

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 12.10.2018

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Cr1.A.No.44 of 2013

Ashok @ Ashok Kumar
@ Ravi Kumar @ Raj Kumar ... Appellant/Accused /A-2

vs.

State by:
Intelligence Officer,
Narcotics Control Bureau,
South Zonal Unit,
Chennai.
(NCB F.No.48/1/9/2002-NCB/MDS) ... Respondent/Complainant

Prayer: The Criminal Appeal filed under Section 374 (2) of Cr.P.C. r/w 36-B of NDPS Act, 1985, against the judgment dated, 28.03.2012, made in C.C.No.27 of 2003, on the file of the Learned Principal Special Judge, Principal Special Court, Chennai.

For Appellant : Mr.G.Ravi Kumar

For respondent : Mr.N.P.Kumar
(Special Public Prosecutor)

JUDGMENT

This criminal appeal has been filed by the second accused, against the judgment of conviction dated 28.03.2012 in C.C.No.27 of 2003 made by the learned Principal Special Judge, Principal Special Court under EC and NDPS Act, Chennai.

2 Originally a complaint was filed by the respondent herein against eight persons showing them as accused 1 to 8 for various offences punishable under NDPS Act. In the said complaint, one Roshan Khan and the appellant herein were shown as A7 and A8 and as absconding accused and hence a case in C.C.No.347 of 2002 was split up and was tried only in respect of A1 to A6. The appellant herein and the said Roshan Khan were tried in separately in C.C.No.27 of 2003.

3 Case of the prosecution is that on 17.05.2002 at 18.00 hours, P.W.1/the Intelligence Officer of the NCB received an information through telephonic that one Zimzar (A1) and one Sadurudeen (A2) both Srilankan Nationals were indulging in drug trafficking between Chennai and Srilanka and they were staying in Hotel Regal, Egmore, Chennai. They were procuring about 44 Kgs.of Heroin from one Hidayath Khan of Gujarat, who was staying in the Hotel Indian Palace, Moore Street, Chennai and they were planning to transport the same to Kanyakumari Coast by Tata Sumo Vehicle bearing Registration No.TN-22-P-9597 in the early hours of 18.05.2002 for illicit exportation to Srilanka by sea route by one Paul Samuel (A4) of Nagercoil, who had already come to Chennai and staying at the Peoples Lodge, Egmore, Chennai, for taking possession of the drug. The above said Zimzar, Sadurudeen and Paul Samuel along with one Shihab and Thevarasa both Srilankans were likely to travel to Kanyakumari in the said Tata Sumo along with the Narcotic drug which will be concealed in both sides of the back side seats in the speaker area cavity and rear door inner panel cavity.

4 P.W.1, on the basis of information, went to the place of occurrence along with the officers of NCB, South Zonal Unit, Chennai, and mounted surveillance. On 18.05.2002, the vehicle, mentioned in the information report, bearing Registration No.TN-22-P-9597 white colour Tata Sumo had come from Chennai towards Trichy on GST Road. P.W.1 intercepted the vehicle and the officers informed the information received and wanted to search the Tata Sumo and the five persons under NDPS Act and explained section 50 of NDPS Act that they have a right to be searched before a Judicial Magistrate or a Gazetted Officer for which they declined the offer and the officers themselves can conduct the search. Then the officers enquired about the occupants of Tata Sumo, person sitting in the driver seat told his name as Devarasa Srilankan and the person next to him revealed his name as Paul Samuel belonging to Nagercoil, the occupant of back seat having good physique, tall revealed his name as Zimzar, Srilankan and the person next to Sadurudeen sitting corner of the back seat door having good physique, medium height around 32 years of age revealed his name as Shihab, Srilankan. Then officers asked the occupant of the Tata Sumo that whether they are possessing any narcotic drug, for which, Zimzar told that heroin was concealed inside body and back side door of Tata Sumo and weighing around 44 Kgs. He opened the back sides of the two rear door and opened the false speaker box and took out blue cloth packets. Then the back side door's inside a specially made cavity was opened and took out blue colour packets and handed over all the pockets to the officers. Other four occupants of Tata Sumo admitted the knowledge of concealment of narcotic drug in the Tata Sumo. Then officers opened each

packets and found polythene covers having brown colour powder believed to be heroin.

5 The officers took a small quantity from each packet and tested with Field Test Kit, which answered positive for heroin, a narcotic drug. Then the officers seized the above packets on reasonable belief that they were heroin. The packets were weighed separately and found total of about 44.820 kgs of heroin in all. The accused entered in to a criminal conspiracy to do or cause to be done illegal acts to procure, possess, conceal, transport and export about 44.820 Kgs of brown colour powder which was seized from the possession of the accused, that in pursuance of criminal conspiracy and in a course of same transaction the accused had caused the procurement, concealment, possession, transportation and attempt to export of the seized heroin and thereby the accused had committed an offence punishable U/s.8(c) r/w 21(c), 29 & 25 of NDPS Act.

6 In order to prove the case of the prosecution, P.W.1 to P.W.6 were examined and Ex.P1 to Ex.P77 were marked. On the side of the accused, no one was examined and no document was marked.

7 The trial Court, after trial, found the appellant herein guilty of offence punishable under Sections 8(c) r/w.29 & 25 of NDPS Act, 1985 as amended by Act9/01 and hence by judgment dated 28.03.2012 convicted and sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1 lakh for each offence.

8 Aggrieved against the said judgment of conviction dated 28.03.2012, the second accused had preferred the present criminal appeal.

9 The learned counsel for the appellant/A2 would submit that identity of the appellant is strongly disputed, since P.W.5, who is owner of the vehicle, has stated that one Ashok Kumar of Nagarcoil has taken vehicle, whereas, the appellant herein is Srilankan National. The appellant was convicted only based on the statement recorded under Section 67 of NDPS Act/Ex.P15, that too while the appellant was in custody, which is contrary to the decision of the Hon'ble Apex Court reported in 2004 SCC Online Raj 194 and apart from the above statement, there is no iota of evidence to prove conspiracy by the appellant. Further P.W.5, owner of the vehicle did not claim his vehicle, which was involved in the alleged offence. The Investigating Officer had not mentioned registration number of the vehicle. Even the vehicle, which was said to have been used in the alleged offence was not marked in this case. Statements recorded from the other witnesses in other case cannot be taken

to convict the appellant. There is no evidence to prove the link with the other accused and there is no proof in this case that this appellant had conspired with the other accused and he had involve in the alleged smuggling of contraband. The trial Court had failed to consider the above facts and simply relied on the statement recorded under Section 67 of the NDPS Act and erroneously convicted the appellant, which warrants interference. Furthermore, the first accused had already been acquitted by this Court, by observing that there is no evidence to prove the offence charged against him.

10 The learned Government Advocate (Crl.Side) would submit that the first and second accused in the present case were tried separately, since they had been absconded. As far as the first accused is concerned, there was no statement recorded from him, whereas, the present appellant/A2 is concerned, he has given voluntary statement under Section 67 of NDPS Act which was marked as Ex.P15. P.W.5, owner of the vehicle, which was involved in the offence, had clearly stated that the appellant used to take the vehicle occasionally at rent and returned the same and like wise, before the occurrence, the appellant had taken the vehicle, but not returned and only when the summons received, he had come to know that his vehicle was used for smuggling. P.W.5 further stated that he can identify the accused and before the Court he has clearly identified the appellant/A2, he is the one, who taken the vehicle from him. Hence from the above, involvement of the appellant in the offence has been clearly proved. The learned Principal Special Judge, after appreciating the facts and evidences, had convicted the appellant, which does not call for any interference.

11 Heard the learned counsel appearing on either side and perused the materials available on record.

12 Originally a complaint was filed by the respondent herein against eight persons showing them as accused 1 to 8 for various offences punishable under NDPS Act. In the said complaint, one Roshan Khan and the appellant herein were shown as A7 and A8 and as absconding accused and hence a case in C.C.No.347 of 2002 was split up and was tried only in respect of A1 to A6. The appellant herein and the said Roshan Khan were tried in separately in C.C.No.27 of 2003.

13 Prosecution had relied on the statement recorded under Section 67 of the NDPS Act and the Court below had also observed that the appellant/A2 voluntarily given statement, which itself sufficient to convict the appellant. The question whether conviction can be made based on the statement recorded under Section 67 of the NDPS Act, is now pending before the Hon'ble Supreme Court. The question has to be decided now is that

whether there is any material to link the appellant in the offence, except Ex.P15. Apart from Ex.P15, other evidences also put incriminating circumstances on the appellant. P.W.5, owner of the vehicle, had clearly stated that the appellant is the one who taken the vehicle from him and before the Court he had identified the appellant. P.W.5 in his evidence had stated that the appellant used to take his vehicle at rent and so far more than 5 times the appellant had taken the vehicle from him. Evidence of P.W.1 to P.W.5 had clearly proved the involvement of the appellant in the offence and the offence charged against the appellant had clearly proved. The first accused was acquitted by this Court, since there was no direct evidence against him, whereas, the appellant/A2 is concerned, there is evidence much available against him, which would sufficient to convict him. This Court, as a first appellate Court, re-appreciated entire evidence on record independently and is of the considered opinion that the prosecution has proved the case.

14 In the result, the criminal revision is dismissed and the conviction and sentence imposed by the trial Court is hereby confirmed.

Sd/-

Deputy Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Principal Special Judge,
Principal Special Court, Chennai.
2. The Public Prosecutor,
Madras High Court.
3. The Section Officer,
VR Section, Madras High Court.
4. The Section Officer,
Criminal Section,
High Court, Madras-104.

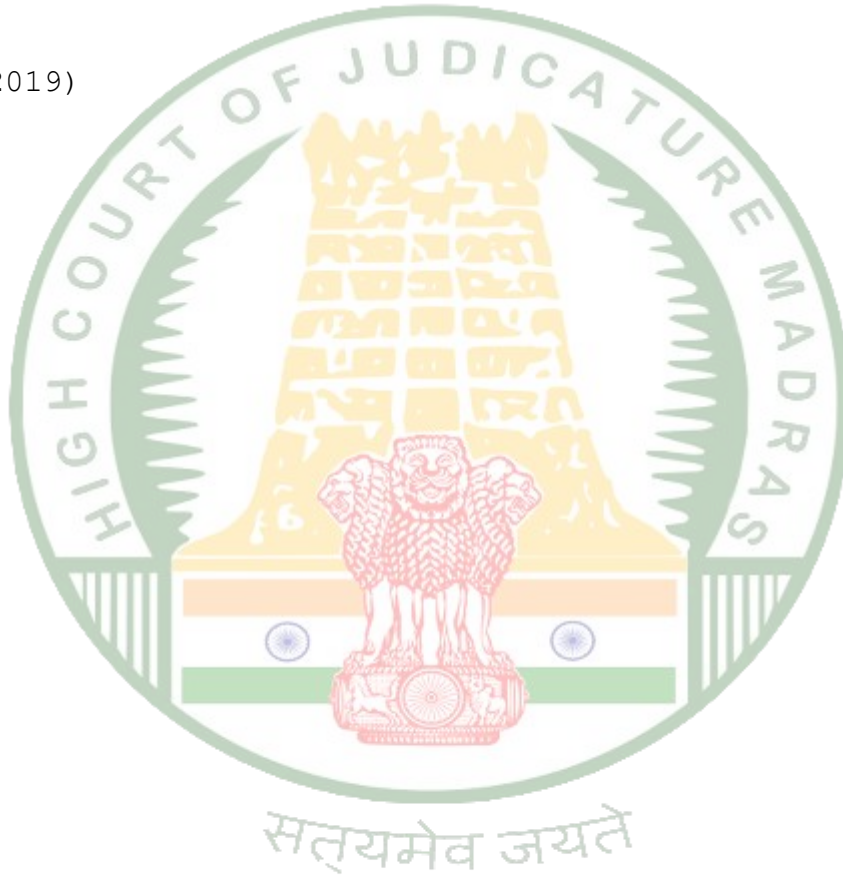
5.The Superintendent of Central Prison,
Puzhal, Chennai-66.

6.The Intelligence Officer,
Narcotic Central Bureau South Zonal Unit,
Chennai.

+2cc to Mr. G.Ravi Kumar, Advocate, S.R.No. 70988

Crl.A.No.44 of 2013

VG II(CO)
GN(25/02/2019)



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