

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.01.2019

PRONOUNCED ON : 16.04.2019

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.A.No.801 of 2009

Intelligence Officer,
Narcotics Control Bureau,
South Zonal Unit,
Chennai.

... Appellant/Complainant

Vs

1.Dinesh M.Patel @ Hitesh @ Babu

2.R.Ravisankar

... Respondents/Accused 3 & 5

PRAYER: Appeal filed under Section 378 of the Code of Criminal Procedure against the order of acquittal of the respondents / Accused nos.3 & 5 passed by the learned Principal Special Judge, Principal Special Court under EC & NDPS Act, Chennai, in C.C.No.136 of 2005, dated 17.07.2008.

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

For Respondents: Mr.R.Rajan for R.1
Mr.A.Ilangovan
Legal Aid Counsel for R.2

JUDGMENT

This Criminal Appeal is filed by the appellant / complainant as against the order of acquittal of the respondents herein / accused nos.3 & 5 passed by the learned Principal Special Judge, Principal Special Court under EC & NDPS Act, Chennai, in C.C.No.136 of 2005, dated 17.07.2008.

2. For the sake of convenience, the respondents / accused nos.3 & 5 are referred to as per their rank before the trial Court.

3. The brief facts of the case, as projected by the prosecution, are as follows:

3.1. On 19.02.2005, PW2 received an information over phone that one Srilankan, namely, "Nana" is indulging in drug trafficking between India and Srilanka with his assistant, namely, Ravishankar, the fifth accused, through his contact the second accused. The second accused is also associating with the fifth accused in procurement, transportation and smuggling out the same to Srilanka with the assistance of the fourth accused. On the above arrangement, on 19.02.2005, the third accused delivered about 2 kgs of Heroin to accused nos. 5 & 2 and the same has been handed over to the first accused, who has come down to Chennai for this purpose, as instructed by the fourth accused. The first accused was travelling to Kilakarai in Moore Travels bus, bearing Reg. No.TN-04-K-0429, with the narcotic drug from Mannadi, Chennai. After reaching Kilakarai, the Heroin will be handed over to the fourth accused for onward illicit export to "Nana" of Srilanka. PW1 reduced this information into writing and submitted the same to PW4 / the Superintendent. On instructions, a team led by PW4 proceeded to GST Road, Tambaram, near Police Check-Post at about 21.45 hours and after spotting the bus, they stopped it by showing conventional signals, entered into the bus and contacted one Ziaavudeen and Murugesan, the staff of the travels, explained the information, after identifying themselves as Officers of NCB, Chennai, requested them to be the independent witnesses for the search proceedings to be conducted in the bus, for which, they agreed. Then, on examination of the passengers in the bus, the Officers identified the first accused, matching with the description as mentioned in the information report, who was seated in Seat No.26. The officers introduced themselves to him and informed about the information and their intention to search him and his belongings as per the provisions of NDPS Act. On enquiry, the first accused affirmed that he is in possession of about 2 kgs of Heroin and took out a carton box from the luggage area and handed over the same to PW2. On further enquiry, the first accused informed that he was to accompany with the second accused and due to non-availability of accommodation in the same bus, the second accused left in Parveen Travels bound for Keelakarai, bearing Reg.No.AP-31-W-9999. Immediately, the said information was passed onto the Officers of NCB, RIU, Trivandrum, who were camping at Madurai at that time.

3.2. The box handed over by the first accused was Carton box for a ready made garments, which had an inscription as "Generation Nxt-Gen-Xand Casual Wear". The officers got down with the contraband, the first accused along with his luggage and two independent witnesses, who are the staff of the bus and allowed the bus to go. On cut opening the carton box in the presence of the above two independent witnesses, they found two packets wrapped with adhesive tape which was further opened and

found to contain the polythene cover which was transparent and brown coloured powder believed to be Heroin inside was visible. The packets were cut opened and a small quantity of the powder was tested with the field test kit and the answer was positive for Heroin. PW2 seized both the packets, weighing about 2.060 kgs and arrested the first accused. The officers from Madurai Camp office intercepted Parveen travels bound to Keelakarai and arrested the second accused.

3.3. On 22.02.2005, PW1 has received information on phone that the third accused, who is wanted in two NCB cases, was returning to Palanpur along with his family friends on 23.02.2005 by Navajeevan Express. PW1 reduced the same into writing and on instructions from his superiors, a team reached the spot and found the third accused and thereafter, arrested him. On 14.08.2005, based on an information received, the fourth accused was found at Koyembedu Bus Stand, Chennai and was also arrested.

3.4. Since the accused entered into a criminal conspiracy to do or cause to be done illegal acts to procure, possess, conceal, transport and export about 2.060 kgs of narcotic substances, they have committed the offence punishable under Section 8(c) r/w 21(c), 28 & 29 of NDPS Act. Charge has been framed as against accused nos.1 to 3 under Section 8(c) r/w 21 (c) of NDPS Act and as against accused nos.1 to 5 under Section 8(c) r/w 28 & 29 of NDPS Act. The trial Court, vide impugned judgment, while convicting the accused nos.1, 2 & 4, has acquitted the accused nos.3 & 5. As against this judgment of acquittal, the Department has preferred the instant appeal.

4. The learned Special Public Prosecutor for the appellant has raised the following grounds for the consideration of this Court:

4.1. The lower Court failed to appreciate that the accused nos.3 & 5 had given statement under Section 67 of NDPS Act, which is admissible in evidence. It is also a substantive piece of evidence, which can be acted upon without corroboration.

4.2. The evidence of PWs 1 & 2 clearly establishes the fact that the statement under Section 67 was voluntary and without any coercion or influence.

4.3. The lower Court ought to have seen that unless the third accused had given the details of the other accused, viz., accused nos.1, 2 & 4, the appellant could not have apprehend them. Having admitted that only on the information given by the third accused, the other accused were arrested, the lower Court ought to have convicted the accused nos.3 & 5.

5. On the other hand, the learned Counsel for the respondents / accused nos. 3 & 5 has made his submissions sailing with that of the impugned judgment and prayed for dismissal of the instant appeal.

6. Heard the learned Counsel appearing on either side and perused the documents placed on record.

7. Since the appeal is filed as against an order of acquittal, it is necessary to bear in mind the principles governing the appeal against acquittal, as laid down by the Hon'ble Supreme Court in V.Sejappa v. State [(2016) 12 SCC 150], in which, it has been held as under:

"23. In Muralidhar alias Gidda and Anr. v. State of Karnataka (2014) 5 SCC 730, this Court noted the principles which are required to be followed by the appellate court in case of appeal against order of acquittal and in paragraph (12) held as under:-

"12. The approach of the appellate court in the appeal against acquittal has been dealt with by this Court in Tulsiram Kanu AIR 1954 SC 1, Madan Mohan Singh AIR 1954 SC 637, Atley AIR 1955 SC 807, Aher Raja Khima AIR 1956 SC 217, Balbir Singh AIR 1957 SC 216, M.G. Agarwal AIR 1963 SC 200, Noor Khan AIR 1964 SC 286, Khedu Mohton (1970) 2 SCC 450, Shivaji Sahabrao Bobade (1973) 2 SCC 793, Lekha Yadav (1973) 2 SCC 424, Khem Karan (1974) 4 SCC 603, Bishan Singh (1974) 3 SCC 288, Umedbhai Jadavbhai (1978) 1 SCC 228, K. Gopal Reddy (1979) 1 SCC 355, Tota Singh (1987) 2 SCC 529, Ram Kumar (1995) Supp 1 SCC 248, Madan Lal (1997) 7 SCC 677, Sambasivan (1998) 5 SCC 412, Bhagwan Singh (2002) 4 SCC 85, Harijana Thirupala (2002) 6 SCC 470, C. Antony (2003) 1 SCC 1, K. Gopalakrishna (2005) 9 SCC 291, Sanjay Thakran (2007) 3 SCC 755 and Chandrappa (2007) 4 SCC 415. It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate court must bear in mind the following:

(i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court;

(ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal;

(iii) Though, the powers of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions

but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanour of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified; and

(iv) Merely because the appellate court on reappreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court."

8. The evidence placed before the Court shows that PW1 has received certain information, which was marked as Ex.P1. The contents of Ex.P1 is that on 22.02.2005, when PW1 was on duty, he received an information that the third accused / first respondent, who was wanted in connection with some Heroin cases, was returning to Palanpur along with his family members, on 23.02.2005 by Navajeevan Express, in the name of Babu in coach number S8. The Officers of the NCB proceeded to Central Railway Station, Chennai and identified the said Babu as Hitesh / the third accused. On receipt of summons from the officers, the third accused / Hitesh accompanied the officers to the office, where, the third accused has given confession statement under Section 67 of the NDPS Act. Thereafter, the officers placed him under arrest.

9. The third accused in this case is also an accused in C.C.No.120 of 2005 and the charge against him is under Section 8 (c) r/w 29, 21(c) & 28 of NDPS Act. He was prosecuted for possession of 6 kgs of Heroin in that case and was convicted by the trial Court for the possession of 4 kgs of Heroin. Since the third accused was already prosecuted in C.C.No.120 of 2005, the learned trial Judge, holding that the goods involved in the present case was already covered, acquitted the third accused, as it amounts to double jeopardy.

10. This Court is not in a position to sail the same. The cause of action for both the cases are different. The places and dates of seizure are also different. The third accused was

convicted only for the possession of 4 kgs of narcotic drug in C.C.No.120 of 2005, which does not include the 2 kgs involved in the present case. Had the trial Court convicted the accused for the 6 kgs in whole, then the case would stand on a different footing. However, the trial Court has found the accused guilty for the possession of only 4 kgs of narcotic drug and not 6 kgs. Each case has to be dealt with, independently, based on its own facts and circumstances. Therefore, this Court is inclined to deal with this case on its own merits.

11. The statement recorded under Section 67 of the NDPS Act can be used as a prima facie evidence and it does not attract the provisions of Section 25 of the Indian Evidence Act and Section 161 Cr.P.C. The confession statement of the third accused / first respondent under Section 67 of the NDPS Act was marked as Ex.P3 and its English version was marked as Ex.P4. Perusal of Ex.P4 would go to show that the third accused received two parcels from one Ravi @ Ramesh @ Suraj, of 4 kg and 2kg Heroin, to be delivered to one Kutty and the fifth accused. Since the third accused himself has admitted that he was in possession of 6 kgs (4 + 2) of Heroin, the same can be used as a prima facie evidence as against him. Therefore, this Court is of the view that the trial Court has erred in acquitting the third accused. Since this falls within the yardstick laid down in Sejappa's case (cited supra), this Court is inclined to interfere with the order of acquittal insofar as the third accused / first respondent is concerned.

12. As regards the fifth accused / second respondent, he has not given any statement under Section 67 of the NDPS Act. The only evidence available against him is the Section 67 statement of the co-accused. The second accused, in his Section 67 statement [Ex.P51], has stated that the fifth accused has handed over 2.060 kgs of Heroin to him for being given to the first accused. The first accused, in his Section 67 statement [Ex.P37], has stated that he came to know that the Heroin was handed over by the fifth accused. Therefore, it is clear that the evidentiary value of Section 67 statement of the first accused as regards the involvement of the fifth accused is only hearsay. Likewise, the evidentiary value of Section 67 statement of the fourth accused as regards the involvement of the fifth accused is also hearsay. Thus, it is clear that other than the Section 67 statement of the second accused, there is nothing on record as against the fifth accused. The Hon'ble Apex Court as well as this Court, have, time and again, held that the statement of co-accused has to be viewed only with caution and it should be supported by corroboration. Since the same lacks in this case, the trial Court has rightly acquitted the fifth accused. Therefore, this Court is not inclined to interfere with the impugned judgment insofar as the acquittal of the fifth accused is concerned.

13. In the result,

i) this criminal appeal is partly allowed;

ii) the order of acquittal passed by the learned Principal Special Judge, Principal Special Court under EC & NDPS Act, Chennai, in C.C.No.136 of 2005, dated 17.07.2008, as regards the third accused is quashed and as regards the fifth accused, the same is confirmed.

iii) the third accused is found guilty and convicted for the offence punishable under Sections 8(c) r/w 21(c), 28 & 29 of NDPS Act.

iv) considering the nature of offence and the quantity of the contraband involved, this Court is about to impose the minimum punishment prescribed for the offence under Sections 8 (c) r/w 21(c), 28 & 29 of NDPS Act and therefore, this Court feels that it may not be necessary to question him and accordingly, dispenses with the legal formality.

v) the third accused is convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/- for each offence (in total Rs.3,00,000/-), in default, to undergo rigorous imprisonment for six month for each offence.

vi) the trial Court is directed to take steps to secure the accused to undergo the imprisonment. Needless to say that the period of detention already undergone, if any, by the accused shall be set off under Section 428 Cr.P.C. and the substantive portion of imprisonment shall run concurrently.

s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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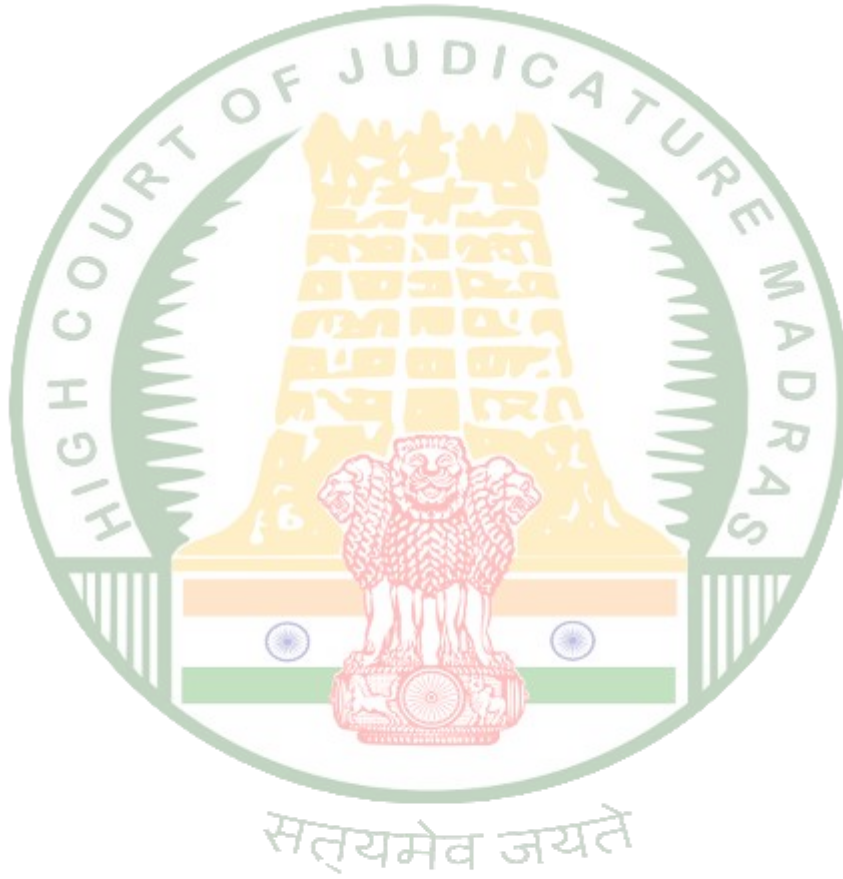
1.The Principal Special Judge,
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Chennai.

2.The Intelligence Officer,
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South Zonal Unit,
Chennai.

3.The Public Prosecutor,
Madras High Court,
Chennai.

Cr1.A.No.801 of 2009

SSD (CO)
SP (30/09/2020)



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