajaji Bhavan,
Besant Nagar, Chennai-600 090.
(F.No.48/1/12/1998/NCB/MDS) ...Appellant/Complainant

vs.

1.Mohamed Saleem @ Rifaz ...1st Respondent/Accused No.1

2.Mohamed Munawwir Mohamed Ameer ...2nd Respondent/Accused No.2

Criminal Appeal preferred under Section 378 Cr.P.C., against the judgement dated 23.09.2004 passed by the learned Additional Judge, Special Court for NDPS Cases, Chennai, in C.C.No.51 of 1999.

For Appellant : Mr.N.P.Kumar
Special Public Prosecutor for NDPS

For Respondents : Mr.S.N.Thangaraj
Legal Aid Counsel

JUDGMENT

This appeal has been preferred against an order of acquittal passed by the learned Additional Judge, Special Court for NDPS Cases, Chennai, in C.C.No.51 of 1999 dated 23.09.2004.

2. The respondents herein are the accused. They stood charged for the offence under Sections 8(c) r/w 21 and 29 of NDPS Act 1985. The Trial Court, by judgment dated 23.09.2004, found the first accused/first respondent guilty and convicted him under Section 8(c) r/w 21(c) of NDPS amended Act, 2001, and sentenced him to undergo ten years rigorous imprisonment and to

pay a fine of Rs.1,00,000/- (Rupees one lakh) in default to undergo rigorous imprisonment for one year and found the second accused/second respondent guilty and convicted him under Section 8(c) r/w 21(b) of NDPS Act and sentenced him to undergo two years rigorous imprisonment and to pay a fine of Rs.15,000/- (Rupees fifteen thousands) in default to undergo rigorous imprisonment for six months. The trial Court acquitted both the accused/respondents for the offence under Section 8(c) r/w 29 of the NDPS Act. Now, challenging the order of acquittal in respect of charge under Section 8(c) r/w 29 of NDPS Act, the appellant filed the present appeal.

3.The case of the prosecution, in brief, is as follows:

(i) On 21.12.1998, the Officers of the Narcotics Control Bureau(NCB), Chennai, on information, intercepted the first accused at Kamarajar Domestic Airport, Chennai, while he bound for Mumbai. P.W.1 was working as Intelligence Officer, Narcotics Control Bureau, Chennai along with a team of officers based on an information received through his informant and after revealing his identity, informed him about the information and informed him that he has a right to be taken to Magistrate for search, P.W.1 searched the bag belonging to the first accused and found 2 Kilo grams of narcotics substance(heroin) and he tested the substance with test hit brought by them and got the positive report. After following the necessary procedure as contemplated under NDPS act seized the Narcotic substance. Then, during the investigation, the first accused informed P.W.1 that the above narcotics substance brought for A-2 and the same was recorded by P.W.5. Based on that P.W.1, P.Ws.6 and 11, the Intelligence Officers, working in NCB proceeded to the house of A-2, where his wife was present, after informing about her legal rights, they conducted search and during the search they found 10 grams of narcotics substance and after following the procedure as contemplated under Section 50 of the NDPS Act seized the same. Subsequently, necessary summons were issued to the accused and both the accused appeared before the authorities, and A-1 voluntarily given a statement which was recorded by P.W.5[Ex.P31]. Then P.W.5 arrested the first accused. A-2 appeared before P.W.6 and he has also voluntarily given statement Ex.P44. Then, P.W.6 arrested the second accused after following the legal formalities. P.Ws.5 and 6 searched the another house of A-2 at Palavakkam, where no incriminating materials were seized. Then, the seized contrabands were sent for chemical examination and the chemical examination, found presence of Di-Actyle morphine, a narcotic drug and the chemical report was marked as Ex.p23. Then the Manager, Indian Airlines, Madras was examined, Flight Manifesto was also recorded and after completing the investigation, P.W.1 has filed the charge sheet before the Special Court for NDPS Act cases.

4. Considering the above materials, the Trial Court framed charges as detailed above and the accused denied the same as false. In order to prove the case of prosecution, as many as 11 witnesses were examined, 52 documents were exhibited and 17 material object were marked.

5. Out of the said witnesses examined, P.W.1 is the Intelligence Officer at NCB, Chennai. According to him, he had received an information that the first accused is going to Bombay in a Indian Airlines Flight, and carrying 2 kgs of heroin and after receipt of the information, he formed a team and intercepted A-1 at the Airport, after informing him about the information and also his legal rights P.W.1 searched the bag of the first accused and found 2 kgs of heroin and after completing all the formalities, he seized the heroin. P.W.2 is working as Assistant Chemical Examiner attached to the Customs House, examined the seized contrabands and found that all the three samples are heroin and he sent report Ex.P23. P.W.3 is working as Intelligence Officer in NCB, Chennai and he conducted investigation. Based on the statement given by A-2 he recorded the statement of one Magudaraj and he identified the second accused. P.W.4 is another Intelligence Officer working in NCB at Chennai. He searched the house of A-2 at Palavakkam and he found no incriminating materials. P.W.5 is an Intelligence Officer working in NCB at Chennai. He along with P.W.1 examined the first accused and thereafter issued summons to A-1 and recorded his statement. P.W.6 is also an Intelligence Officer working in NCB at Chennai. He was in the part of the team intercepted the first accused and he issued summons to the second accused, recorded the statement of A-2, arrested him and remanded him to judicial custody. P.W.7 was working as Traffic Superintendent in Kamarajar Domestic Airport, Chennai. He was a witness to the seizure of heroin. P.W.8 is working as Superintendent in NCB, Chennai. He received an information that a person was carrying heroin and travelling from Chennai to Bombay and he informed the same to P.W.1. P.W.9 is the witness to the seizure of heroin from the house of A-2. P.W.10, he is one of the resident in the house where A-2's wife was resided and he is witness to the search conducted by Intelligence Officers. According to him, no incriminating material was found in the house of A-2's wife. P.W.11 is working as Intelligence Officer in NCB, Chennai. He was also part of the team intercepted A-1 at Airport.

6. When the above incriminating materials were put to the accused under Section 313 Cr.P.C., they denied the same as false. Their defence was a total denial. They have examined one Noor Mazharria as D.W.1 and no exhibits were marked.

7. Considering the above materials, the trial Court convicted first accused/first respondent under Section 8(c) r/w 21(c) of NDPS Act, and sentenced him to undergo ten years rigorous imprisonment and to pay a fine of Rs.1,00,000/- (Rupees one lakh) in default to undergo rigorous imprisonment for one year and found the second accused/second respondent guilty and convicted him under Section 8(c) r/w 21(b) of NDPS Act and sentenced him to undergo two years rigorous imprisonment and to pay a fine of Rs.15,000/- (Rupees fifteen thousands) in default to undergo rigorous imprisonment for six months. The trial Court acquitted both the accused/respondents for the offence under Section 8(c) r/w 29 of the NDPS Act. Now, challenging the order of acquittal in respect of charge under Section 8(c) r/w 29 of NDPS Act, the appellant filed the present appeal.

8. Even though notice was served on the respondents 1 and 2 and there was no representation on behalf of the respondents. Hence, this Court, by order dated 19.12.2016, appointed Thiru.S.N.Thangaraj, learned Advocate as the Legal Aid Counsel for the respondents.

9. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents and perused the materials available on record.

10. The learned counsel appearing for the appellant would contend that while the Court below believing the evidence of the prosecution witnesses convicted the accused for the offence under Section 8(c) r/w 21(b) of NDPS Act, the Court below ought not to have acquitted the accused for the offence under Section 8(c) r/w 29 of NDPS Act. The learned counsel appearing for the appellant further submitted that the prosecution mainly relied upon the confession statement of the respondents/A1 and A2 marked as Exs.P31 and P44, the Court below has believed the said confession statement, convicted the respondents/accused 1 and 2 for the other offences, but acquitted the accused for the charge of conspiracy on the ground that there was no further investigation regarding the statement given by the respondents/accused 1 and 2. Once the Court below come to a conclusion that the statement given by the accused under Section 67 of the NDPS Act is voluntary and admissible in evidence and based on the same convicted the respondents/accused, it cannot partly disbelieved the statement and acquitted the accused for the charge of conspiracy, as sufficient materials available from the statement of the accused to prove the conspiracy. The learned counsel appearing for the appellant further submitted that it is settled law that the confession of the accused made under Section 67 of the NDPS Act can be a sole basis for convict

the accused and from the confession of the accused, the prosecution has clearly proved the conspiracy between the accused for committing offence. Hence, the Court below ought not to have acquitted the accused stating that from mere filing the statement, it cannot be presumed that A1 and A2 conspiracy with one Inticab, who was arrayed as A-3 in this case regarding drug trafficking. In support of his contention, the learned counsel appearing for the appellant relied upon a judgment of the Hon'ble Supreme Court in KANHAIYALAL Vs. UNION OF INDIA reported in 2008 (4) SCC 668.

11. Per contra, the learned counsel appearing for the respondents/Accused 1 and 2 would submit that in order to prove the conspiracy, except the confession statement of the respondents/accused there is no other materials available on record. Apart from that there is no investigation regarding the confession made by the accused and since the confession was retracted by the accused while they were questioned under Section 313 Cr.P.C., the retracted confession cannot be used against the respondents/accused and the Court below rightly considered the same and acquitted the accused for the charge of conspiracy. In the above circumstances, there is no reason to interfere with the order of acquittal passed by the Court below. In support of his contention, the learned counsel appearing for the respondents relied upon a judgment of the Hon'ble Supreme Court in TOFAN SING Vs. STATE OF TAMILNADU reported in 2013(12) SCALE and contended that the Hon'ble Supreme Court doubted the ratio laid down in KANHAIYALAL (supra) case and the matter has been referred to the Larger Bench. In view of the same, the judgment of the KANHAIYALAL (supra) case cannot be followed.

12. I have considered the rival submissions.

13. So far as the charge under Section 8(c) r/w 29 of the NDPS Act, the prosecution case was that the respondents/A1 and A-2 along with one Inticab, who was arrayed as A-3 in this case was a resident of Bombay and he engaged A-1 to hand over 2 kilo grams of heroin to A-2 at Chennai and on 19.12.1998, A-1 travelled in a Indian Airlines Flight from Mumbai to Chennai along with heroin and went to the house of A-2, stayed with him, and handover the heroin to A-2, after testing the heroin, A-2 found that the heroin is inferior quality, hence asked A-1 to take back the same and after calling A-3, A-1 taking it back to Mumbai, at that time he was intercepted by the appellant and seized the heroin. Thereafter, A-1 has given a confession under Section 67 of NDPS Act and based on that a summons were issued to A-2 and A-2 also similarly given a confession statement under Section 67 of the NDPS Act. Both the statement were marked as Exs.P31 and P44. The Court below considered the confession

statement of the accused and held that both the statement of A-1 and A-2 are admissible in evidence and relying upon the same, the Court below convicted the first accused/first respondent under Section 8(c) r/w 21(c) of NDPS Act, and sentenced him to undergo ten years rigorous imprisonment and to pay a fine of Rs.1,00,000/- (Rupees one lakh) in default to undergo rigorous imprisonment for one year and found the second accused/second respondent guilty and convicted him under Section 8(c) r/w 21 (b) of NDPS Act and sentenced him to undergo two years rigorous imprisonment and to pay a fine of Rs.15,000/- (Rupees fifteen thousands) in default to undergo rigorous imprisonment for six months. But, the Court below acquitted both the accused/respondents for the offence under Section 8(c) r/w 29 of the NDPS Act on the ground that the appellant did not conduct any investigation on the statement given by A1 and A-2 in Ex.P31 and Ex.P44, and by mere filing of said statement, Court cannot presume that A-1 and A-2 had conspiracy with A-3 regarding the drug trafficking and commit the offence.

14. Section 29 of NDPS Act speaks about the punishment of abetment and criminal conspiracy, which reads as follows:-

29. Punishment for abetment and criminal conspiracy

(1) Whoever abets, or is a party to a criminal conspiracy to commit, an offence punishable under this Chapter, shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and not withstanding any thing contained in section 116 of the Indian Penal Code, be punishable with the punishment provided for the offence.

(2) A person abets, or is a party to a criminal conspiracy to commit, an offence, within the meaning of this section, who, in India abets or is a party to the criminal conspiracy to the commission of any act in a place without and beyond India which

(a) would constitute an offence if committed within India; or

(b) under the laws of such place, is an offence relating to narcotic drugs or psychotropic substances having all the legal conditions required to constitute it such an offence the same as or analogous to the legal conditions required to constitute it an offence punishable under this Chapter, if committed within India

15. It is a settled principle of law that a criminal conspiracy is an agreement between two or more persons to do an illegal act or legal act by illegal means. If the agreement is not an agreement to commit an offence, it does not amount to conspiracy unless it is followed up by an overt act done by one or more persons is furtherance of the agreement. The offence is complete as soon as there is meeting of minds and unity of purpose between the conspirators to do that illegal act or legal act by illegal means. It is not necessary that each conspirators must know all the details of the scheme, not be a participant at every stage and the conspiracy can be inferred from circumstances.

16. In the instant case, the prosecution has established that through the confessional statement of A1 and A2 that both were conspired along with A-3 to commit the offence. The Court below considered the confessional statements of A-1 and A-2 under Section 67 of the NDPS Act and held that it is voluntary and admissible in evidence and based on the same convicted the accused for other offences. But, acquitted the accused on the ground that there is no further investigation based on the statement given by the accused. The Hon'ble Supreme Court in KANHAIYALAL case reported in 2008(4) SCC 668 (supra) has held that the confessional statement recorded by the officer in the course of investigation of a person accused of an offence under the NDPS Act is admissible in evidence against him and also held that the conviction can be maintained solely on the basis of confession given under Section 67 of the NDPS Act, and the Hon'ble Supreme Court held as follows:-

44. In addition to the above, in Raj Kumar Karwal v. Union of India this Court held that officers of the Department of Revenue Intelligence who have been vested with powers of an Officer-in-Charge of a police station under Section 53 of the NDPS Act, 1985, are not police officers within the meaning of Section 25 of the Evidence Act. Therefore, a confessional statement recorded by such officer in the course of investigation of a person accused of an offence under the Act is admissible in evidence against him. It was also held that power conferred on officers under the NDPS Act in relation to arrest, search and seizure were similar to powers vested on officers under the Customs Act. Nothing new has been submitted which can persuade us to take a different view.

17. Even though recently the Hon'ble Supreme Court in TOFAN SINGH Vs. STATE OF TAMIL NADU reported in 2013(12) SCALE has referred the issue to a larger Bench, in the absence of any authoritative pronouncement by the larger Bench the ratio laid down in KANHAIYALAL case (supra) is still holds good, and the confessional statement of the accused made under Section 67 of the NDPS Act is admissible in evidence. In the above circumstances, I am of the considered view that the prosecution has clearly established the conspiracy between the accused to commit the offence. Hence, the findings of the Court below that a further investigation is required in respect of the confessional statement given by the accused to prove the conspiracy is not correct. Hence, it is liable to be set aside.

18. In the result, the Criminal Appeal is allowed and the order of acquittal of respondents for the offence under Section 8(c) r/w 29 of the NDPS Act is set aside and both the accused are convicted for the offence under Section 8(c) r/w 29 of the NDPS Act.

19. The Registry is directed to issue notice to the respondents/accused for questioning them regarding sentence, and post the matter on 05.06.2017 for questioning the respondents. While parting with the case, I appreciate the valuable services rendered by Mr.S.N.Thangaraj, the learned counsel appearing on behalf of the respondents as legal aid counsel. The Secretary, High Court Legal Services Committee is directed to pay a fee to the learned counsel appearing for the respondents as per rule.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Special Judge,
Additional Special Court for NDPS Cases,
Chennai.

2.Intelligence Officer
Narcotics Control Bureau,
South Zonal Unit,
C3A, Rajaji Bhavan,
Besant Nagar, Chennai-600 090.

3.The Special Public Prosecutor for NDPS,
High Court, Madras.

4.The Secretary,
High Court Legal Services Committee,
Madras.

5.The Section Officer,
Criminal Section,
High Court, Madras.

Crl.A.No.1351 of 2004

KJ(CO)
RS(20/04/2017)



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