

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 09.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.640 of 2014

Chukwuemeka Damasus Chinedu @ Damas

... Appellant

vs.

State represented by
The Intelligence Officer,
Narcotics Control Bureau,
Chennai Zonal Unit, Chennai.
(NCB F.No.48/1/3/2012/NCB/MDS)

... Respondent

The Criminal Appeal has been filed under Section 374(2) of Cr.P.C, praying to set aside the conviction of the appellant in C.C.No.25 of 2012 dated 05.11.2014 by the learned Principal Special Judge, Special Court under EC & NDPS Act, Chennai, by allowing this appeal.

For Appellant : Mr.M.Nallathambi,
Legal Aid Counsel

For Respondent : Mr.N.P.Kumar,
Special Public Prosecutor

JUDGMENT

This criminal appeal has been filed against the judgment of conviction dated 05.11.2014 made in C.C.No.25 of 2012 by the learned Principal Special Judge, Special Court under EC & NDPS Act, Chennai.

2 Case of the prosecution is that while P.W.1/the Intelligence Officer, was on duty, on 11.02.2012, had received a secret information, about the illicit sale of Narcotic Drug cocaine by the appellant/accused and he was staying in Sukavi Guest House, situated at No.18, Boobegum Street, Mount Road, Chennai and was in possession of 122 grams of Cocaine. P.W.1 reduced the same into writing and submitted to his immediate superior the Superintendent, NCB, and after obtaining necessary permission, proceeded to the place of occurrence along with team members with necessary equipments. P.W.1 and the team after reaching the place, introduced themselves with the persons

available in the reception of the said Guest House. The persons, who were present in the reception were requested to stand as witness and they also agreed for the same. Therefore, the police officials along with the witnesses went to room No.203, where the accused was staying and knocked the door, the accused came out. P.W.1 had shown his identity card and also the accused was informed about his right to be searched either before the Magistrate or before the Gazetted Officer and enlightened about Section 50 of the NDPS Act, but the appellant/accused told that it was not necessary to take him to a Magistrate or a Gazetted Officer and instead, stated that the officer himself can do search. When the accused was specifically questioned as to whether he had in possession of any narcotic drug, the appellant/accused handed over a white colour polythene, which contains 122 small packets and it was found that the same is narcotic drug cocaine weighing 122 grams. P.W.1 had drawn out samples M.O.1 & M.O.2 5 grams each and M.O.3 bulk cocaine, packed and sealed and obtained signatures of accused and witnesses and also recovered MOs.4 to 6. Thereafter, prepared recovery Mahazar and since the accused has no valid licence or permit for his conscious possession of cocaine, issued arrest memo Ex.P19 and arrested the appellant/accused. On the next day, P.W.1 was instructed to hand over the papers to P.W.3. Accordingly P.W.1 handed over the proceedings to P.W.3. P.W.6 was instructed to carry out further investigation and he also investigated the matter further and recorded statement of accused under Section 67 of NDPS Act and after completing investigation filed complaint against the appellant/accused, for the offence under Sections 8(c) r/w 29 and 21(c) of NDPS Act, which was taken on file by the learned Principal Special Judge, Special Court under EC & NDPS Act, Chennai, in C.C.No.25 of 2012.

3 Before the trial Court, in order to prove the case of the prosecution, P.W.1 to P.W.6 were examined and Ex.P1 to Ex.P42 were marked along with Material Objects 1 to 6. On the side of the accused, no one was examined and no document was marked.

4 The learned Principal Special Judge, after trial, acquitted the appellant/accused for the offence under Section 8 (c) r/w 29 and found guilty of offence under Section 8 (c) r/w 21 (c) of NDPS Act, 1985 as amended by Act 9/2001, and by judgment dated 05.11.2014, convicted him and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/-, in default, to undergo rigorous imprisonment for a further period of three months.

5 Aggrieved against the judgment of conviction dated 05.11.2014, the accused had preferred the present criminal appeal before this Court.

6 The learned counsel appearing for the appellant/accused would submit that the appellant was not informed about the right to be searched either before the Magistrate or Gazetted Officer and thereby the mandatory provision of Section 50 of NDPS Act was not complied with, which itself is fatal to the case of the prosecution. The statutory right of the accused should not be denied by the police and they have no authority to do the same. Prosecution has stated that totally 122 grams of cocaine was recovered from the appellant/accused and two samples drew out each 5 grams and shown even after taking the samples also there is 122 grams of cocaine available, which is not believable, which creates doubts in the case of the prosecution. Further, prosecution has shown two witnesses for recovery, but, has failed to examine both the witnesses and examined only one witness as P.W.5. Prosecution has failed to prove the statement recorded under Section 67 of NDPS Act. Prosecution has stated that at the time of seizure of contraband, some photographs also seized from the accused, but P.W.3, the Investigating Officer, has failed to prove the fact how the photographs match with the appellant/accused and also prosecution has produced some other photo prints before the Court. The appellant has retracted his statement, recorded under Section 67 of NDPS Act, which was not brought before the Court. The appellant is an innocent Touristor and he was falsely implicated in this case and the appellant is in prison for more than seven years. Hence the learned counsel prays acquittal of the appellant.

7 The learned Government Advocate (Crl.Side) would submit that none of the mandatory provisions contemplated under the NDPS Act had been violated by the prosecution. The Seizure Officer/P.W.1, soon after receiving the secret information, reduced the same into writing and obtained necessary permission from his immediate superior/P.W.4 and proceeded to the place of occurrence. He identified the accused and duly informed the right to be searched either before the Magistrate or before the Gazette Officer, thereby the mandatory provision has been duly complied with. After completing legal formalities, the person who were available in the Guest House, were requested to stand as witness, for which they have also agreed. In the presence of independent witnesses, the appellant handed over the contraband cocaine weighing 122 grams and obtained signatures of witnesses and the appellant in the recovery Mahazar Ex.P12. The samples have also been sent for chemical analyst, who was examined as P.W.2 has clearly spoken that the samples received by her is cocaine, which is prohibited and comes under Narcotic Drug and Psychotropic Substances. Since the appellant/accused, neither had any valid license nor got any permission for possession of totally 122 grams of cocaine, he was in conscious possession of the contraband and thereby committed offence punishable under Sections 8 (c) r/w 20(c) of NDPS Act, 1985. Even though,

prosecution did not examine the other witnesses cited in the Mahazar, but has examined the Receptionist of the Guest House as P.W.5, who has clearly spoken about the recovery of the contraband, which would suffice to prove the recovery. Further, the appellant/accused had voluntarily handed over the contraband, which was proved from his confession statement and he has stated that he has 34 customers. Hence trial Court had rightly appreciated the evidence of prosecution side witnesses and convicted the appellant, which does not warrants any interference of this Court.

8 Heard the rival submissions made by the learned counsel appearing on either side and perused the original records.

9 The main contention raised by the learned counsel for the appellant/accused is that prosecution had violated the mandatory provisions as contemplated under Section 50 of the NDPS Act and the appellant/accused was not informed his right of search. Further prosecution has not examined both the witnesses for Mahazar and has examined only one witness and also the statement recorded under Section 67 of NDPS Act was retracted by the appellant.

10 On a perusal of the records, it reveals that the accused was duly informed about his right to be searched either before the Magistrate or before the Gazetted Officer, but, he told that it was not necessary to take him either before the Magistrate or before the Gazetted Officer and instead P.W.1 himself could make personal search. It is to be noted that the appellant/accused himself has voluntarily handed over the contraband to the Seizure Officer and even though, as contended by the learned counsel that Section 50 has not been complied with, it is not fatal to the case of the prosecution, since the contraband was not recovered from the body of the appellant/accused. Further prosecution has examined P.W.5, independent witness, who is the Receptionist in the Guest House, and also the person, who stayed in Room.No.1. Therefore non-examination of yet another Mahazar witness is not fatal to the case of the prosecution, since prosecution has examined P.W.5, the Receptionist of the Guest House, which would suffice to prove the recovery. This Court does not find any reason to discard the evidence of P.W.5. Further it is seen that the appellant/accused initially stayed in Room.No.207, subsequently shifted to Room.No.203, on the basis of request made by the appellant/accused. Prosecution has recovered the rent receipts for the rooms, in which the appellant stayed.

11 It is stated by the learned counsel for the appellant that P.W.1 totally recovered 122 grams of cocaine and even after taking the samples also there is 122 grams, which is not

possible. But on reading of the evidence of P.Ws.1 and 5, it was only stated that 122 packets have been recovered and in every packet taken samples totally two samples each 5 grams and hence the above contention is not acceptable. Further it is stated that the confession statement of the appellant/accused was retracted, but there was no proof for the same and from the evidence of P.W.4, confession was proved. The evidence of P.W.3, one of the Intelligence Officers, has also corroborated the evidence of P.W.1 and P.W.4. Further recovery has been proved through the evidence of independent witness P.W.5, who is Receptionist of the Guest House and the accused did not challenge the presence of P.W.5, at the time of recovery. On reading of the entire evidence of prosecution witnesses, P.Ws.1 to 6, prosecution has proved its case beyond reasonable doubt and there is no reason to discard the evidence of independent witness P.W.5, who supported the case of the prosecution. The trial Court gone into all these aspects and found the accused guilty. From the oral and documentary evidences, this Court, as an appellate Court, after re-appreciating entire materials, found the appellant guilty of offence under Section 8 (c) r/w 20 (c) of NDPS Act, 1985.

12 In the result, the criminal appeal stands dismissed, judgment of conviction dated 05.11.2014 made in C.C.No.25 of 2012 by the learned Principal Special Judge, Special Court under EC & NDPS Act, Chennai, is hereby confirmed. Trial Court is directed to secure the accused to undergo remaining period of sentence, if any.

13 While parting with the case, I appreciate the services rendered by Mr.M.Nallathambi, learned counsel who appeared on behalf of the appellant/accused, as Legal Aid Counsel. The learned counsel on record for the appellant is entitled for remuneration as per rules.

Sd/-

सत्यमेव जयते
Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

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To

- 1) The Principal Special Judge, Special Court
under EC & NDPS Act, Chennai.
- 2) The Intelligence Officer, Narcotics Control Bureau,
Chennai Zonal Unit, Chennai.

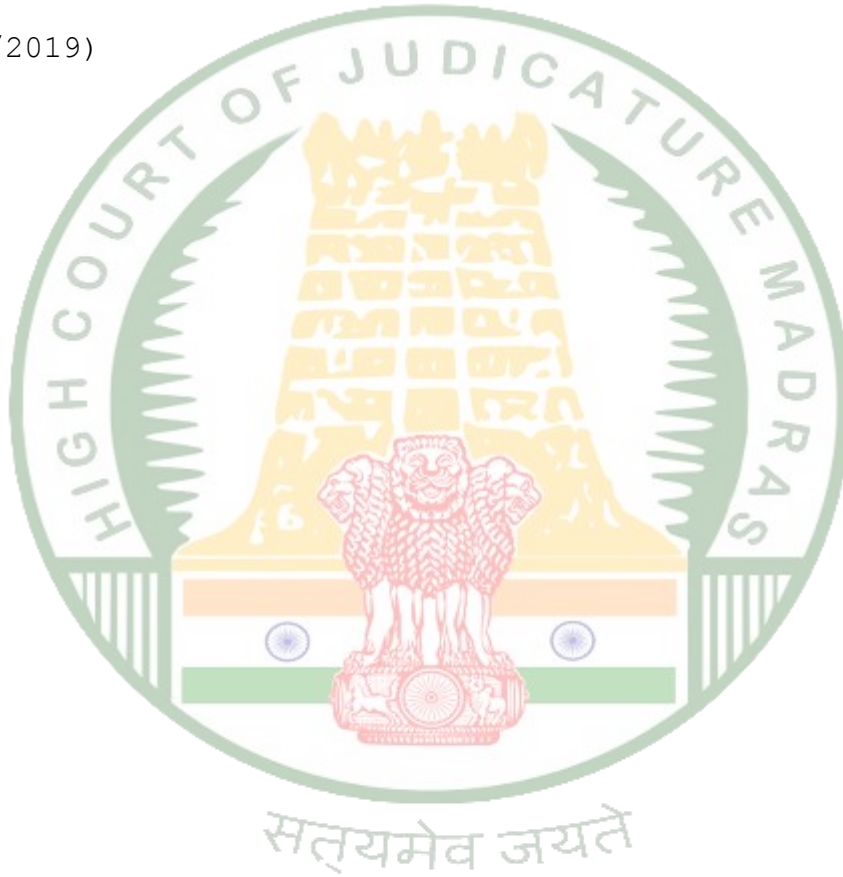
3) The Superintendent, Central Prison, Puzhal, Chennai.

4) The Public Prosecutor, High Court of Madras.

+1 cc to Mr.M.Nallathambi, Advocate, S.R.No.57502

CrI.A.No.640 of 2014

KS (CO)
SSM(10/09/2019)



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