

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 15..11..2016
Pronounced on : 16..03..2018

CORAM

THE HON'BLE MR.JUSTICE P.VELMURUGAN

Criminal Appeal No.411 of 2013

Fernandez Darel Riano

... Appellant/Accused

-Versus-

State Rep. by
The Intelligence Officer, (AIU)
Customs House,
Rajaji Salai,
Chennai 600001.

... Respondent/Complainant

Appeal filed under Section 374(2) of Code of Criminal Procedure, 1973 against the judgment of conviction and sentence made in Calendar Case No.20 of 2009 dated 09.04.2013 by the learned Principal Special Judge, Special Court under NDPS Act, Chennai-600 104.

For Appellant : Mr.R.Vijayaraghaven

For Respondent : Mr.N.B.Kumar,
Spl. Public Prosecutor for Customs

JUDGEMENT

The sole accused in Calendar Case No.20 of 2009 on the file of the learned Principal Special Judge, Special Court under EC & NDPS Act, Chennai, is the appellant herein. She stood charged for offence under Section 8(c) r/w 21(c) of The Narcotic Drugs and Psychotropic Substances Act, 1985. When the appellant was questioned as to the charge, she pleaded not guilty and therefore, she was put on trial. The learned Principal Special Judge, after full-fledged trial, found the appellant guilty of offence under Section 8(c) r/w 21(c) of the NDPS Act. The appellant was accordingly convicted and sentenced to undergo rigorous imprisonment for a period of ten years with a fine of Rs.1,00,000/- in default to undergo rigorous imprisonment for two months for the offence under Section 8(c) r/w 21(c) of the NDPS Act. Challenging the above said judgment of conviction and

sentence, the accused is before this court with this criminal appeal.

2. The case of the prosecution in brief is as follows:- During 2008, P.W.1 was working as Intelligence Officer at Chennai Airport. While she was on duty, on 22.05.2008 at about 9.30 p.m. she noticed that the accused was moving in a suspicious manner. When she was about to board Malaysia Airlines Flight MH 181, she was intercepted by P.W.1 and on being questioned, she did not give any proper answer. P.W.1 developed suspicion and so she decided to check the baggage of the accused. Therefore, P.W.1 directed to bring the baggage belong to the accused in the presence of P.W.2, P.W.4 and another officer who were on duty as Supervisor in a Duty Free Shop, available at Anna International Terminal. She was told about her right to be searched before the Gazetted Officer or a Judicial Magistrate and enlightened about Section 50 of the NDPS Act and she declined to accept the offer.

3. On checking, P.W.1 found a bulge in the bottom of red colour VIP stroller zipper suitcase and when it was break opened, she found a flat brown colour tapped packet containing powdered substance concealed into the suitcase, then it was tested with the field test kid by P.W.1 and the tested powder was found to be heroin. The substance in the packet was weighed as 2015 grams. On further inquiry, the accused also admitted the same. P.W.1 took two samples of each weighing 5 grams from the powder in a sealed cover with customs seal with identification marks thereon. The remaining bulk heroin were packed and sealed with customs seal. She seized the suitcase and obtained the signature of the witnesses and accused and signed in the labels. She also seized the travel documents of the accused. Thereafter, the accused was taken on judicial remand. P.W.7 Superintendent in Air Prosecution Unit prepared a remand report and produced the accused along with contraband before the Special Court.

4. The accused was produced before the trial court and the substance of the offences were explained and charges were framed. The appellant denied the charges and opted for trial. Thus, she was put on trial.

5. Based on the materials collected during the course of investigation, the prosecuting agency has examined as many as 7 witnesses as P.W.1 to P.W.7, Exs.P.1 to P.19 documents and M.Os.1 to 6 were marked.

6. Out of the above said witnesses, P.W.1 was the Intelligence Officer at Chennai Airport during the relevant point of time. She has stated that on 22.05.2008 while she was on duty she found the accused moving in a suspicious manner

towards security check. When the accused was about to board Malaysian Airlines Flight MH 181, she was intercepted and on being questioned, the accused did not answered properly. So, she developed suspicion and decided to check her baggage. On checking the baggage she found a bulge in the bottom of the suitcase and when it was opened, she found a flat brown colour tapped packet containing powdered substance concealed into the suit case. When it was tested with the field test kid, it answered that it was heroin. She has further stated that she took two samples of each weighing 5 grams from the packet as M.O.1 & M.O.2 respectively and packed them with customs seal NO.198 and marked them as 1(a) and 1(b) respectively. The remaining heroin were packed, marked as M.O. 3. She seized M.O.4 Red Colour Suitcase; Brown colour cover (inside M.O.4) as M.O.5 and Synthetic sheet (inside M.O.4) as M.O.5, Ex.P.1 Boarding Pass, Ex.P.2 Passport, Ex.P.3 Baggage Tag, Ex.P.4 Flight Ticket from the accused under a cover of Ex.P.5 mahazar in the presence of witnesses. She recorded the confession statement (Ex.P.6) from the accused and prepared arrest memo (Ex.P.7) and forwarding memo Ex.P.8 and statement of the accused as Ex.P.9. On getting sanction Order (Ex.P.19) for prosecution from the Customs Airport Commissioner, Chennai and on completing her investigation, she filed a complaint (Ex.P.18) against the accused, on the same day, P.W.7 prepared a remand in the presence of independent witnesses. Thereafter, the accused was taken on judicial remand and produced the material objects to the Special Court.

7. At the relevant point of time, P.W.2 was working as Superintendent in the Customs Intelligence Department, has stated that on 22.05.2008 when he was on duty, P.W.1 intercepted the accused and recovered heroin from the accused. P.W.1 recorded the statement from the accused. According to him, the accused in her statement confessed to her guilt and filed a report U/s 57 of the NDPS Act and the same is marked as Ex.P.10.

8. P.W.3 was the then Assistant Chemical Examiner in Customs House Laboratory at Chennai. He has spoken about the examination conducted by him. According to him, during tests the contraband were found to be that of heroin. Ex.P.11 is the requisition letter received from the Court and Ex.P.12 is the chemical analysis report.

9. P.W.4, the Superintendent of Customs in the Chennai Docks Section as Apraiser, has stated that he was present at the relevant point of time when the baggage of the accused was found with contraband. He has further stated that the accused gave a statement on her own handwriting before P.W.1 in which he was signed as a witness and the same is marked as Ex.P.6.

10. P.W.5, the Superintendent of Revenue Recovery Unit, Chennai has stated that he sent the letter to Delhi as directed by Assistant Commissioner. The said letter is marked as Ex.P.13 and he got a reply from Delhi and the reply to the same is marked as Ex.P.14.

11. P.W.6, was working as Supervisor in a Duty Free Shop, at Anna International Terminal during the relevant point of time. He stated that, as requested by P.W.1, witnessed the examination of red colour stroller bag, recovery of a pack concealed beneath the bottom portion of the suitcase. He further stated that the contents inside the packet was weighted about two kilograms and 15 grams, two samples of each weighing about 5 grams were collected and remaining power was sealed and prepared mahazar. P.W.6 signed as witnesses in the mahazar and other documents prepared by P.W.1 along with one Devi Malakkar.

12. P.W.7, the then Superintendent, in the Air Prosecution Unit Airport, has spoken about the preparation of the remand report and forwarding the accused to the court along with the seized documents, contrabands and other properties. Ex.P.16 is the remand report and Ex.P.17 is the memo filed for submission of properties.

13. All the incriminating material evidence produced during the course of trial were put before accused, the accused, in general, denied all the evidence as false. However, she did not choose to examine any witness and marked any document on her side. Her defence is a total denial of the prosecution case.

14. Having considered all the above, the learned trial judge convicted the appellant for the offence under Sections 8(c) r/w 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced her to imprisonment besides fine as stated in the first paragraph of this judgment. Challenging the conviction and sentences, the accused is before this court with the present criminal appeal.

15. Heard the learned counsel appearing for the appellant and the learned Special Prosecutor appearing for the respondent and also perused the available records.

16. The learned counsel for the appellant would submit that there is a material contradictions on the evidence of P.W.1 and absolutely there is no evidence let in by the prosecution to establish the case as to who brought the M.O.4 suit case; that Ex.P.6 were alleged to have been recorded on 22.05.2008, but the date found in the signature of the Superintendent is 23.05.2008. There is no signature of the accused or witness on the cover of the Ex.P.3; P.W.4 during cross examination admitted that

independent witnesses are available at the time of interruption and seizure and Ex.P.6 was not attested by any of the witnesses; the prosecution failed to establish the alleged seizure beyond all reasonable doubt. The learned trial Judge ought to have extended the benefit of doubt in favour of the appellant.

17. Per contra, the learned Special Public Prosecutor would vehemently oppose the criminal appeal and contend that when the appellant was about to board a flight, on suspicion, she was intercepted by P.W.1 directed to bring the baggage of the appellant and on a thorough checking in the presence of P.W.2, P.W.4 and P.W.6, she found to have smuggled 2015 kgs of heroin by concealing the same in her suitcase (M.O.4) and the same was proved by chemical analysis report is that of heroin. Thus, the prosecution proved its initial burden of proving its case and that the learned trial Judge after analysing the material documents rightly presumed the culpable mental state of the appellant that she was with conscious possession of such a huge quantity of heroin which had been concealed in her own baggage. According to him, once the possession of contraband has been proved, then, the burden shifts on the appellant to prove that she was not in conscious possession of the contraband. In the instant case, the appellant was not able to discharge the onus of proof that she was not in conscious possession and therefore, in view of the provision in Section 54 of the NDPS Act, the trial court rightly invoked the presumption and found that the appellant was guilty and imposed the Judgment of conviction and sentence.

18. Admittedly, the appellant was holding Phillipines passport. On 22/05/2008 she was intercepted at Security Check point in Chennai International Airport by the respondent after she was found to have smuggled 2015 Kgs of heroin. She was, accordingly, booked under Section 8(c) r/w 21, 28 and 29 of the NDPS Act. Later, on she was put on trial for charges under Sections 8(c) r/w 21(c), 28, 29 of NDPS Act.

19. P.W.1, who was the Intelligence Officer during the relevant point of time, has spoken about the suspicion developed against the appellant in her activities, at the time when she was about to board the Malaysian Airlines Flight MH 181 and therefore, she intercepted her and on being questioned, she did not give any proper answer and on further suspicion, she decided to check the baggage of the accused which were already checked-in by the authorities. During such checking P.W.2, P.W.4 and another officer who were on duty as Supervisor in a Duty Free Shop, at Anna International Terminal are present. P.W.1 found a flat brown colour tapped packet containing powdered substance concealed into the suitcase, and the substance in the packet was weighed about 2015 grams. She seized the contraband and the

other material objects. When it was tested, the same was proved to be heroin. P.W.1 further stated that she took samples in accordance with law. On further inquiry, the appellant confessed to have smuggled the same to Malaysia. She also stated that she seized the travel documents and other material objects from the possession of the appellant. P.W.1 recorded the statement from the appellant in the presence of witnesses, in which, the appellant confessed to her guilt. According to P.W.1, on getting sanction for prosecution from the Customs Airport Commissioner, Chennai and on completing her investigation, she filed a complaint (Ex.P.18) on 23.05.2008 against the appellant.

20. P.W.3, the then Assistant Chemical Examination in Customs House Laboratory at Chennai has also stated that during the tests the contrabands were found to contain Di-acitylemorphine. Ex.P.12 is the analysis report. Though, the learned counsel for the appellant contended that the prosecution has failed to prove the alleged seizure, this court does not find any justification in the arguments advanced by the learned counsel for the appellant.

21. Section 54 of the NDPS Act creates a presumption that the Accused is guilty of an offence, if she fails to 'satisfactorily account' for possession of contraband. Section 35 states that in a prosecution under NDPS Act, it would be presumed that the Accused has the 'culpable mental state' necessary for the offence. It is needless to point out that before drawing presumption under Section 34 and Section 35 of the NDPS Act, the prosecution must establish a prima-facie case and which the appellant is permitted to rebut. In the instant case, the prosecution has discharged its initial burden. Whereas the appellant in this case has not rebutted the statutory presumption. Therefore, the submission of the appellant that the appellant was not in conscious possession of the same is liable to be rejected. The physical possession of the contraband which was admittedly recovered from the checked-in baggage of the appellant, the knowledge that this substance was not heroin has not been rebutted by the appellant. It is also not the case of the appellant that the said checked-in baggage did not belong to her. The baggage slips (Ex.P.3) and boarding pass (Ex.P.1) would clearly establish that the baggage belonged to that of the appellant.

22. The Apex Court has time and again held that once a physical possession of the contraband by the accused has been established, the onus is upon the accused to prove that it was not a conscious possession. Thus, the onus would be upon the accused to rebut the statutory presumption of this fact that the accused was not in the knowledge that this substance was a contraband. In this case on hand, the appellant was found to have smuggled 2015 kgs of heroin which was found to have been concealed in her suitcase (M.O.4). The appellant did not have any proper answer. Once the physical possession of the contraband by the appellant has been proved, Section 35 of the NDPS Act would come into play and the onus shifts on the appellant to prove that she was not in conscious possession of the contraband. The burden of proof cast on the accused under Section 35 of the NDPS Act can be discharged through different modes. The appellant has failed to discharge her burden in the manner known to law. In her statement submitted during the proceeding under Section 313 of Cr.P.C. also no plea has been taken that she was not in conscious possession of the contraband. It is to be noted that huge quantity of heroin was recovered from the possession of the appellant at the airport while she was about to board a flight bound for Malaysia. This court does not find any justification in the contention of the appellant that non examination of the person who was allegedly asked to bring M.O.4 suitcase for re-check would cause prejudice to the appellant. In this case, since P.W.1 re-checked the suitcase (M.O.4) in the presence of P.W.2, P.W.4 and P.W.6 and the appellant in her statement to P.W.1 in the presence of P.W.2 confessed to her guilt, the non examination of the person who was asked to bring the suitcase for examination by P.W.1 neither caused any prejudice to the appellant in this case nor it affect the credibility of the prosecution version.

23. In view of the foregoing discussions, this court is of the considered view that the prosecution has proved its case beyond all reasonable doubts and that the learned trial judge was right in holding that the appellant was guilty of charges and that this court does not find any illegality or irregularity in the judgment of conviction and sentence rendered by the trial court.

24. Insofar as the sentence is concerned, considering both the mitigating and aggravating circumstances of the case, this court is of the view that the quantum of both physical and monetary sentence imposed on the appellant by the learned trial judge appear to be appropriate and thus, the same also do not require any interference at the hands of this court. Thus, this court does not find any merit in the appeal and the same deserves to be dismissed.

25. In the result, this Criminal Appeal is dismissed and the judgment of conviction and sentence dated 09.04.2013 recorded by the learned Principal Special Judge, Special Court under EC & NDPS Act, Chennai, in C.C.No.20 of 2009 against the appellant is hereby confirmed.

Sd/-
Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

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TO

1. THE PRINCIPAL SPECIAL JUDGE,
SPECIAL COURT, (NDPS & EC ACT)
CHENNAI.
2. THE INTELLIGENCE OFFICER (AIU)
CUSTOMS HOUSE, RAJAJI SALAI, CHENNAI.
3. THE SUPERINTENDENT,
CENTRAL PRISON, (FOR WOMEN)
PUZHAL CHENNAI.

COPY TO
THE SECTION OFFICER,
CRIMINAL SECTION, HIGH COURT, MADRAS.

Pre Delivery Judgment
in
Criminal Appeal No.411 of 2013

ssi (CO)
TR(28/03/2018)

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