

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 18..11..2016
Judgment Pronounced on : 09..02..2018

CORAM

THE HON'BLE MR.JUSTICE P.VELMURUGAN

Criminal Appeal No.414 of 2013

Mrs.Patcharut Punsakon

... Appellant/Accused

-Versus-

State Rep. by
The Intelligence Officer,
Customs House,
Rajaji Salai,
Chennai 600001.
[O.S.No.21 of 2008-INT]

... Respondent/Complainant

Appeal filed under Section 374(2) of Code of Criminal Procedure, 1973 against the judgment of conviction and sentence dated 08.04.2013 recorded in Calendar Case No.03 of 2009 by the learned Special Judge, II Additional Special Court under NDPS Act, Chennai.

For Appellant : Mr.R.Vijayaraghaven

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

JUDGEMENT

The sole accused in Calendar Case No.3 of 2009 on the file of the learned Special Judge, Additional Special Court under NDPS Act, Chennai, is the appellant herein. She stood charged for offence under Sections 8(c) r/w 21(c), 28 and 29 of The Narcotic Drugs and Psychotropic Substances Act, 1985 and Section 135(1)(a)(ii) of The Customs Act. When the appellant was questioned as to the charges, she pleaded not guilty and therefore, she was put on trial. The learned Special Judge, after full-fledged trial, found the appellant guilty of offence under Sections 8(c) r/w 21(c), 28 and 29 of the NDPS Act and under Section 135(1)(a)(ii) of The Customs Act. The appellant was accordingly convicted and sentenced to undergo rigorous imprisonment for ten years with a fine of Rs.1,00,000/- for each offence in default to suffer rigorous imprisonment for six months for each default and further sentenced to undergo

imprisonment for three years with a fine of Rs.10,000/- in default to undergo rigorous imprisonment for one month for offence under Section 135(1)(a)(ii) of The Customs Act, 1962. Challenging the above said judgment of conviction and sentences, 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 he was on duty, on 29.04.2008 at about 10.30 p.m. he noticed that the accused moving in a suspicious manner towards security check area. When she was about to board Jet Airways Flight 9W032 bound for Kuala Lumpur, she was intercepted by P.W.1 and on being questioned, she did not give proper answer. P.W.1 developed suspicion and so he decided to check the luggage of the accused which were already checked-in by the authorities. Therefore, P.W.1 directed P.W.4 to bring the "checked-in luggage" of the accused and checked in the presence of P.W.4 and another lady officer who were on duty as Security Supervisor in Jet Airways. At that time P.W.6, the Superintendent of Customs was also present. 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 black colored EMINENT suitcase and when it was cut and opened, he found 4 polythene bags containing powdered substance concealed into the suitcase, then it was tested with the field test kit by P.W.1 and test answered, that the tested powder was heroin. On further inquiry, the accused also admitted the same. P.W.1 took two samples of each weighing 5 grams from each of the four polythene covers and packed and sealed with customs seal and marked them visibly. The remaining bulk heroin were packed and sealed with customs seal. He seized the suitcase and obtained the signature of witnesses and the accused and he also signed in the labels. He also seized the travel documents of the accused. P.W.2 sent a letter to Thailand Consul General informing them about the arrest of the accused. Thereafter, the accused was forwarded to the court for judicial remand. With the above allegations, P.W.2 filed the complaint against the appellant under Section 8(c) r/w 21(c), 28 and 29 of the NDPS Act.

4. On appearance before the trial court, the substance of the offences were explained and charges were framed as stated in first paragraph of this judgment. The appellant denied the charges and opted for trial. Thus, she was put on trial.

5. Based on the materials collected during investigation, the prosecuting agency has examined as many as 7 witnesses as P.W.1 to P.W.7, Exs.P.1 to P.23 were marked and M.Os.1 to 15.

6. Out of the above said witnesses, P.W.1 was the Intelligence Officer at Chennai Airport during the relevant point of time. He has stated that on 29.04.2008 while he was on duty he found the accused moving in a suspicious manner towards security check. When the accused was about to board Jet Airways Flight 9W032 bound for Kuala Lumpur she was intercepted and on being questioned, she did not answer properly. So, he developed suspicion and decided to check her checked-in-luggage. On checking the luggage he found a bulge in the bottom of the suitcase and when it was cut and opened, he found 4 polythene bags containing powdered substance concealed into the suit case. When it was tested with the field test kit, it answered that it was heroin. He has further stated that he took two samples of each weighing 5 grams from each of the four polythene covers M.O.5 to 12 respectively and packed and sealed with customs seal NO.198 and marked them as 1(a) to 4(a) and 1(b) to 4(b) respectively. The remaining bulk heroin were packed. They are M.O.1 to 4. He seized M.O.13 black colour suit case; passport (Ex.P.2), Boarding pass (Ex.P.3), Luggage Claim slip (Ex.P.4) from the accused under a cover of Ex.P.1 mahazar in the presence of witnesses. On the same day, he prepared a remand in the presence of P.W.2. He, thereafter, forwarded the accused to the court for judicial remand. He also forwarded the material objects to the court.

7. P.W.2 was the Intelligence Officer at Chennai Airport during the relevant point of time. She has stated that on 29.04.2008 when she was on duty at Chennai Airport, the accused was brought before her by P.W.1 to record her statement. She accordingly recorded the statement from the accused. The accused was holding a Thailand Passport. According to her, the accused in her statement confessed to her guilt. Subsequently, on the very same day, during further interrogation, the accused gave another statement and in pursuance of the same, a mobile phone with Bangkok SIM card (M.O.14) and Nokia Cellphone with Airtel SIM card (M.O.15) were recovered. She has further stated that on 30.04.2008 itself, she has sent a letter (Ex.P.19) to Thailand Consul General, informing them about the arrest of the accused. On getting sanction for prosecution from the Customs Airport Commissioner, Chennai and on completing her investigation, she filed a complaint (Ex.P.21) on 24.09.2008 against the accused under Sections 8(c) r/w 21, 29, 29 of NDPS Act.

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 of heroin. Ex.P.9 is the chemical analysis report.

9. P.W.4, the Supervisor at Jet Airways, Chennai Airport, has stated that he was present at the time when the baggage of the accused was cut and opened. He has further stated that on a thorough checking, the Intelligence Officer found that the accused was smuggling heroin by concealing the same in her luggage. He has also stated that M.O.1 to 13 were recovered in his presence and he signed in the recovery mahazar.

10. P.W.5, the then In charge of Supervising follow up action, R.S.I. (AIR) has stated that the accused was a Thai National lady. He was present at the time when further statement was recorded from the accused by P.W.2 during interrogation at the customs house and in pursuance of the same, two cell phones with SIM cards were recovered from the accused in his presence under a cover of mahazar and he signed in the recovery mahazar.

11. P.W.6, the then Superintendent, Airport Intelligence Unit, Anna International Airport, Chennai, has stated that on 30.04.2008, while he was on duty, P.W.1, on suspicion that she might be carrying some contraband, intercepted the accused and on a thorough check, she was found to have smuggled contraband which was latter on found to be heroin. He has further stated that P.W.1 recovered the contrabands, travel documents and other material objects in the presence of two independent witnesses.

12. P.W.7, the then Superintendent, 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.13 is the remand report.

13. When the all the incriminating materials that appeared in the evidence let in by the prosecution witnesses were put to the appellant before the trial court, she, in general, denied the same as false. However, she did not choose to examine any witness nor did she mark 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 offence under Sections 8(c) r/w 21 (c), 28 and 29 of The Narcotic Drugs and Psychotropic Substances Act, 1985 and Section 135(1)(a)(ii) of The Customs Act and sentenced her to imprisonment besides fine as stated in the first paragraph of this judgment. Challenging the conviction and sentences, the convict is before this court with the present criminal appeal.

15. I have heard the learned counsel appearing for the appellant and the learned Special Prosecutor appearing for the respondent and also perused the records carefully.

16. The learned counsel for the appellant would submit that the alleged confession cannot be said to be a substantive piece of evidence and without there being any corroborative evidence, the trial court ought not to have acted upon the alleged confession of the appellant; the learned trial judge found the accused guilty of offence punishable under 135(i)(a) of the Customs Act merely on the basis of the alleged confession of the appellant and thereby the learned Judge committed serious illegality; absolutely there is no evidence let in by the prosecution to establish as to who brought M.O.13 suit case from the Cargo of the flight; that M.O.14 and M.O.15 were not seized at the time of alleged seizure at the airport; that Ex.P.23 came to be marked by the prosecution in order to fill up the lacuna and that there are discrepancies with regard to Ex.P.23; and that when 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. He would contend that when the appellant was about to board a flight bound for Kulalambur, on suspicion, she was intercepted by P.W.1 and P.W.4 was directed to bring the checked-in luggage of the appellant and on a thorough re-check in the presence of P.W.4, P.W.6 and another lady officer who was on duty at Airport, she was found to have smuggled 4.900 kgs of heroin by concealing the same in her suitcase (M.O.13) and that the chemical analysis report also proved that it was heroin. Thus, the prosecution proved its initial burden of proving its case and that the learned trial Judge had 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 luggage. 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 invoked the presumption and found that the appellant was guilty and it does not require any interference at the hands of this court.

18. I have meticulously considered the rival submissions.

19. Admittedly, the appellant was a Thaaai National. On 29.04.2008 she was intercepted at Security Check point in Chennai International Airport by the respondent after she was found to have smuggled 4.900 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 and Section 135(1) (a) (ii) of The Customs Act.

20. 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 a Jet Airways Flight 9W032 bound for Kuala Lumpur and therefore, he intercepted her and on being questions, she did not give proper answer and on further suspicion, he decided to check the luggage of the accused which were already checked-in by the authorities. During such re-check in the presence P.W.6, the Superintendent of Customs and P.W.4 and another lady officer, who were on duty as Security Supervisors in Jet Airways at Airport, she was found to have smuggled 4.900 kgs of contraband by concealing the same in her suitcase. He 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 he took samples in accordance with law. On further inquiry, the appellant confessed to have smuggled the same to Kuala Lumpur. He also stated that he seized the travel documents and other material objects from the possession of the appellant.

21. P.W.2 was another intelligence officer at Chennai Airport during the relevant point of time. She has stated that on 29.04.2008 the appellant was brought before her by P.W.1 for the purpose of recording her statement and she accordingly recorded the statement from the appellant in the presence of P.W.6, in which, the appellant confessed to her guilt. On the same day, during further interrogation, the appellant is stated to have made another statement to P.W.2 pursuant to which M.O.14 and M.O.15 were stated to have been recovered. P.W.2 has further stated that on 30.04.2008 itself, Tailand Consul General was informed of arrest of the appellant. According to P.W.2, on getting sanction for prosecution from the Customs Airport Commissioner, Chennai and on completing her investigation, she filed a complaint (Ex.P.21) on 24.09.2008 against the appellant.

22. The contention of the learned counsel for the appellant is that the alleged confession of the appellant cannot be said to be a substantive evidence and merely on the basis of confession of the appellant, the learned trial court found her guilty of offence u/s 135 of the Customs Act cannot be countenanced. In this regard, it is needless to state that a confession made before an Officer of the Department of Revenue Intelligence under the NDPS Act may not be hit by Section 25 of The Evidence Act and the statement recorded u/s 67 of the NDPS Act is admissible. The Officers of the Customs Department are empowered to conduct an enquiry or investigation for an offence

under the provisions of the NDPS Act, but, they are required to follow the provisions of the said Act scrupulously. The field test carried out also answered that it was heroin. Having regard to the oral and documentary evidence, this court is of the view that there is no irregularity committed on the part of the respondent right from interception of the appellant and until she was apprehended for the offences said to have been committed by her.

23. 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 be of heroin. Ex.P.9 is the analysis report in this regard. 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 said argument.

24. Section 54 of the NDPS Act creates a presumption that the Accused is guilty of an offence, if he fails to 'satisfactorily account' for possession of contraband. Section 35 states that in a prosecution under the 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 this 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.4) and boarding pass (Ex.P.3) and also the invoice statement of travel agent (Ex.P.12) also established that this luggage in fact belonged to the appellant.

25. 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 4.900 kgs of heroin which was found to have been concealed in her suitcase (M.O.13). 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 his burden in the manner known to law. In her statement under Section 313 of Cr.P.C. also no plea has been taken that she was not in conscious possession of the contraband. The appellant has only pleaded that a false case has been foisted against her and she had not stated anything as to why would the revenue authorities foist the false case against her. 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 Kuala Lumpur. Admittedly, the revenue officials had no previous enmity with the appellant. It is not possible to accept the contention of the appellant that she is being falsely implicated as it is highly improbable that such a huge quantity has been arranged by the authorities in order to falsely implicate the appellant. 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.13 suitcase for re-check would not in any way cause any prejudice to the appellant. Whether or not any prejudice has been caused to the accused is a question of fact to be determined in each case. In this case, since P.W.1 re-checked the suitcase (M.O.13) in the presence of P.W.4 and P.W.6 and that the appellant in her statement to P.W.2 in the presence of P.W.6 confessed to her guilt and in pursuance of her subsequent statement made on the very same day in the presence of P.W.5, cellphone and SIM cards were recovered from the appellant, non examination of the person who was asked to bring the suitcase for examination by P.W.1 could not have caused any prejudice to the accused in this case nor does it affect the credibility of the prosecution version.

26. In view of the foregoing discussions, this court is of the considered view that the respondent 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 same warranting interference at the hands of this court.

27. 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 only to be dismissed.

28. In the result, this Criminal Appeal is dismissed and the judgment of conviction and sentence dated 08.04.2013 recorded by the learned Special Judge, Additional Special Court under NDPS Act, Chennai, in C.C.No.3 of 2009 against the appellant are hereby confirmed. Since it was reported that the appellant has already been in jail and she shall serve out sentence as awarded by the trial court.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

kmk

To

- 1.The Special Judge
II Additional Special Court under NDPS Act,
Chennai.
- 2.The Principal District Judge, Chennai
- 3.The District Collector/District Magistrate, Chennai
- 4.The Director General of Police, Chennai-4.
- 5.The Intelligence Officer,
Customs House,
Rajaji Salai,
Chennai 600001.
- 6.The Public Prosecutor
High Court, Chennai
- 7.The Superintendent, Central Prison for Women
Puzhal, Chennai

CA(CO)

sm:22.2.2018

Criminal Appeal No.414 of 2013

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