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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 03.07.2019

PRONOUNCED ON: 23.07.2019

CORAM:

THE HON'BLE MR. JUSTICE P.N.PRAKASH

Crl.A.Nos.1 & 10 of 2016

K.Ramesh, S/o.Kondaiah,
No.C-51, Kurunchi Nagar,
Ramapuram, Chennai.
Sri Lanka Address,
No.14/7, Old Mathalai Veedhi,
Kandy, Sri Lanka.

..Appellant/Accused No.2
in Crl.A.No.1 of 2016

The Intelligence Officer,
Narcotic Control Bureau,
Chennai Zonal Unit,
Chennai-90.

..Appellant/Complainant
in Crl.A.No.10 of 2016

Vs.

The Intelligence Officer,
Narcotic Control Bureau,
South Zone,
Rajaji Bhavan,
Besant Nagar,
Chennai-600 090.

..Respondent/Complainant
in Crl.A.No.1 of 2016

1. K.Ramesh, S/o.Kondaiah,
No.C-51, Kurunchi Nagar,
Ramapuram, Chennai.
Sri Lanka Address,
No.14/7, Old Mathalai Veedhi,
Kandy, Sri Lanka.
2. Sugandan @ Kanakasabai,
Srilankan, DOB 22.07.1979,
S/o. Rajarathinam,
No.349, SLR Camp,
Kavangarai, Puzhal, Chennai.
3. Sabesan, S/o.Shachinandan,
1st Floor, New No.45, Rajeswari Street,
Ullagaram, Chennai-91.



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4. Sekar @ Ceylon Sekar,
S/o.R.V.Karmegam,
No.108, Old Market Street,
Rameswaram,
Ramanathapuram District.

..Respondents/Accused
in Crl.A.No.10 of 2016

Criminal Appeals filed under Sections 374 (2), 377 (2) and 378 Cr.P.C. against the judgment and order dated 28.07.2015 passed in C.C.No.14 of 2010 in R.R.No.1 of 2010 in NCB.F.No.48/1/1/2010-NCB-MAS for the offences u/s8(c) r/w 22(c) NDPS Act on the file of the I Additional Special Court for the NDPS Act, Chennai.

Prayer in Crl.A.No.10/2016:- Criminal Appeal filed under sections 377 (2) and 378 Cr.P.C against the Judgment and Decree dated 28.07.2015 passed in CC No.14 of 2010 in A2 - U/S.28 & 29 of NDPS Act and A3 U/S.8(C) r/w 22(C) 28 & 29 and acquitted A4 U/S.8(C) r/w. 27A, 28 & 29 of NDPS Act and acquitted A5 u/s.8 (C) r/w 22 (C) 28 & 29 of NDPS Act on the file of the I Addl. Special Court for NDPS Act, Chennai.

For Appellant
in Crl.A.No.1 of 2016 &
For R1 : Mr.R.C.Paul Kanagaraj
in Crl.A.No.10 of 2016

For Appellant : Mr.N.P.Kumar
in Crl.A.No.10 of 2016 Special Public Prosecutor
for NCB cases

For Respondent : Mr.N.P.Kumar
in Crl.A.No.1 of 2016 Special Public Prosecutor
for NCB cases

COMMON JUDGMENT

These criminal appeals have been preferred against the judgment and order dated 28.07.2015 passed in C.C.No.14 of 2010 in R.R.No.1 of 2010 in N.C.B.F.No.48/1/1/2010-NCB-MAS on the file of the I Additional Special Court for the NDPS Act Cases, Chennai.

2. Shorn of the minute details, a precis of the facts leading to the institution of these criminal appeals are as follows:

2.1 Srikanth (PW1), an officer of the Narcotic Control Bureau (in short "the NCB") received information that Mohammed Aslam (A1) has brought 1 kg. of heroin, a narcotic drug, from



Mumbai to Chennai and has checked in to Room No.208, Supreme Guest House, Egmore, and that one Ramesh (A2) and Sugandan (A3) were coming there to collect the contraband for onward transport to Sri Lanka. This information was recorded on 17.01.2010 at 10.00 p.m. vide Ex-P1 and was placed before Gunabalan (PW4), Superintendent of the NCB, an officer of gazetted rank. A team of officers led by Gunabalan (PW4) went to the said room along with two independent witnesses viz., Arumugam (PW7) and Srinivasan (not examined). In that room, the NCB officials found three persons viz., Mohammed Aslam (A1), Ramesh (A2) and Sugandan (A3). After introducing themselves, the NCB officials questioned the inmates and seized a suitcase (M.O.2) with a false cavity and 660 grams of white colour substance, believed to be heroin. The officers tested the substance with the Narcotic Field Test Equipment, which answered positive for heroin. The officers drew two representative samples of 5 grams each and thereafter, sealed the samples and the balance contraband by affixing the NCB seal thereon. A spot mahazar (Ex-P2) was prepared. The three accused were summoned to the office of the NCB, where, their statements under Section 67 of the Narcotic Drugs and Psychotropic Substances Act (for brevity "the NDPS Act") were recorded. The statements of Mohammed Aslam (A1), Ramesh (A2) and Sugandan (A3) were marked as Ex-P52, Ex-P12 and Ex-P49, respectively. Thereafter, all the three accused were placed under arrest and they were produced before the jurisdictional Court for remand. The seized contraband, along with the samples, were also produced before the Special Court for NDPS Act cases and a requisition was given to send one of the samples to the Tamil Nadu Forensic Sciences Laboratory, for chemical examination.

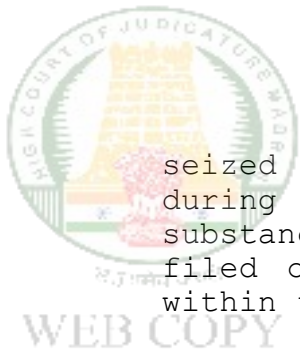
2.2 The sample was examined by Maria Selvi Roselin (PW9), Scientific Assistant Gr.I, who, in her evidence as well in the report (Ex-P93), has stated as under:

"Detected AlPrazolam in the exhibit and also detected caffeine and phenolphthalein (dilutents) in the exhibit."

2.3 During the course of investigation, it came to light that Sabesan (A4) and Sekar (A5) who were prisoners in the Central Prison, Madurai, had masterminded the operation.

2.4 After examining various witnesses and completing the investigation, the authorized officer of the NCB filed a complaint before the Special Court for the NDPS Act cases, which was taken on file as C.C.No.14 of 2010 against six accused viz., Mohammed Aslam (A1), Ramesh (A2), Sugandan (A3), Sabesan (A4), Sekar (A5) and Ukkar Singh (A6 - Asconding) .

2.5 In the mean time, Mohammed Aslam (A1), Ramesh (A2) and Sugandan (A3) were released on bail, on the ground that the



seized material was not heroin, as projected by the prosecution during investigation, but AlPrazolam, which is a psychotropic substance under the NDPS Act. Nevertheless, the complaint was filed on the premise that the seized article would also fall within the ambit of the NDPS Act.

2.6 On the appearance of A1 to A5, they were furnished with the relied upon documents under Section 207 Cr.P.C. Since the involvement of Ukkar Singh (A6) in the offence came to light during investigation, he was arrayed as A6 in the complaint. Since the NCB was unable to apprehend him during investigation, he was shown as absconding accused No.6 in the complaint and the case against him was split up as C.C.No.24 of 2010.

2.7 On 23.03.2011, the Trial Court framed charges under Sections 8(c) r/w 29, 22-C, 25, 27-A and 28 of the NDPS Act, against A1 to A5 and when they were questioned, they pleaded "not guilty".

2.8 After framing of charges and before the commencement of trial, Mohammed Aslam (A1) absconded and therefore, the case against him was split up on 10.10.2011 and renumbered as C.C.No.1 of 2014.

2.9 To prove its case, the prosecution examined nine witnesses and marked ninety three exhibits and nine material objects.

2.10 When A2 to A5 were questioned under Section 313 Cr.P.C on the incriminating circumstances appearing against them, they denied the same. On behalf of the accused, no witness was examined nor was any document marked.

2.11 After considering the evidence on record and hearing either side, the Trial Court, by judgment and order dated 28.07.2015 passed in C.C.No.14 of 2010 acquitted Sugandan (A3), Sabesan (A4) and Sekar (A5) of all the charges, but, convicted Ramesh (A2) for the possession of commercial quantity of AlPrazolam and sentenced him as under:

Provision under which convicted	Sentence
S. 8(c) r/w 22-C of the NDPS Act	Ten years rigorous imprisonment and fine of Rs.1,00,000/- in default to undergo two months rigorous imprisonment.

2.12 Challenging the aforesaid conviction and sentence, Ramesh (A2) has filed CrI.A.No.1 of 2016 before this Court.



2.13 Challenging the acquittal of Ramesh (A2) of the other charges and the complete acquittal of Sugandan (A3), Sabesan (A4) and Sekar (A5), the NCB has filed Crl. A.No.10 of 2016 before this Court.

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3. Heard Mr.R.C.Paul Kanagaraj, learned counsel for Ramesh (A2) in both the appeals and Mr.N.P.Kumar, learned Special Public Prosecutor for NCB cases.

4. The prosecution case rests on the evidence of Saravana Raj (PW2), Intelligence Officer, NCB, Gunabalan (PW4), Superintendent, NCB and Arumugam (PW7), the independent witness. Though the contraband was recovered from the hotel room, which would fall within the meaning of 'public place' under Section 43 of the NDPS Act, yet, the information received by Srikanth (PW1) has been recorded as required by Section 42 of the Evidence Act, vide Ex-P1 and a search team was constituted under the stewardship of Gunabalan (PW4), Superintendent of the NCB, an officer of gazetted rank who derives power for search, seizure and arrest under Section 41 (2) of the NDPS Act.

5. Gunabalan (PW4), in his evidence, has stated that the information report (Ex-P1) under Section 42 of the NDPS Act, was placed before him by Srikanth (PW1), wherein, it was stated that Sabesan (A4) and Sekar (A5), though, lodged in prison, have arranged with Mohammed Aslam (A1), to transport of 1 kg. of heroin from Mumbai to Chennai and that Mohammed Aslam (A1) has checked in to Room No.208, Supreme Guest House and that one Ramesh (A2) would come to the said room to collect the contraband. Gunabalan (PW4) has further stated in his evidence that he constituted a team of officers headed by him and went to Supreme Guest House at 23.45 hours on 17.01.2010; they called two persons viz., Arumugam (PW7), an employee of the lodge and Srinivasan (not examined) as independent witnesses; when the party, along with the witnesses, went to Room No.208 and knocked the door, Mohammed Aslam (A1) opened the door; inside the room, apart from Mohammed Aslam (A1), Ramesh (A2) and Sugandan (A3) were also available; they introduced themselves to Mohammed Aslam (A1) and asked him as to whether he was in possession of 1 kg. of heroin, for which, Mohammed Aslam (A1) produced a suitcase (M.O.2) with a false cavity and stated that he had brought the contraband from Mumbai and had just handed over the same to Ramesh (A2).

6. At this juncture, it may be necessary to discuss the evidence of Arumugam (PW7), independent witness, on this aspect.

7. Arumugam (PW7), has stated that when the NCB officials questioned those three persons in the room, Ramesh (A2) took out the contraband from the suitcase (M.O.2) and handed it over to

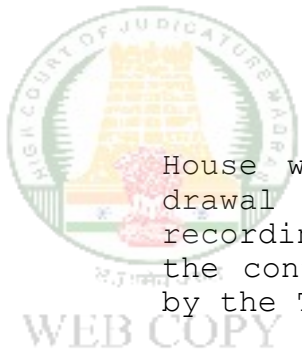


the officials. Further, in the cross-examination, Arumugam (PW7) has stated that when the officers entered the room, neither Ramesh (A2) nor Sugandan (A3) had any parcel with them.

8. Mr.R.C.Paul Kanagaraj, learned counsel for Ramesh (A2) laid stress on these pieces of evidence and contended that the possession and custody of the contraband was with Mohammed Aslam (A1) and not with Ramesh (A2). He built up his arguments by further contending that even if the entire prosecution case, including the confession statements of the accused is accepted, yet, Ramesh (A2) can, at the most be convicted under Section 30 of the NDPS Act, for preparation to take possession and for further transport of the contraband. There appears to be some force in the submission of Mr.R.C.Paul Kanagaraj, learned counsel for Ramesh (A2).

9. In this case, the NCB received information that 1 kg. of heroin has been transported by Mohammed Aslam (A1) from Mumbai to Chennai, at the instance of Sabesan (A4) and Sekar (A5), who were said to be operating from the Central Prison, Madurai. The NCB officials were not able to record the statements of Sabesan (A4) and Sekar (A5) under Section 67 of the NDPS Act, since they refused to give any statement upon their examination by the officials in the Central Prison, Madurai. However, the NCB officials had gathered certain call details to show that Sabesan (A4) and Sekar (A5) were freely using mobile phones from inside the prison for organizing a well networked syndicate. Unfortunately, the NCB was not able to collect legal evidence to establish that Sabesan (A4) and Sekar (A5) were using mobile phones from inside the prison, for reasons that are not far to seek. Though the Prison Rules prohibit the use of mobile phones by prisoners, yet, it is common knowledge that transgression of such rules by prisoners with the connivance of prison officials does occur, for which, it will be very difficult to obtain proof. No prison official would be foolhardy to confess to such transgressions in the prison as that would cost him his job. Though the prosecution may have reasonable grounds to believe that Sabesan (A4) and Sekar (A5) had masterminded the operation from inside the prison, yet, in the absence of legal proof, they cannot be mulcted with criminal liability.

10. Yet another peculiar feature in this case is that, the NCB believed that heroin, a narcotic drug, was transported from Mumbai to Chennai for onward transmission to Sri Lanka, but, the contraband that was seized turned out to be AlPrazolum, a psychotropic substance and not a narcotic drug. However, that alone cannot be a good reason to give a clean chit to the accused in this case. The prosecution has proved beyond cavil the seizure of the contraband from Room No.208, Supreme Guest



House which was in the occupancy of Mohammed Aslam (A1), the drawal of samples, the preparation of the seizure Mahazar, the recording of the statements of the accused, the forwarding of the contraband to the Special Court and the analysis of samples by the Tamil Nadu Forensic Sciences Laboratory.

11. It is well settled that a confession statement of an accused recorded by the NCB under Section 67 of the NDPS Act is not hit by Section 25 of the Evidence Act and is admissible in evidence. The said statement is not a substantive piece of evidence as against the co-accused and is relevant only in terms of Section 30 of the Evidence Act, that too in a joint trial.

12. Bearing this legal principle in mind, if the confession statement (Ex-P12) of Ramesh (A2) is analyzed, it comes to light that Ramesh (A2) came to India as a refugee during the ethnic conflict in 1995 and got married to Sumithra, an Indian citizen and they have a child; he was doing some cloth business which ran into heavy loss and was in abject poverty; so, he approached his distant relative Sekar (A5), who was in the Central Prison, Madurai, for some financial help; Sekar (A5) asked him to meet Mohammed Aslam (A1) and collect the parcel of 1 kg. of heroin from him for transporting it to Sri Lanka; on 17.10.2010, Mohammed Aslam (A1) called Ramesh (A2) and asked him to come to Room No.208 in Supreme Guest House, where, he was staying; soon thereafter, his (Ramesh's-A2) distant relative by name Sugandan (A3) contacted him and asked for financial help; so, he (Ramesh-A2) told Sugandan (A3) also to join him to meet Mohammed Aslam (A1) and share whatever Mohammed Aslam (A1) would give them.

13. Only in those circumstances, Ramesh (A2) and Sugandan (A3) went to Room No.208 where Mohammed Aslam (A1) was staying. Mohammed Aslam (A1) showed him a suitcase (M.O.2) with a false cavity, wherein, he had kept the parcel. While they were talking, the NCB officials came into the room and effected the seizure.

14. A confession statement recorded under Section 67 of the NDPS Act does not fall within the embargo of Section 25 of the Indian Evidence Act, 1872 and is, thus admissible in evidence. The rationale for this was spelt out by the Supreme Court in *Raj Kumar Karwal v Union of India*¹ wherein it was held that an officer appointed under Section 53 of the NDPS Act, other than a police officer, was not entitled to exercise "all" powers under Chapter XII of the Code of Criminal Procedure. Consequently, these officers have no power to submit a final report under Section 173 of the Code with the result that they would not fall within the expression "police officer" occurring in Section 25 of the Evidence Act. The Supreme Court reiterated this position

¹ (1990) 2 SCC 409



in *Kanhaiyalal v Union of India*². Subsequently, a two judge bench, in *Tofan Singh v State of Tamil Nadu*³ doubted the correctness of the aforesaid judgments and the matter is now pending before a larger Bench. However, the Supreme Court in *National Insurance Co Ltd v. Saju Paul*⁴ has held that the pendency of a reference before a larger Bench does not bar the Court from following the law laid down in the earlier judgments under reference.

15. Before discussing the effect of the confession statement of Ramesh (A2), it is necessary to briefly re-state the law governing the admissibility of confessions. The Evidence Act does not define a confession. Its judicially evolved definition, which has been accepted without demur, was laid down by Lord Atkin in the celebrated Privy Council decision of *Pakala Narayana Swami v Emperor*⁵. The Board held that a confession must admit the terms of the offence, or at any rate, substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not, by itself, a confession. Confessions are a species of admissions which are defined in Section 17 of the Evidence Act to mean a statement, oral or documentary, which enables the Court to draw an inference as to any fact in issue.

16. Sections 6 to 16 of the Evidence Act, declare that evidence may be given of facts which are "declared to be relevant" under the aforesaid sections. An admission or a confession would normally be excluded under the hearsay rule but for Sections 17 to 31 of the Evidence Act. If the confession is made to a police officer, the same would stand excluded in view of the bar contained in Section 25 of the Evidence Act unless it falls within the exception contained in Section 27 of the Act.

17. Confessions are considered highly reliable because of a presumption that no person would make a declaration against his own interest unless he is prompted by his conscience to tell the truth. Truthfulness and voluntariness are the twin tests to be satisfied before a Court can act upon a confession statement.

18. It is necessary to emphasize that just like any other piece of evidence, a confession statement can be admitted in evidence only for drawing an inference of truth. In *State of Maharashtra v Kamal Ahmed Mohammed Vakil Ansari*⁶, the Supreme Court pointed out that the truth of a confession statement cannot be evidenced through the person to whom such confessions

² (2008) 4 SCC 668

³ (2013) 16 SCC 331

⁴ (2013) 2 SCC 41

⁵ AIR 1939 PC 47

⁶ (2013) 12 SCC 17



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are made. A confession statement links the confessor to the offence. Therefore, it is incumbent on the prosecution to prove that an offence had been committed and thereafter, use the confession, insofar as it is rendered admissible, to link the accused with the offence. In some cases, the very commission of an offence will come to light only during the confession. In majority of the cases, the commission of the offence surfaces first, and the confession is then used to link the confessor with the offence. It must, however, be remembered that a confession is only a part of the puzzle and the puzzle cannot be resolved by taking refuge in a confession.

19. The confession statement of Ramesh (A2) must be tested against the touchstone of the aforesaid legal principles. The confession proceeds to state that Ramesh (A2) had come to meet Mohammed Aslam (A1) to collect 1 kg. of heroin. The confession does not state that Ramesh (A2) had come to collect a drug parcel from Mohammed Aslam (A1). Ramesh (A2) has confessed to the commission of a crime relating to 1 kg. of heroin. However, even according to the prosecution what was recovered was not heroin but AlPrazolam, a psychotropic substance. This is reinforced by the Chemical Analyst's Report (Ex 93). As stated supra, for the Court to act upon a confession, it must necessarily pass the twin tests of truthfulness and voluntariness. In the considered opinion of this Court, a careful analysis leads to the irresistible conclusion that the confession statement of Ramesh (A2) does not pass the very first hurdle ie., the test of truthfulness, and hence, cannot be used to link him with the offence relating to the seizure of 660 grams of AlPrazolam.

20. Once we exclude the confession, what remains are the statements of Gunabalan (PW4) and Arumugam (PW7) which speak about the conduct of Ramesh in coming to Room No.208 to meet Mohammed Aslam (A1). According to Arumugam (PW7), independent witness, when the NCB officials questioned him, he took out a packet from the false cavity of the suitcase (M.O.2) of Mohammed Aslam (A1) and gave it to them. The question then is: Does the aforesaid conduct of Ramesh (A2) amount to a preparation or an attempt to commit the offence?

21. As a general principle, every crime consists of three stages. First is the intention to commit, secondly, a preparation to commit, and thirdly, an attempt to commit the offence. If the attempt succeeds, the accused is said to have committed the offence. On the other hand, if the attempt fails, on account of reasons beyond the control of the accused, the offence remains inchoate and the accused is said to have attempted to commit the offence. The first two stages viz., intention and preparation are not penal except in certain situations eg., Section 122 and 399 of the IPC. Attempts are made punishable generally under Section 511 IPC and more



specifically for example under Sections 307, 308 and 309 of the IPC. Under the general criminal law, an attempt is said to commence when preparations are complete and the accused has taken steps towards the commission of the offence. The dividing line between preparation and an attempt has always been one of degree and Courts have consistently refrained from drawing any bright line distinctions.

22. A Division Bench of this Court [P.N.Ramaswami and Anantanarayanan, JJ] in *In Re: Maragatham*⁷ applied the test of "locus poenitentiae" to distinguish attempts from mere preparation. The Latin phrase "locus poenitentiae" means an opportunity to withdraw before the consummation of the offending act. Ramaswami, J. observed:

"24. To draw a line between preparation and attempt, as just now mentioned, is really difficult but still it must be drawn. The law allows locus poenitentiae to every person before he brings himself within the grips of the Criminal law. This is the stage to which he can go and beyond which he cannot.

"An act which does not contribute to the commission of the crime, cannot be counted part of the actus reus, even though it may be excellent evidence of mens rea. If the acts of the accused, taken by themselves, are unambiguous, and cannot, in reason, be regarded as pointing to any other end than the commission of the specific crime in question, then they constitute a sufficient actus reus. In other words, his acts must be unequivocally referable to the commission of the specific crime. They must speak for themselves. It would be of assistance to the proper solution of difficult cases of alleged attempts, if no extrinsic evidence of the mens rea of the accused, e.g., such as a confession, were to be considered unless and until a sufficient actus reus has first been established. There is of course no such rule or practice operating in our Courts in cases of attempt but Magistrates and Judges would be well-advised to apply their minds in this way to cases offered for their consideration. So long as a sufficient actus reus of an attempt has been done, it does not matter what happens afterwards. The attempt may be successful or unsuccessful. If successful the offence may merge in the greater crime but that does not alter its nature. Thus, the tests to be applied is the same in all cases of attempt, whether the accused has attempted what is possible or impossible. If the acts of the accused beyond reasonable doubt indicate and indicate only that he intended to commit a certain definite

⁷ AIR 1961 Madras 498



crime, then he has performed a sufficient actus reus to support a charge of attempting to commit that crime."

23. In *Abhayanand Mishra v. State of Bihar*⁸, the Supreme Court examined the tests for an attempt under Section 511 IPC and opined as under:

"11. Another contention for the appellant is that the facts proved do not go beyond the stage of preparation for the commission of the offence of cheating, and do not make out the offence of attempting to cheat. There is a thin line between the preparation for and an attempt to commit an offence. Undoubtedly, a culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence."

24. The Court specifically rejected the "penultimate act" test holding that Section 511 IPC was not meant to merely cover the penultimate act towards the completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence, and were done with the intent to commit it and done towards its commission. The Court, however, refrained from any hard and fast rule which is clear from the following passage:

"12. It is to be borne in mind that the question whether a certain act amounts to an attempt to commit a particular offence is a question of fact dependent on the nature of the offence and the steps necessary to take in order to commit it. No exhaustive precise definition of what would amount to an attempt to commit an offence is possible. The cases referred to make this clear."

25. In *Malkiat Singh v. State of Punjab*⁹, the Supreme Court held that in order to constitute an attempt, the actus reus ought to have reached a point so as to have a sufficient proximity to attempt the commission of the offence. The Court observed:

⁸ AIR 1961 SC 1698

⁹ (1969) 1 SCC 157



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"6. As a matter of law a preparation for committing an offence is different from attempt to commit it. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence. On the other hand, an attempt to commit the offence is a direct movement towards the commission after preparations are made. In order that a person may be convicted of an attempt to commit a crime, he must be shown first to have had an intention to commit the offence, and secondly to have done an act which constitutes the actus reus of a criminal attempt. The sufficiency of the actus reus is a question of law which had led to difficulty because of the necessity of distinguishing between acts which are merely preparatory to the commission of a crime, and those which are sufficiently proximate to it to amount to an attempt to commit it. If a man buys a box of matches, he cannot be convicted of attempted arson, however clearly it may be proved that he intended to set fire to a haystack at the time of the purchase. Nor can he be convicted of this offence if he approaches the stack with the matches in his pocket, but, if he bends down near the stack and lights a match which he extinguishes on perceiving that he is being watched, he may be guilty of an attempt to burn it. Sir James Stephen, in his Digest of Criminal Law, Article 50, defines an attempt as follows:

"an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined, but depends upon the circumstances of each particular case."

(emphasis supplied)"

26. In *State of Maharashtra v. Mohd. Yakub*¹⁰, the Supreme Court laid down a three part test concluding that in order to constitute an attempt, the actus reus must have sufficiently reached a point so as to be proximate with the intended result, i.e., the commission of the offence. In his concurring opinion, Chinnappa Reddy, J. observed:

"32. Let me now state the result of the search and research: In order to constitute "an attempt", first, there must be an intention to commit a particular offence, second, some act must have been done which would necessarily have to be done towards the commission of the offence, and, third, such act must be "proximate"

¹⁰ (1980) 3 SCC 57



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to the intended result. The measure of proximity is not in relation to time and action but in relation to intention. In other words, the act must reveal, with reasonable certainty, in conjunction with other facts and circumstances and not necessarily in isolation, an intention, as distinguished from a mere desire or object, to commit the particular offence, though the act by itself may be merely suggestive or indicative of such intention; but, that it must be, that is, it must be indicative or suggestive of the intention."

27. In *Koppula Venkat Rao v. State of A.P.*¹¹, the Supreme Court reiterated that "the dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation."

28. The NDPS Act, 1985 is a consolidating and amending Act which was enacted to give effect to the UN Convention on Narcotic Drugs, 1961 as amended by the 1972 protocol, and the Convention on Psychotropic Substances, 1971. This is clear from the preamble of the Act which reads as under:

"An Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances and for matters connected therewith."

29. The statement of objects and reasons, inter alia, states as under:

"During the recent years new drugs of addiction which have come to be known as psychotropic substances have appeared on the scene and posed serious problems to national governments. There is no comprehensive law to enable exercise of control over psychotropic substances in India in the manner as envisaged in the Convention on Psychotropic Substances, 1971 to which also India has acceded."

30. Article 22(2)(a)(ii) of the Convention on Psychotropic Substances, 1971 reads thus:

"Intentional participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connexion



with the offences referred to in this article, shall be punishable offences as provided in paragraph 1".

The aforesaid Article required State parties to take measures to enact laws to punish a) conspiracies b) attempts and c) preparatory acts done in connection with the offences under the Convention. The NDPS Act substantially enacts this obligation as it punishes an attempt to commit offences (Section 28), abetments and conspiracies to commit offences (Section 29), and preparation to commit offences under the Act (Section 30).

31. Section 30 of the NDPS Act punishes a preparation to commit offences under the Act and reads as under:

"30. Preparation.—If any person makes preparation to do or omits to do anything which constitutes an offence punishable under any of the provisions of 1 [sections 19, 24 and 27A and for offences involving commercial quantity of any narcotic drug or psychotropic substance and from the circumstances of the case] it may be reasonably inferred that he was determined to carry out his intention to commit the offence but had been prevented by circumstances independent of his will, he shall be punishable with rigorous imprisonment for a term which shall not be less than one-half of the minimum term (if any), but which may extend to one-half of the maximum term, of imprisonment with which he would have been punishable in the event of his having committed such offence, and also with fine which shall not be less than one-half of the minimum amount (if any), of fine with which he would have been punishable, but which may extend to one-half of the maximum amount of fine with which he would have ordinarily (that is to say in the absence of special reasons) been punishable, in the event aforesaid: Provided that the court may, for reasons to be recorded in the Judgment, impose a higher fine." (emphasis supplied)

32. One should not get confused with the definition of the word "preparation" in Section 2 (xx) with the one in Section 30. The former is a noun and the latter is used in the context of a verb. They both should have to be used in totally different contexts about which we need not dwell upon for the present. It may be recalled that under the general criminal law, preparation to commit an offence "consists in devising or arranging the means or measures necessary for the commission of the offence". In other words, the locus poenitentiae does not go beyond the scope of preparatory acts to manifest itself in the form of actus reus to commit the offence. Section 30, on the other hand, specifically enacts, that

a) There must be preparatory acts or an omission that constitutes an offence under the Act;



b) That, from the facts, a reasonable inference may be drawn that he was determined to carry out his intention to commit the offence; and

c) That he had been prevented from doing so on account of circumstances independent of his will.

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33. In the considered opinion of this Court, the third limb of the ingredients of Section 30 of the NDPS Act is a marked departure from the general criminal law inasmuch as the requirement of the prosecution to show that the accused was prevented from commission of an offence on account of circumstances independent of his will is now statutorily incorporated into Section 30 which deals with preparation. To recapitulate, in *Malkiat Singh* (supra), the Supreme Court observed that "preparation consists in devising or arranging the means or measures necessary for the commission of the offence." In *Abhayanand Mishra* (supra), the Supreme Court had interpreted Section 511 IPC to say that "Attempt to commit an offence, therefore, can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence."

34. However, under Section 30 of the NDPS Act, preparation does not stop with mere preparatory acts or omissions but goes beyond that to enact that the facts must lead to a reasonable inference that the accused was determined to carry out his intention but had been prevented on account of circumstances independent of his will. The ingredients of Section 30 of the NDPS Act push the traditional distinction between an attempt and preparation to a near vanishing point.

35. In *Badrilal Sharma v State*¹², a learned single judge of this Court (R. Mala, J.) considered a similar defence under Section 30 of the NDPS Act. On facts, the learned judge rightly found that the evidence on record clearly established conscious possession of the contraband, and, on facts, there was no scope to invoke Section 30 of the Act.

¹² Criminal Appeal 814 of 2009 decided on 18.06.2012



36. Attempts are made punishable under Section 28 of the NDPS Act. In view of the ingredients of preparation under Section 30 of the NDPS Act, the threshold for constituting an attempt under Section 28 of the NDPS Act is clearly higher than the requirements of an attempt under the general criminal law and would now appear to approximate within the realm of the "penultimate act" theory. However, as was pointed out by James Stephen in Article 50 of his Digest of Criminal Law," the point at which such a series of acts begins cannot be defined, but depends upon the circumstances of each particular case"

37. The philosophy behind Section 30 of the NDPS Act springs from the age old adage "Nip it in the bud" - meaning that if a person is found with the materials and machinery for manufacturing a narcotic drug, a psychotropic substance, even before he churns out the first consignment, his preparation can be foiled and he can be prosecuted and punished under Section 30. Once he prepares it, he passes the stage of preparation and attempt and would be liable for the higher offence of "possession".

38. This Court is not expressing any definitive opinion on Section 28 of the NDPS Act for the present as, on the peculiar and rather unusual facts of this case, it is clear that the prosecution's case of Ramesh (A2) would go no further than to constitute preparation within the ambit of Section 30 of the NDPS Act.

39. The facts and circumstances of the case show that Ramesh (A2) and Sugandan (A3) entered Room No.208 at 11.30 p.m. and immediately thereafter at 11.45 p.m., the NCB officials entered the room. The evidence on record only shows that Ramesh (A2) was aware that Mohammed Aslam (A1) had kept the contraband in the false cavity of the suitcase (M.O.2), which was intended to be given to him for further transport to Sri Lanka. From the evidence of Arumugam (PW7), independent witness, it is apparent that the possession was not handed over to Ramesh (A2) by Mohammed Aslam (A1), because, the contraband was in the false cavity of the suitcase belonging to Mohammed Aslam (A1). Though Ramesh (A2) would have had the will to take possession of the contraband from Mohammed Aslam (A1) for carrying it to Sri Lanka, he was prevented by circumstances independent of his will, by the entry of the NCB officials, within a few minutes of his entering the said room. The role of Ramesh (A2) was to collect the contraband from Mohammed Aslam (A1) for transport to Sri Lanka. For executing the role, he made preparations by coming to the room of Mohammed Aslam (A1) and within 15 minutes of his coming, the NCB officials entered the room and took control of the situation. Had the NCB officials recovered heroin, then, the confession statement of Ramesh (A2) would have linked him to the offence and this Court would not have been in a position to bring his conduct within the description of the



expression "preparation" set out in Section 30, supra. In other words, the exclusion of the confession statement of Ramesh (A2) from consideration coupled with the proved fact that the contraband was not heroin, a narcotic drug, but, AlPrazolam, a psychotropic substance, impels this Court to infer that Ramesh's (A2's) conduct of meeting Mohammed Aslam (A1) were preparatory acts for collecting some contraband. Had this been a police case, the confession statement would have been made inadmissible by virtue of Section 25 of the Evidence Act. However, with the aid of Section 34 IPC, Ramesh (A2) would be liable for conviction, provided, the contraband was heroin. Thus, the fact that the contraband turned out to be something else changes the texture of the case.

40. Had Ramesh (A2) been caught by the NCB officials with the contraband outside the room, then Section 30 would have had no application. Therefore, the evidence on record falls short for establishing the charge under Section 8(c) r/w 22-C of the NDPS Act, but, is sufficient enough to fix criminal liability under Section 30 of the NDPS Act.

41. In view of the above, this Court convicts Ramesh (A2) for preparing to take custody of a drug and is awarded the minimum sentence viz., one-half of the minimum term. The minimum term for the offence under Section 8(c) r/w 22-C of the NDPS Act is ten years rigorous imprisonment and fine of Rs.1 lakh, which has been awarded by the Trial Court. Taking into consideration the overall facts and circumstances of the case and bearing in mind the penury of Ramesh (A2) and the fact that he was not involved in any such case earlier, the sentence of ten years rigorous imprisonment is reduced to five years rigorous imprisonment. Consequently, the fine amount of Rs.1,00,000/- is also reduced to Rs.50,000/-, in default to undergo one month rigorous imprisonment.

42. Coming to the appeal filed by the State challenging the acquittal, this Court does not find any material worth the salt to implicate Sugandan (A3) in the offence, because, Sugandan (A3) was only a distant relative of Ramesh (A2), who, badly needed money and at the instance of Ramesh (A2), he joined him to meet Mohammed Aslam (A1), at the fateful hour. Beyond that, there is absolutely no material to establish his involvement in the offence.

43. As regards Sabesan (A4) and Sekar (A5), though, subjectively one can infer that they were operating from the confines of the Central Prison, Madurai, in the absence of legal evidence, they cannot be convicted on the basis of subjective satisfaction.

44. In Arulvelu and another Vs. State¹³, the Supreme Court



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has held that when two views are possible, the one favouring the accused merits consideration. The relevant passage from the said judgment is as follows:

"36. Careful scrutiny of all these judgments lead to the definite conclusion that the Appellate Court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The Trial Court judgment cannot be set aside because the Appellate Court's view is more probable. The Appellate Court would not be justified in setting aside the Trial court judgment unless it arrives at a clear finding on marshaling the entire evidence on record that the judgment of the Trial Court is either perverse or wholly unsustainable in law."

In the result, Crl.A.No.10 of 2016 filed by the NCB stands dismissed and Crl.A.No.1 of 2016 filed by Ramesh (A2) is partly allowed with the above modifications. The period of sentence already undergone by Ramesh (A2) shall be set off under Section 428 Cr.P.C.

nsd/cad

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Intelligence Officer,
Narcotic Control Bureau,
South Zone, Rajaji Bhavan,
Besant Nagar, Chennai-600 090.
2. The I Additional Special Judge,
for NDPS Act cases, Chennai.
3. The Public Prosecutor,
High Court, Madras.
4. The Superintendent,
Central Prison, Puzhal ,
Chennai.

Copy to:-

The Section Officer,
Criminal Section,
High Court, Madras - 104.

Crl.A.Nos.1 & 10 of 2016

Kak(12/09/2019)