

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Judgment 20.08.2018	Date of pronouncing Judgment 14.11.2019
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THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.570 of 2014
and
M.P.No.1 of 2015

Senthil Kumar

... Appellant

Versus

The Assistant Commissioner of Customs
Prosecution Unit (Air)
New Customs House
Chennai - 600 027.

... Respondent

Appeal filed u/s.374 (2) of Cr.P.C. against the Judgment of conviction and sentence passed by the learned Principal Special Judge for NDPS Act Cases, Chennai, in C.C.No.25 of 2014 dated 05.09.2014.

For Appellant : Mr.M.Ramesh

For Respondent : No appearance

Judgment

The respondent (Customs) registered a case against the appellant for the offence under sections 8(c) r/w.22 (c) of NDPS Act and after investigation, the respondent (Customs) laid a private complaint before the Special Court for NDPS Cases in R.R. No.23 of 2013 in O.S.No.57 of 2013 - INT and the learned Special Judge, after taking the complaint on file in C.C.No.25 of 2014 and after completing the formalities, framed charges against the appellant for the offences under sections 8(c) r/w.22 (c) of NDPS Act.

2. Subsequently, in order to prove the case of prosecution, during the trial, on the side of prosecution, as many as 3 witnesses were examined as PW.1 to PW.3 and 17 documents were marked as Exs.P1 to P17, besides 4 Material Objects.

3. After completing the prosecution witnesses, when incriminating circumstances culled out from the evidence of prosecution witnesses were put before the accused/appellant, he denied as false. On the side of defence, no oral and documentary evidence was produced.

4. After completing the trial and hearing the arguments advanced on either side and perusing the oral and documentary evidences, the learned Special Judge has come to the conclusion that the accused/appellant is guilty for the offence under sections 8(c) r/w.22 (c) of NDPS Act and convicted him for the above said offence and sentenced him to undergo 10 years rigorous imprisonment and to pay a fine of Rs.1,00,000/-, in default to remit the fine amount, the accused to undergo six months rigorous imprisonment.

5. Challenging the said judgment of conviction passed by the learned Special Judge, the convict has preferred the present appeal before this Court.

6. The learned counsel for the appellant would submit that based on the evidence of PW.1 alone, the trial Court has convicted the appellant and that even there is no independent witness examined in this case, when the alleged offence taken place in the airport. Though the case of the prosecution is that on information received by the Superintendent of Customs Officials, they intercepted the appellant. The alleged information received from the informer has not been reduced into writing under Section 42 of the NDPS Act, which is violation of the mandatory provisions of the said Act. The respondent did not explain the right of the appellant as per Section 50 of the NDPS Act and therefore, the seizure and arrest itself is very doubtful and the violation of mandatory provisions of Section 50 of the NDPS Act is fatal to the case of the prosecution. As per the provisions of the Act, the appellant should have been searched before the Gazetted Officer of Customs or the Magistrate. Though the prosecution has stated that the appellant was searched before the Superintendent of Customs (Gazetted Officer) and seized the contraband, the above officer was not shown as prosecution witness. The said Superintendent was neither cited as witness nor examined as prosecution witness. The prosecution has not proved its case beyond reasonable doubt and the mandatory provisions of the NDPS Act, viz., Sections 42, 50 and 57 have not been duly complied with. Further, conviction recorded based on the statement given by the appellant/accused under Section 67 of the NDPS Act is not permissible. The prosecution has to establish its case through independent witness and also the statement of PW.1 needs corroboration. In this case, the prosecution failed to establish its case beyond reasonable doubt. The learned trial

Judge failed to consider the legal as well as factual position and simply convicted the appellant based on the unreliable evidence of prosecution, which warrants interference.

7. The learned counsel for the appellant has placed his reliance on the following decisions in support of his case:-

(i) III (1999) CCR 109 (SC) (State of Punjab ..vs.. Baldev Singh etc.,);

(ii) (2012) 1 Supreme Court Cases (Crl.) 385 : (2011) 12 Supreme Court Cases 207 (State of Delhi ..vs.. Ram Avtar alias Rama);

(iii) (2013) 2 Supreme Court Cases 67 (Ashok Kumar Sharma ..vs.. State of Rajasthan);

(iv) (2013) 1 Supreme Court Cases (Cri) 933 : (2013) 2 Supreme Court Cases 212 (Sukhdev Singh ..vs.. State of Haryana);

(v) (2013) 4 MLJ (Crl.) 499 (SC) (Gurjant Singh @ Janta ..vs.. State of Punjab);

(vi) (2014) 5 Supreme Court Cases 345 (State of Rajasthan ..vs.. Parmanand and another).

8. According to the prosecution, it is an admitted fact that the appellant was intercepted in Anna International Airport Terminal at Chennai on 31.07.2013 and he was in possession of air ticket to Jakarta and also when he reached the security point, at that time, when he was doubted about, the Customs Officials questioned him and as he appears to be severe and nervous, on suspicion, they made a search and found that the slipper was beyond the weight, therefore, they suspected and when it was searched, there was a special designated base in it and they recovered contraband from that slipper in accordance with law and subsequently, it was tested and found as contraband 'ephedrine'. PW.1 took two samples, each weighing 25gm, and also packed and labelled in accordance with the procedures and also sealed the same. After recovery, the appellant was arrested through Mahazar and the arrest was duly informed to their relatives and the contraband was also recovered through the Mahazar. After completing the formalities, he preferred a report under Section 57 of the NDPS Act and based on this report, subsequently, the case was also filed. The report was also filed before the superior official and subsequently, the appellant was produced along with the report before the Special Court. After the investigation, a complaint was filed before the Special Court. After trial, the Special Court, has rightly come to the conclusion that there is no violation of mandatory provisions and the prosecution has established its case beyond reasonable doubt.

9. Heard and perused the records.

10. It is the case of the prosecution that on specific information that the appellant, who bound for Jakarta via Kuala Lumpur by Malasian Airlines Flight - MH0181/31.07.2013, would be smuggling narcotic drugs concealed in his sandals worn by him, the appellant was identified and intercepted at the security area of the departure hall at Anna International Terminal, Chennai Airport. For the specific question whether he was carrying any narcotic drugs on his person or in his hand bag, the appellant replied in negative. As he was found nervous, he was brought to the AIU room situated at the Arrival Hall of Anna International Airport along with his blue and black colour zipper shoulder bag. The appellant, holder of Indian Passport No.H4420824/18.08.2009 was bound for Jakarta via Kuala Lumpur by Malasian Airlines Flight MH0181 dated 31.07.2013; the appellant was having two boarding passes, one for travel from Chennai to Kuala Lumpur and another for travel from Kuala Lumpur to Jakarta, in the name of the appellant. When the appellant was questioned again as to whether he was in possession of any narcotic drugs or controlled substance/contraband, to which, he replied in negative. Not satisfied with his reply, the same was informed to the Superintendent, AIU Hall, who was present there, who in turn, directed PW.1 to arrange for two independent witnesses for further proceedings. As directed, PW.1 arranged for two witnesses and briefed them the details, showed them the appellant, his passport and travel documents. PW.1 also informed them about their intention to search the appellant's package and his person in their presence under the provisions of NDPS Act, to which they agreed and PW.1 introduced the witnesses to the team of officials and the appellant, then he informed, in the presence of the witnesses, the appellant that his package would be examined and searched, for his person search would be conducted under the provisions of the Narcotic Drugs and Psychotropic Substances Act and as per Section 50 of the NDPS Act, he had right to be searched either before the Magistrate or a Gazetted Officer and that the Superintendent was a Gazetted Officer. The appellant agreed to be searched before the said Superintendent (AIU) and PW.1 examined the appellant's hand bag - one blue and black colour zipper shoulder bag, which contains only his personal belongings. Thereafter, PW.1 examined the appellant and conducted examination of his person and during the search, he examined the black and light brown colour stanza sandals worn by the appellant and found them to be unusually heavy, and on suspicion that the same might contain any narcotic drugs or ephedrine etc., PW.1, in the presence of the witnesses and in the presence of the appellant, cut open the said black and light brown colour stanza sandals worn by the appellant and recovered two polythene covers, one from each sandal, containing some white colour crystalline substance suspected to be narcotics drug. The contents of both the polythene covers were

transferred to one 'Flemingo Red and White Duty Free Shop carry bag' and marked as 'P'. A small pinch of powder from the above white colour crystalline substance was taken by PW.1 and tested with Narcotic Field Kit and all of them answered positive for the presence of Ephedrine, a controlled substance under the provisions of the NDPS Act. Therefore, in the presence of both the appellant and the witnesses, he weighed the above said white crystalline powder and the same was weighed to 510gm. The entire 510gm of white coloured granules, suspected to be ephedrine, the controlled substance under the Narcotic Drugs and Psychotropic Substances Act and valued internationally at Rs.5,10,000/-, was seized by PW.1 under the Mahazar. After that, he drew two representative samples of 25gm each in the presence of the appellant and two witnesses and did the packing and sealing of the samples as given in the Mahazar. He also seized one pair of stanza sandals and packing materials used for concealing the substance etc., (Material Objects), travelling ticket (e-ticket), two boarding passes and passport for further action under the NDPS Act. The entire proceedings were conducted as narrated in the Mahazar and was completed on 31.07.2013 at 5.15 hrs. He returned the hand bag - blue and black colour bag to the appellant. The appellant accompanied PW.1 along with AIU team to main Customs House, RSI, where the appellant was placed under arrest under Section 8(c) r/w. 22(c) of the NDPS Act at 13.00 hrs on 31.07.2013, after explaining to him the grounds of the arrest under NDPS Act. Thereafter, he handed over the appellant along with the documents to the prosecution Officer one Santhosh Kumar and assisted him in the prosecution of the appellant and in producing the seized properties before the Chief Metropolitan Magistrate (E.O. - II), Egmore, Chennai and therefore, deposited the properties with the Detention Officer, Customs, International Airport. Thereafter, after the investigation, the prosecution has filed a complaint, otherwise police report, before the Special Court under NDPS Act and the trial Court has also taken cognizance of the offence.

11. In order to prove the case of the prosecution, as already stated, on the side of the prosecution, three witnesses were examined. The Intelligence Officer (AIU - Air Intelligence Unit) was examined as PW.1. He has clearly deposed that on specific information that the appellant, who bound for Jakarta via Kuala Lumpur by Malasian Airlines Flight - MH0181/31.07.2013, would be smuggling narcotic drugs concealed in his sandals worn by him, they identified and intercepted the appellant at the security area of the departure hall at Anna International Terminal, Chennai Airport. For the specific question whether he was carrying any narcotic drugs on his person or in his hand bag, the appellant replied in negative. As he was found nervous, he was brought to the AIU room situated at the Arrival Hall of Anna International Airport. PW.1 arranged

for two witnesses and introduced the witnesses to the team of officials and the appellant and then informed the appellant that his person and his package would be examined and searched and as per Section 50 of the NDPS Act, he had right to be searched either before the Magistrate or a Gazetted Officer and that the Superintendent was a Gazetted Officer. The appellant agreed to be searched before the said Superintendent (AIU) and PW.1 examined the appellant's blue and black colour zipper shoulder bag, which contains only his personal belongings, hence, the same was returned to the appellant. While examining his person, PW.1 examined the black and light brown colour stanza sandals worn by the appellant and found them to be unusually heavy, and on suspicion, PW.1 cut open the said black and light brown colour stanza sandals and recovered two polythene covers, one from each sandal, containing some white colour crystalline substance suspected to be narcotics drug. The contents of both the polythene covers were transferred to one cover and the same was weighed to 510gm. A small pinch of powder from the above white colour crystalline substance was taken and tested and all of them answered positive for the presence of Ephedrine. After that, he drew two representative samples of 25gm each and did the packing and sealing of the samples and obtained signatures from the appellant and the witnesses and he also signed on the pack. The remaining white colour crystalline substance was kept in a polythene cover and taped by adhesive and then kept in a carton box and labelled it. He recovered Boarding Passes, Flight Ticket and Passport from the appellant under spot Mahazar and obtained the signatures of the appellant and the witnesses and he also signed. The Mahazar prepared on 31.07.2013 was marked as Ex.P1, Boarding Pass of the appellant dated 31.07.2013 from Kaula Lumpur to Jakarta was marked as Ex.P2, Boarding Pass from Chennai to Kaula Lumpur dated 31.07.2013 was marked as Ex.P3, ticket dated 31.07.2013 was marked as Ex.P4, passport of the appellant was marked as Ex.P5, old passport of the appellant was marked as Ex.P6, confession statement given by the appellant in the Airport before PW.1 in the presence of witness PW.2 and others dated 31.07.2013 was marked as Ex.P7, confession statement recorded by the Customs Officers was marked as Ex.P8, Chart of the passengers dated 31.07.2013 on the particular flight was marked as Ex.P9. The arrest of the appellant/accused was also duly informed to his wife. The arrest memo dated 31.07.2013 was marked as Ex.P10 and the telegram to the wife of the appellant/accused dated 31.07.2013 was marked as Ex.P11.

12. The evidence of PW.1 was corroborated by PW.2, who has clearly deposed that he was working as salesman in Flemingo Duty Free in the International Airport on 31.07.2013 and when PW.1 asked him to stand as a witness for the proceedings, he also accepted the same and one Shanthikumar also stood as a witness

along with him for the search proceedings conducted by PW.1 on 31.07.2013 in the International Airport.

13. PW.2 has also clearly corroborated the evidence of PW.1 and he was all along with PW.1 i.e., from the search till the arrest and handover before the authorities. He also admitted that he has signed in the Mahazar and he was the witness to all the proceedings. Therefore, the prosecution has proved its case about the secret information received while PW.1 was in duty in the International Airport and he also intercepted the appellant and since the appellant appeared to be very severe and nervous, he suspected and also questioned the appellant whether he was carrying any narcotic drugs on his person or in his hand bag, and during questioning, though the appellant denied, subsequently when belongings were searched at the Terminus, his sandals appeared to be unusually heavy, therefore, suspected and opened it and found the contraband by name ephedrine and also prepared Mahazar and recovered the same. The evidence of PW.1 was corroborated by PW.2. Therefore, all the procedures contemplated under the NDPS Act were complied with.

14. The Scientific Expert was examined as PW.3. She has clearly deposed that the samples were received from the Court for analysis and she found the substance and all the sample packs and also the seals and everything were intact and after examination, she found that the substance is Metha Phetamine Hydrochloride and her report was marked as Ex.P16. So PW.3 herself proved that the recovered contraband from the appellant was Metha Phetamine Hydrochloride (Ephedrine), which is a prohibited substance under the NDPS Act. The appellant has not produced either any licence or permission to possess the contraband. Therefore, he has committed the offence under Sections 8(c) r/w.22 (c) of NDPS Act.

15. The prosecution has also clearly proved through PWs.1 to 3 and Exs.P1 to P17 besides M.Os.1 to 4 that the appellant was in conscious possession and he did not possess any valid licence or permission from appropriate Government or competent authority.

16. Though the learned counsel for the appellant would submit that the mandatory provisions of NDPS Act like Sections 42, 50 and 57 were not complied with, but on reading of the entire evidence of PW.1, who was in duty on the date of occurrence in the International Airport, he received the secret information and immediately, he intercepted the appellant and questioned and thereafter, he proceeded and therefore, the contention of the learned counsel for the appellant is not acceptable since proceedings under Section 43 was done in this case. The appellant was searched before Superintendent of AIU,

who is also the Gazetted Officer. So in the presence of the Gazetted Officer only, the appellant was searched and the belongings of the appellant was searched. Though the Gazetted Officer was not examined in this case, but witness to all the proceedings and the Mahazar was examined as PW.2. In the Airport, that too, in the security area, one cannot expect the public, that too, the passengers as a witness, where the passengers are proceeded to catch the flights and the passengers may not be in a position to stay for hours to give evidence. The reason stated by the learned counsel for the appellant that the independent public was not examined, is not acceptable. Therefore, mere non-examination of any independent public as a witness is not fatal to the case of the prosecution and the non-examination of the Gazetted Officer in the presence of whom, the appellant was searched is also not fatal to the case of the prosecution.

17. PW.1 has clearly deposed about the entire proceedings and PW.2 has clearly corroborated the evidence of PW.1. The appellant has also not denied that he was not in possession of Boarding Passes and Air-Ticket (Exs.P2, P3 and P4), which itself shows that he was present in the Airport on that day and he scheduled to be travelled from Chennai to Jakarta and also he went upto the security area. Therefore, the presence of the appellant on the date of occurrence in the Airport is not disputed and the recovery alone is disputed by the appellant. In this case, from the evidences of PWs.1 and 2, recovery was also clearly proved and the alleged contraband in possession of the appellant was also proved and that the samples contained the substance, viz., Metha Phetamine Hydrochloride (Ephedrine) was also proved through PW.3 and his report. Therefore, in this case, PW.1 prepared the report under Section 57 of the NDPS Act and has produced before the prosecution officer.

18. On reading of the entire materials available on record, this Court finds that the prosecution has proved its case for the offence of the appellant under Sections 8(c) r/w.22(c) of NDPS Act and on reading of the judgment of the trial Court also, the trial Court has found that the prosecution has established its case beyond reasonable doubt and also there is no violation of mandatory provisions of NDPS Act. Therefore, this Court does not find any perversity in the judgment of the trial Court. This Court also finds that the prosecution has proved its case through cogent and reliable evidence and there is no merit in the appeal and the appeal is liable to be dismissed and accordingly dismissed.

19. There is no quarrel with the propositions laid down in the above said decisions referred to by the learned counsel for the appellant. The facts and circumstances involved in those

cases are not identical to the facts of the present case and the facts and circumstance of the present case is entirely different from those cases. Therefore, the decisions relied on by the learned counsel for the appellant are not applicable to the present case.

20. In the result, the Criminal Appeal stands dismissed and the conviction and sentence passed by the learned Principal Special Judge for NDPS Act Cases, Chennai, in C.C.No.25 of 2014 dated 05.09.2014 are hereby confirmed. Consequently, connected Miscellaneous Petition is closed. The period of sentence already undergone, if any, by the appellant/sole accused shall be set off under Section 428 Cr.P.C.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Principal Special Judge for NDPS Act Cases
Chennai.
2. The Assistant Commissioner of Customs
Prosecution Unit (Air)
New Customs House
Chennai - 600 027.

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