

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Crl.A.Nos.1729 and 1764 of 2003

Crl.A.No.1729 of 2003

Intelligence Officer,
Narcotics Control Bureau,
C-3-A, Rajaji Bhavan,
Besant Nagar, Chennai-90.
(NCB F.No.48/1/1/97/NCB/MDS) ... Appellant

Vs

1.Kamza Zakeeya
2.S.M.Jahufar Sadiq
3.Mohamed Fathima ... Respondents

Prayer: Criminal Appeal filed under Section 378 of the Criminal Procedure Code, against the acquittal of the respondent in C.C.No.75/97 dated 27.05.2003 by the Additional Special Court for NDPS Act cases, City Civil Court Buildings, Chennai-600 104.

Crl.A.No.1764 of 2003

Intelligence Officer,
Narcotics Control Bureau,
C-3-A, Rajaji Bhavan,
Besant Nagar, Chennai-90.
(NCB F.No.48/1/1/97/NCB/MDS) ... Appellant

Vs

1.Meera Mohiddin @ Wapa
2.Syed Ibrahim
3.Hamza Zakeeya @ Hamsa
4.S.M.Jahufar Sadiq ... Respondents

Prayer: Criminal Appeal filed under Section 378 of the Criminal Procedure Code, against the acquittal of the respondent in C.C.No.74/97 dated 27.05.2003 by the Additional Special Court for NDPS Act cases, City Civil Court Buildings, Chennai-600 104.

For Appellant : Mr.N.P.Kumar
Special Public Prosecutor
in CrI.A.1729 & 1764/2003

For Respondent : Mrs.S.Sujatha, Legal Aid Counsel
for R2 & R3 in CrI.A.1729/2003 &
for R4 in CrI.A.1764/2003

Mr.R.C.Paul Kanagaraj
for R2 in CrI.A.No.1764/2003

No Appearance
for R1 in CrI.A.1729/2003 and
for R3 in CrI.A.1764/2003

R1 - Died in CrI.A.1764/2003

COMMON JUDGMENT

These Criminal Appeals were preferred by the Intelligence Officer, NCB against the order of acquittal passed by the learned Judge, Additional Special Court for NDPS Act cases, City Civil Court Buildings, Chennai made in C.C.Nos.74 and 75 of 1997 dated 27.05.2003 wherein the learned trial Court acquitted the accused concerned in both cases.

2.Brief case of the appellant/complainant is that:

The case of the appellant is that based on the intelligence gathered by the officers of the Department, the following premises were searched and certain quantities of Heroin as shown hereunder were recovered i)21, Alagiri Street, MGR Nagar, Chennai - about 600 grams of Heroin, ii)1A Nancy street, Purswalkam, Chennai about 520 grams of Heroin and other documents iii)14, Krishnappan Mudali Street, Purusawalkam, Chennai - about 20 grams of Heroin, Indian currency Rs.25,000/- and other documents. Based on the material objects seized and the voluntary confessional statements given by Meera Mohiddin @ Wapa, Kamza Zakeeya @ Hamsa, S.M.Jahufar Sadiq, Syed Ibrahim, Mohamed Fathima and Jafar Ali, they were placed under arrest on 18.1.97 at 22.45 hrs, 22.30 hrs, 22.15 hrs, 23.45 hrs. 21.40 hrs and 21.30 hrs respectively and the details of which are narrated in the relevant Mahazars Exhibits P1 to P8. Investigation conducted so far reveals the involvement of the aforesaid persons in the offence of trafficking in Heroin. The accused were arrested and confessions were recorded following the procedures through Exhibits P10 to P12, P23 to P25 and P32 to 37. On further investigation PW 2 enquired witnesses Subramani, Venugopal and inspected the premises of the accused on

18.1.1997. PW6, the chemical expert received the parcels containing 4 samples from PW 1 and issued his report through Exhibit-P22 observing M.Os 3, 5 and 6. PW1 the investigating officer completed all his formalities and submitted the remaining samples before the trial Court on 14.4.1997 and filed the complaint against the accused for having committed a cognizable and non bailable offence namely, under section 8(c) read with 21, 23, 27(A) and 29 of the NDPS Act, 1985.

3. During the trial, the prosecution examined PWs-1 to 6 and Exhibits-P1 to P44 were marked and M.Os-1 to 4 were marked. No witnesses have been marked on the side of defense.

4. On completion of trial, the learned trial Court acquitted all the accused holding that the prosecution failed to prove the charges beyond reasonable doubt. Aggrieved over the acquittal, the special public prosecutor filed this criminal appeal.

5. The learned Special Public Prosecutor for the appellant submits that the prosecution has proved beyond reasonable doubt, the seizure of 520 grams of Heroin vide Exp.1 (seizure mahazar) yet the trial Court has erroneously acquitted on the ground that PW 3 had not signed in all the pages of Ex.P1. A seizure mahazar is a contemporaneous document which can be used either to corroborate or contradict the testimony of the witness. There is no statutory rule governing the manner of drawal of a mahazar. A mahazar can be used to refresh the memory as contemplated by section 159 of Evidence Act.

6. The learned Special Public Prosecutor for the appellant submits that the trial Court has accepted the evidence of the fact of seizure of Heroin, yet it was pleased to acquit the respondent on the ground that the prosecution has failed to prove that the accused were in conscious possession of the contraband. The trial Court failed to note that the respondents have given statements under Section 67 of the NDPS Act wherein they given graphic details owning knowledge and consciousness of possession. A statement recorded under Section 67 of the NDPS Act is admissible in evidence as confession, which legal position has been overlooked by the trial Court.

7. The learned Special Public Prosecutor for the appellant submits that similarly the learned judge has accepted the evidence of the prosecution relating to seizure of 20 gms of Heroin and Rs.25,000/- cash at No.14, Krishnappa Mudali Street,

Pursaiwakkam, Chennai, but has held that PW3 could not have been present since she has signed the mahazar only in the last page. This reasoning is unsustainable in the facts of the case.

8.The learned Special Public Prosecutor for the appellant submits the learned judge has erroneously held that the statements under Section 67 of the NDPS Act is inadmissible in evidence as the accused was in prolonged custody of the department. In this case there had been seizures at three different places and in a case of conspiracy of this nature, the officials need some reasonable time to co-ordinate the seizures and then to record the statements from the concerned persons. The learned judge failed to note that none of the accused made any complaint of ill-treatment when they were produced before the judicial magistrate immediately after their arrest.

9.The learned Special Public Prosecutor for the appellant submits that the contraband under seizure, the learned judge failed to note that the samples were drawn at the spot and all the items were packed and sealed in the presence of the concerned respondents. The signature of the concerned respondents was also obtained on the contraband. Thereafter the contraband was produced before the remanding Magistrate and the remanding Magistrate has also signed thereon. Thereafter the contraband was produced intact before the trial Court.

10.The learned Special Public Prosecutor for the appellant submits that the samples were sent through Court to the Laboratory for chemical analysis. It is in the evidence of PW6 (Chemical examiner) as well in his report Ex.P22 that the seals were intact.

11.The learned Special Public Prosecutor submits citation for support of his submissions:

(2012) 1 LW (Cr1) 70

12.Heard the arguments on either side and perused the entire materials available on record.

13.As far as the provision of law under which the respondents in both cases sought to be prosecuted is concerned, the Section 8(c) of the NDPS Act prohibits purchase, acquisition, possession, importation into India and export out of India as well as the sale of narcotic drugs as well as

hashish. In terms of Section 12, no person is permitted to engage in or to have control of any trade whereby a narcotic drug is obtained outside India and supplied to any person outside India without the previous authorisation of the Central Government and subject to conditions that may be imposed by the Government in that behalf. Section 20(b)(ii)(c) of the NDPS Act provides for punishment for those who in contravention of any provision of the NDPS Act or any rule or order made or condition of licence granted thereunder produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, and involves commercial quantity. Section 23 provides for punishment for illegal import into India, export from India or transshipment of narcotic drugs and psychotropic substances. Section 24 thereof provides for punishment for external dealings in narcotic drugs and psychotropic substances in contravention of Section 12 and Section 27-A deals with the punishment for financing illicit traffic and harbouring offenders. Section 28 provides for punishment for attempts to commit offences under the NDPS Act. Section 29 provides for punishment for abetment and criminal conspiracy.

14. In order to appreciate the submissions, let me first visit the law with respect to possession for the offences under the NDPS Act.

15. In *Mohan Lal v. State of Rajasthan*, reported in (2015) 6 SCC 222, the Hon'ble Supreme Court observed that when one conceives of possession, it appears in the strict sense that the concept of possession is basically connected to "actus of physical control and custody". Attributing this meaning in the strict sense would be understanding the factum of possession in a narrow sense. With the passage of time there has been a gradual widening of the concept and the quintessential meaning of the word "possession". The classical theory of the English law on the term "possession" is fundamentally dominated by Savignyan "corpus" and "animus" doctrine. Distinction has also been made in "possession in fact" and "possession in law" and sometimes between "corporeal possession" and "possession of right" which is called "incorporeal possession". Thus, there is a degree of flexibility in the use of the said term and that is why the word "possession" can be usefully defined and understood with reference to the contextual purpose for the said expression. The word "possession" may have one meaning in one connection and another meaning in another.

16.The Hon'ble Supreme Court further observed in Mohan Lal (supra), that over the years, it has been seen that Courts have refrained from adopting a doctrinaire approach towards defining possession. A functional and flexible approach in defining and understanding the possession as a concept is acceptable and thereby emphasis has been laid on different possessory rights according to the commands and justice of the social policy. Thus, the word "possession" in the context of any enactment would depend upon the object and purpose of the enactment and an appropriate meaning has to be assigned to the word to effectuate the said object.

17.Having pointed out the relevant legal position with respect to possession, when I turn to the evidence tendered on record it is found that one of the principal prosecution witness, PW1 vividly described the events relating to possession, search and seizures effected against the respondents. In the present case, the defence never questioned on the content of the information on the strength of which raid was conducted. No step was taken to call for any such record. In fact, the defence did not even dispute the recovery of heroin from the house in question.

18.The very nature of power vested by Section 41(2) requires an element of stealth hence the prosecution in a case of this nature cannot be expected to bring independent witnesses to show who identified the house of the respondents. Reliance in this regard may be placed on the case of Kashmiri Lal v. State of Haryana, reported in (2013) 6 SCC 595, wherein the Hon'ble Supreme Court held that there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to be reliable and trustworthy, the Court can definitely act upon the same. If in the course of scrutinising the evidence, the Court finds the evidence of the police officer as unreliable and untrustworthy, the Court may disbelieve him but it should not do so solely on the presumption that a witness from the Department of Police should be viewed with distrust. This is also based on the principle that quality of the evidence weighs over the quantity of evidence. In the instant case, the search was conducted by NCB and not by police. Under these circumstances reliance has to be placed only on the oral testimony of the prosecution witnesses. It is the contention of the learned Counsel for the appellant that prosecution evidence has been able to prove that the house belonged to the

respondents/accused and hence, the question of possession of seized on the part of the respondents/accused arises.

19. Now, from the trend of the cross examination of the prosecution witnesses as well as from the arguments made in this Court it is apparent that defence neither disputes the fact of recovery of commercial quantity of heroin, nor does the defence disputes that the seized commercial quantity was found in sealed packets in a house. The circumstance, as stated hereinbefore, when taken together in its entirety, leaves no manner of doubt that the house from where the contraband seized was recovered belonged to the respondents. The plea taken by the respondent that his house was not searched does not create the possibility of an alternate doubt strong enough to say the alternate view in favour of the respondent is as nearly reasonably probable. Thus, the plea that instead of the house of the respondent some other house was searched appears to be a plea without any substance, for if the respondent is a resident of the same village he could have easily adduced evidence to probabalise his plea. A mere suggestion to prosecution witnesses that the house from where the seized contraband was recovered does not belong to them cannot be accepted to be a sufficient compliance of probabalising the plea of lack of possession when it was within the reach and means of the respondents.

20. The facts from the records show that respondents were in custody. In the proved circumstances, it cannot be said that they had made a voluntary statement which satisfies the conditions precedent laid down under Section 67 of the Act. In the backdrop of the aforementioned events, I find it difficult to accept that such statements had been made by them, although they had not been put under arrest. As the authorities under the Act can always show that they had not formally been arrested before such statements were recorded, a holistic approach for the aforementioned purpose is necessary to be taken. The Hon'ble Apex Court in D.K. Basu v. State of West Bengal ((1997) 1 SCC 416) laid down the law that if a person in custody is subjected to interrogation, he must be informed in clear and unequivocal terms as to his right to silence. This rule was also followed by a Constitution Bench of the Hon'ble Apex Court in State of Punjab v. Baldev Singh (1999) 6 SCC 172). The Hon'ble Apex Court in Baldev Singh's case held thus:

"It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed and that the compliance with the procedural safeguards contained in Section 50 in CrI.A.No.262 of 2008 and 1260/2007 are intended to

serve dual purpose to protect a person against false accusation and frivolous charge as also to lend credibility to search and seizure conducted by then empowered officer."

21. In *Noor Aga v. State of Punjab and another* (2008 (9) SCW 5964) the Hon'ble Apex Court held thus:

"The Court while weighing the evidentiary value of such a statement cannot lose sight of ground realities. Circumstances attendant to making of such statements should, in our considered opinion, be taken into consideration." The Hon'ble Apex Court in *U.O.I. v. Bal Mukund and others* (2009 CrL.J. 2407) held inter alia that:

"Where a statute confers such drastic powers and seeks to deprive a citizen of its liberty for not less than ten years, and making stringent provisions for grant of bail, scrupulous compliance of the statutory provisions must be insisted upon. The Apex Court also held that conviction should not be based merely on the basis of a statement made under Section 67 of the Act without any independent corroboration particularly in view of the fact that such statements have been retracted."

22. In *Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate and Another* ((2007) 8 SCC 254) the Hon'ble Apex Court held thus:

"Apart therefrom the High Court was bound to take into consideration the factum of retraction of the confession by the appellant. It is now a well settled principle of law that a confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of the conclusion deducible therefrom."

23. The Court below acquitted the respondents/accused after appraising the evidence on record. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the respondents/accused is further strengthened by acquittal.

24.In the result:

(a) both the Criminal Appeals are partly allowed;

(b) the respondents/accused are convicted by imposing the punishment to the period in which the respondents/accused are already undergone the custody.

25.The Legal Aid Authority attached to this Court is directed to pay a sum of Rs.5,000/- to Smt.S.Sujatha, Legal Aid Advocate.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To

1.The Additional Special Court for NDPS Act cases,
City Civil Court Buildings,
Chennai-600 104.

2.The Intelligence Officer,
Narcotics Control Bureau,
C-3-A, Rajaji Bhavan,
Besant Nagar, Chennai-90.
(NCB F.No.48/1/1/97/NCB/MDS)

3.The Legal Aid Authority,
High Court, Madras-104.

+4cc to M/S.S.Sujatha, Advocate Sr.4367, 4368

Cr1.A.Nos.1729 and 1764 of 2003

vsn II[co]
srg 7/3/2019