

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 25.01.2019

CORAM

THE HONOURABLE MR. JUSTICE P.N.PRAKASH

CRL. APPEAL NO. 129 OF 2013

The Intelligence Officer
Air Intelligence Unit
Customs House
Rajaji Salai, Chennai - 1. .. Appellant

- Vs -

B.Balatheepan .. Respondent

Criminal Appeal filed under Section 378 of the Code of Criminal Procedure, to allow the appeal filed against the judgment dated 20.11.2012, passed by the learned Principal Special Judge, Special Court under EC & NDPS Act, Chennai, made in C.C. No.36/2009.

For Appellant : Mr.M.Venkateswaran, Spl. P.P.

For Respondent : Mr. Charles, Legal Aid Counsel

JUDGMENT

This appeal has been filed by the Customs Department challenging the acquittal of the respondent in C.C. No.36/09 vide order dated 20.11.12 by the Principal Special Court for EC & NDPS Cases, Chennai.

2. Heard Mr.M.Venkateswaran, learned Special Public Prosecutor appearing for the appellant and Mr.Charles, Legal Aid Counsel, appearing for the respondent and perused the materials available on record.

3. It is the case of the prosecution that on 23.1.09, around 2100 hours, the respondent was on his way to board Flight No.UL-124 (Srilankan Airways) to Sri Lanka from Anna International Airport, Chennai. After the respondent checked in his baggage, complied the customs and immigration formalities and while he was proceedings towards the security gate, he was intercepted by Mr.Sailesh Gupta (P.W.1), Intelligence Officer, Customs, and was questioned on suspicion that he may be carrying some contraband; when questioned by P.W.1, the respondent stated

that he is not in possession of any narcotic drugs or any other substance. Not satisfied with the reply, the officer had his checked in baggage brought to the Air Intelligence Unit room and in the presence of two witnesses, viz., Varadarajan (not examined) and Kasi Viswanathan (P.W.5), checked the person of the respondent and found nothing. Thereafter, when the respondent was questioned, he stated that he had only his personal apparel and a keyboard in his baggage, which was also checked. On closer examination of the keyboard, P.W.1 found that the screws were tampered with and this aroused a suspicion in his mind and, therefore, he unscrewed the keyboard and found heroin concealed therein. When the respondent was questioned, he stated that the keyboard and two albums were given to him by one Sudha, who wanted it to be delivered to his (Sudha's) wife in Colombo. The contraband weighed around 1576 grams. The officer seized the keyboard and the contraband and drew representative samples therefrom under cover of Mahazar (Ex.P-6), attested by Varadharajan and Kasi Viswanathan (P.W.5). Thereafter, the respondent was interrogated by Ms.S.Radha (P.W.2), intelligence officer, Air Intelligence Unit and his statement, u/s 67 of the NDPS Act (Ex.P-13) was recorded. The respondent was placed under arrest by serving on him the arrest memo (Ex.P-8). The contraband was sent through the Special Court to the Customs Laboratory for analysis. Dr.R.Sharma (P.W.6) examined the samples and in his evidence as well as in his report dated 30.6.09 (Ex.P-11), has opined that the samples were found to contain Diacetyl Morphine (Heroin). P.W.1 submitted the report u/s 57 of the NDPS Act (Ex.P-7) to his official superior. After completing the investigation, Thiagarajan (P.W.9), the Superintendent of Customs filed the complaint before the Special Court under NDPS Act cases in C.C. No.36/09.

4. The respondent was not released on bail until his acquittal, in view of Section 37 of the NDPS Act. The respondent was furnished with the relied upon documents u/s 207 Cr.P.C. and the trial court framed charges u/s 8 (c) r/w 29, 8 (c) r/w 21 (c) and 8 (c) r/w 28 of the NDPS Act for possession, transport and attempt to illegally export 1576 grams of heroin. When questioned, the accused/respondent pleaded not guilty.

5. To prove the case, the prosecution examined 9 witnesses (P.W.s 1 to 9), marked 17 exhibits (Exs.P-1 to P-17 and 17 M.O.s (M.O.s 1 to 17)). When the respondent was questioned u/s 313 Cr.P.C. about the incriminating circumstances appearing against him, he flatly accepted the recovery, but explained it by saying that one Sudha, known to him, handed over the keyboard and two photo albums to be given to his wife in Colombo and that he did not know of the concealment of Heroin in the keyboard. No witness was examined nor any document was marked on behalf of

the respondent. After hearing either side and after considering the evidence on record, the trial court has acquitted the respondent as aforesaid, aggrieved by which the Department/appellant has filed the present appeal against the said acquittal.

6. Before advertng to the rival submissions, it may be apposite to refer to the judgment of the Supreme Court in the case of V.Sejappa - Vs - State (2016 (12) SCC 150), wherein the Supreme Court has laid down the following guidelines for dealing with an appeal against acquittal :-

"23.....

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."

Thus, when there are two views possible, the view favourable to the accused deserves acceptance.

7. In this case, it is really not necessary to discuss the evidence of the witnesses because the respondent, in the cross examination of the witnesses has not denied the factum of his interception at the airport, search of his belongings and the recovery of the contraband kept concealed inside the keyboard. The respondent has also not disputed the drawal of samples and the report of the chemical examiner that the samples contained Diacetyl Morphine. The respondent has also not repudiated the confession statement that was given by him (Ex.P-13) to Radha (P.W.2). It is beyond cavil that statement u/s 67 of the NDPS Act to an officer of customs is not hit by Section 25 of the Evidence Act and is admissible in evidence.

8. Even in the cross-examination of Kasi Viswanathan (P.W.5), the independent witness, the respondent has not disputed the factum of seizure, but has asked him whether the concealment of the contraband could be noticed on the face of the keyboard for which the witness stated in the negative. Even in the seizure mahazar (Ex.P-6), the answer given by the respondent that the keyboard and 2 albums were handed over to him by Sudha for delivery to his wife at Colombo finds place. This conduct of the respondent from the time of seizure and subsequently is relevant u/s 8 of the Evidence Act.

9. In the statement u/s 67 of the NDPS Act (Ex.P-13), the respondent has stated that on account of civil war, in northern part of Sri Lanka, he came to India as a refugee and settled down in Chennai; got married to one Sharmila; took employment as Office Assistant in GRSA & Co., Chennai; his wife works as Office Assistant in a private computer firm; he got acquainted to Sudha, a Sri Lankan National, living in Chennai; his mother continued to live in Sri Lanka; during one of his earlier visit to Sri Lanka, Sudha gave a keyboard and requested him to give it to his wife, which was in the month of September, 2008; he took the keyboard and Sudha's wife collected it from him; this time also he (Sudha) handed over two photo albums and one keyboard for his wife, which he innocently accepted to carry and was caught by the Customs.

10. At the risk of repetition, it is to be stated that the respondent did not repudiate or change his stand even during the trial. As stated above, when he was questioned u/s 313 Cr.P.C., he accepted the seizure and explained to the Court that it was handed over to him by Sudha for delivery to his (Sudha's) wife at Colombo.

11. The trial court has acquitted the respondent on the ground that the prosecution had failed to conduct any investigation about Sudha or seize the two photo albums, which Sudha had given to the respondent. The trial court has also stated that the respondent was not in conscious possession of the contraband.

12. Mr.Venkateswaran, learned Special Public Prosecutor appearing for the appellant pressed into service Sections 35 and 54 of the NDPS Act and submitted that when possession is established, the presumption arises that the possessor had the culpable mental state and the burden is on the possessor to disprove this fact not by preponderance of probability to put proof beyond reasonable doubt.

13. This Court has no quarrel with the aforesaid legal proposition submitted by Mr.Venkateswaran because Section 35 of the NDPS Act mandates so. In possessory offences, beyond proving possession or custody, the prosecution may not be able to prove what was there in the inner recess of the mind of the possessor and that is why the Legislature has thought it fit to shift the burden and place it at the doorstep of the possessor. However, to fasten criminal liability, mens rea is sine qua non, otherwise the maxim Actus Reus Non Facit Reum Nisi Mens Sit Rea would be rendered otiose. To discharge, the burden u/s 35 and 54 of the NDPS Act, it is not necessary in every case for the accused to lead positive evidence. It would suffice if the accused is able to discharge the burden beyond reasonable doubt via the evidence adduced by the prosecution themselves.

14. In this case, at the time of interception of the accused, his conduct was very normal and no palpable anxiety was noticed by the officers. He submitted himself and his belongings to search. Superficially the keyboard appeared normal. Along with the keyboard, Sudha had given two photo albums, which the customs officials have admitted in their evidence. However, it is their case that when they asked the respondent to identify if Sudha was there in any of the photos in the album, he perused the album and stated that Sudha was not there. In the opinion of this Court, despite this answer, the officers should have seized the album in order to use it for tracing Sudha. In fact, Thiagarajan (P.W.9) has clearly

admitted in the cross examination that no steps were taken to trace Sudha. It is not the case of the Department that Sudha was in Sri Lanka at that time. It is the very case of the respondent that Sudha had just then handed over the keyboard and two albums to him at Chennai to be delivered to his (Sudha's) wife at Colombo. Similarly, in the statement recorded u/s 67 of the NDPS Act also, the respondent has given all the details with regard to his acquaintanceship with Sudha and the circumstance in which he accepted to carry the keyboard and two albums with him to Colombo. In fact, the respondent has stated that he had asked for Sudha's help to bring his mother, who was caught in the crossfire in the civil war to be safely brought to India for which Sudha had assured him that he would do the needful.

15. At this juncture, it is necessary for this Court to place on record its appreciation to the officers of the Customs in recording the seizure events in the mahazar (Ex.P-6) and the statement (Ex.P-13) given by the respondent truthfully without distortion. This is why, perhaps, such statements are still saved from the ban u/s 25 of the Evidence Act. The trial court has discussed in extenso the entire facts and circumstances of the case and also the conduct of the respondent during the trial in admitting the seizure and the statement, given by him for acquitting him of the offence. As pointed by the Supreme Court in V.Sejappa's case (supra), the trial court has had the opportunity to see the demeanour of the witnesses, which opportunity this Court lacks. On the facts of this case, the respondent has discharged the burden u/s 35 and 54 of the NDPS Act and the acquittal of the respondent by the trial court does not warrant any interference.

16. In the result, the criminal appeal is dismissed.

Sd/-

Assistant Registrar(CS-VI)

//True Copy//

GLN

Sub Assistant Registrar

Note to Office :

The Deputy Registrar (Crl. Side) is directed to send the original records immediately back to the trial court.

To

1. The Principal Special Judge for EC & NDPS Act Cases,
Chennai

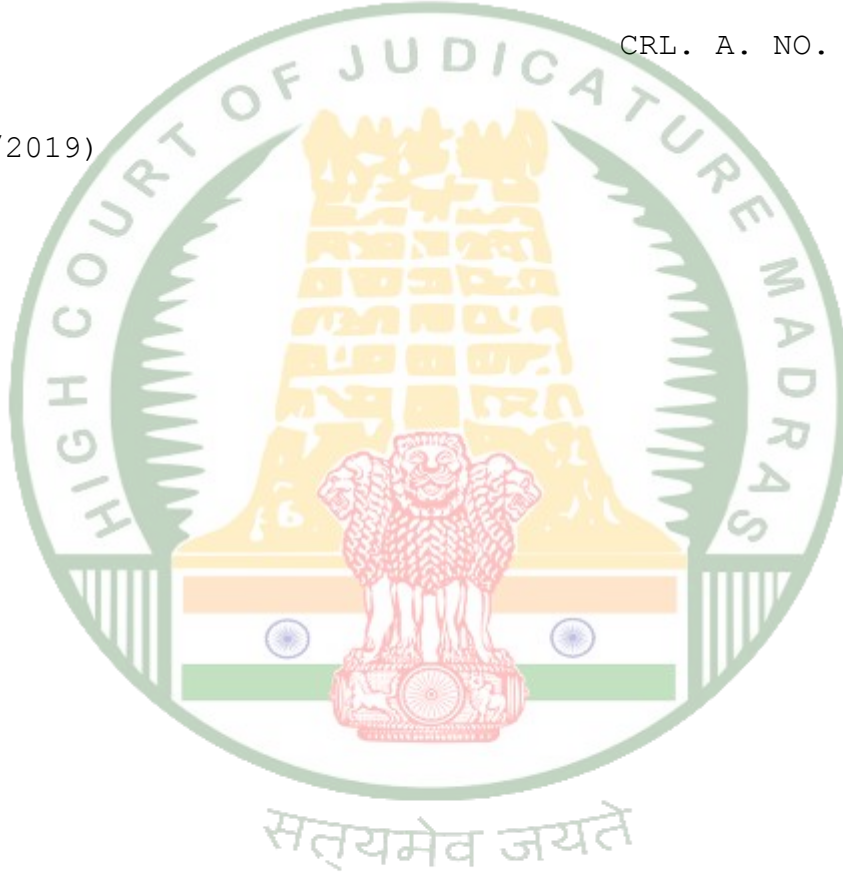
2. The Public Prosecutor
High Court, Madras.

Copy to: The Deputy Registrar (Crl.Side),
High Court, Madras.

+1 cc to Mr.Charles, Advocate, S.R.No.6595

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SSM(19/02/2019)



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