



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 27.09.2019

CORAM

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

CRL.O.P(MD)No.10757 of 2018

and

CrI.M.P(MD)Nos.4847 and 7893 of 2019

Radhamani

... Petitioner / Accused No.6

Vs.

State Rep. by
The Intelligence Officer,
Narcotics Control Bureau,
Regional Intelligence Unity,
Trivandrum.

O.R.No.1/09/NCB/RIU/TVM

...Respondent /Complainant

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C, praying to call for the records in C.C.No.125 of 2012 pending on the file of the Principal Special Court for EC & NDPS Act Cases, Madurai and quash the same as against the petitioner.

For Petitioner : Mr.L.Prabakaran

For Respondent : Mr.C.Arulvadivel @ Sekar
Special Public Prosecutor

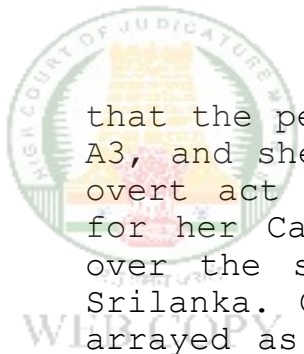
O R D E R

This petition has been filed to quash the proceedings in C.C.No.125 of 2012, on the file of the Principal Special Court for EC & NDPS Act Cases, Madurai, as against the petitioner.

2.The learned counsel for the petitioner submitted that there are totally seven accused, in which, the petitioner herein is arrayed as 6th accused on the charge sheet laid by the respondent herein under the EC & NDPS Act Cases, Madurai.

3.The case of the prosecution is that the respondent seized 1.940 Kgs of Heroin from A1 and A2. The first accused had transported the same from Manakudi to Melamidalam and handed over to the second accused in pursuance of a criminal conspiracy with A3 to A7, to export the same illegally out of India for A7, through Kanyakumari Sea.

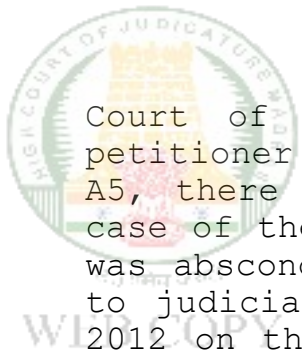
4.The learned counsel appearing for the petitioner submitted
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that the petitioner is arrayed as 6th accused and she is the wife of A3, and she has been falsely implicated in this case. The specific overt act attributed against the petitioner is that, she arranged for her Car driver to take possession of Heroin from A5 and hand over the same to the second accused for dispatching the same to Srilanka. On the basis of the above said allegation, she has been arrayed as A6 in C.C.No.240 of 2009, wherein A1 to A5 faced trial and convicted by the trial Court. On appeals, this Court confirmed the conviction as against the first and second accused and insofar as A3 to A5 are concerned, the conviction and sentences imposed by the trial Court is set aside. Thereafter, on 13.09.2017, the petitioner was arrested and remanded to judicial custody and she was formally arrested based on P.T. Warrant issued by the Principal Special Court for EC & NDPS Act Cases, Madurai, and the case has been split up in C.C.No.125 of 2012 and the trial is now pending.

5.The learned counsel appearing for the petitioner further submitted that the petitioner is also standing in the same footing as that of A3 to A5. This Court, by common judgment dated 31.07.2015, in Crl.A(MD)Nos.120 to 122 of 2014, acquitted A3 to A5. As against the said acquittal, the respondent has not filed any appeal before the Hon'ble Supreme Court of India against the said judgment and therefore, the judgment passed by this Court has become final. This Court observed that only on the basis of the confession statement of the first and second accused, A3 to A5 have been implicated as accused. Even, according to the case of the prosecution, no contraband was recovered from A3 to A5. Insofar as the petitioner is concerned, there is no recovery and no incriminating materials as against the petitioner, except the confession statement of A1 and A2, to corroborate the confession statement of A1 and A2, there is absolutely no material evidence has been produced by the prosecution. He further submitted that the benefit of acquittal is also to be granted to the petitioner herein. Therefore, he prayed for quashing the entire proceedings.

6.The learned Special Public Prosecutor appearing for the respondent would submit that there are totally seven accused, in which, the petitioner is arrayed as 6th accused. Since she absconded, absconding charge sheet has been filed against her and the same was taken cognizance in C.C.No.125 of 2012. The crux of the complaint against the first accused is that he had transported the Heroin from Manakudi to Melamidalam and handed over to the second accused, in pursuance of a criminal conspiracy with A3 to A7, to export the same illegally out of India for A7, through Kanyakumari Sea. As against A1 to A5, the trial has already been commenced and the trial Court convicted and sentenced them. As against the conviction, A1 to A5 preferred appeals before this Court, in which, the appeals filed by A3 to A5, viz., Crl.A.(MD) Nos.120 to 122 of 2014 were allowed and insofar as A1 and A2 are concerned, this Court dismissed the appeal. Against the said conviction, A1 and A2 have preferred SLP before the Hon'ble Supreme



Court of India and the same was also dismissed. Though the petitioner contends that she is on the same footing as that A3 to A5, there are incriminating materials as against her to prove the case of the prosecution. Further, he submitted that the petitioner was absconded and only on 13.09.2017 she was arrested and remanded to judicial custody. Now, the trial is pending in C.C.No.125 of 2012 on the file of the Principal Special Court for EC & NDPS Act Cases, Madurai. Therefore, he sought for dismissal of the quash petition.

7.Heard the learned counsel for the petitioner and the learned Special Public Prosecutor appearing for the respondent.

8.There are totally seven accused, in which, the petitioner is herein arrayed as 6th accused. Since the petitioner/A6 was absconded, final report was filed as against A1 to A5 and the same has been taken cognizance in C.C.No.240 of 2009. The trial Court convicted and sentenced them and as against which, A1 and A2 preferred appeals in C.A.Nos.118 and 119 of 2014 and A3 to A5 preferred Crl.A(MD)Nos.120 to 122 of 2014. This Court, by a common judgment dated 31.07.2015, acquitted A1 and A2 for the offence under Section 8(c) r/w. Section 28 and Section 8(c) r/w. Section 29 of the Act and confirmed the conviction and sentence for the offence under Section 8(c) r/w. Section 21 of the Act, but reduced the default sentence to one month. A3 to A5 were acquitted of all the charges. Against the said conviction, A1 and A2 have preferred SLP before the Hon'ble Supreme Court of India and the same was also dismissed. As against the acquittal order of A3 to A5, the State did not prefer any appeal before the Hon'ble Supreme Court of India. While allowing this appeal, this Court in **K.Velu and Others Vs. State through the Intelligence Officer Narcotics Control Bureau, Regional Intelligence Unit, Trivandrum, reported in (2015) 4 MLJ (Crl.)** has held as follows:

'10. So far as the accused Nos.3 to 5 are concerned, no contraband was recovered from them. They were also not found anywhere near the place of occurrence. As rightly pointed out by the learned Senior Counsel, they have been implicated as accused based on the confession statements said to have been made by the accused Nos.1 and 2 under Section 67 of the Act to PW-9. These two statements, being the confessions of the co-accused, could, of course, be used against the accused Nos.3 to 5, as provided in Section 30 of the Evidence Act. But, the question is how to approach these statements given by the accused Nos.1 and 2 as against the accused Nos.3 to 5.



11. In *Kashmira Singh's* case, cited *supra*, while dealing with the scope of Section 30 of the Evidence Act, has held as follows:-

"The confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshall the evidence against the accused excluding the altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then, of course, it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept".

12. In the instant case, applying the above dictum if we marshall the entire evidences let in by the prosecution, it could be found that absolutely, there is no other evidence against the accused, except the confession statements of the accused Nos.1 and 2. Though it is stated that the accused Nos.1 and 2 had frequent phone calls to the accused Nos.3 to 5, the call details produced under EX-P58 do not reflect the same. There is no evidence that the accused Nos.3 to 5 had used the Cell Phone from Thunkur Prison. Thus, the prosecution has left with the statements made by the accused Nos.1 and 2 alone to prove the offence against the accused Nos.3 to 5. As I have already pointed out, as per the dictum laid down by the Hon'ble Supreme Court in *Kashmira Singh's* case, these two statements, being the confessions of the co-accused, cannot be the foundation for convicting the accused Nos.3 to 5.

17. In the instant case, as I have already pointed out, on marshalling of the entire evidences available on record, other than these two confession statements said to have been made by the accused Nos.1 and 2, I find that there is absolutely nothing on record to even *prima facie* show that there was conspiracy between the accused Nos.1 to 5. In the absence of the proof of



existence of the conspiracy, as has been held by the Hon'ble Supreme Court, it is not possible to invoke the aid of Section 10 of the Evidence Act and therefore, the statements made by the accused Nos.1 and 2 under Section 67 of the Act cannot be used against the accused Nos.3 to 5 by invoking Section 10 of the Evidence Act.

21. I have considered the above submissions. In the said case, the Hon'ble Supreme Court, after having referred to Nalini's case, has held that in order to open the lock of the Section 10 of the Evidence Act, the first condition is proof of the existence of the reasonable ground to believe that the conspirators had conspired together to commit the offence. As I have already concluded, in the instant case, there is no evidence at all on record to make out a prima facie case to show the existence of such conspiracy so as to unlock Section 10 of the Evidence Act and to operate the same. In such view of the matter, I have to hold that in the instant case, the confession statements said to have been made by the accused Nos.1 and 2 cannot be used against the accused Nos.3 to 5 by operating the Section 10 of the Evidence Act.

26. In the instant case, though technically, they were arrested after they made the confession statements on appearing before P.W.9 on summons, on that score, it cannot be held that the conspiracy continued when they made the confession statements before P.W.9. As has been held in Nalini's case (cited supra) the conspiracy will continue either until it is accomplished or it is frustrated or abandoned. In this case, assuming that there was a conspiracy hatched between A1 to A5 earlier, when the contraband was seized from A2 at the place of occurrence, the said conspiracy got frustrated as thereafter the accused were not free to take forward the conspiracy to accomplish their common intention. Thus, at the time when these confession statements were made by accused 1 and 2, the conspiracy was not in force and therefore these statements cannot be used under Section 10 of the Evidence Act against the accused 3 and 4 as substantive evidence, and therefore, these statements would not fall within the ambit of Section 10 of the Evidence Act. On this score also, the said statements cannot be made use of against the accused Nos.3 to 5. If these two



confession statements of the accused Nos.1 and 2 are excluded from consideration as against the accused Nos.3 to 5, it emerges that absolutely, there is no evidence against the accused Nos.3 to 5 to prove the charges framed against them. Thus, I hold that the prosecution has failed to prove the charges against the accused Nos.3 to 5 and therefore, they are entitled for acquittal''.

9. Even according to the case of the prosecution, the petitioner / A6 also stands on the same footing as that of A3 to A5. Therefore, the findings of this Court in Crl.A(MD)No.120 to 122 of 2014 are also applicable to the petitioner herein.

10.In this regard, it is relevant to rely on the judgment reported in **2007-1 L.W.(Crl.) 514 - Tamilmaran Vs. The State rep. by Inspector of Police, Paravakottai Police Station, Mannargudi Taluk, Thiruvarur District**, wherein, this Court has held as follows:

"7. This Court is of the considered view that there is much force on the contention put forward by the learned senior counsel to the effect that the learned trial Judge having disbelieved the prosecution case in toto no useful purpose would be served by putting the petitioner to undergo the ordeal of trial on the basis of the very same set of evidence. It is also pointed out by the learned senior counsel that even the defacto complainant himself turned hostile giving a total go-by to his earlier version and there is no other material available on record to implicate the petitioner. The learned senior counsel has rightly placed reliance on the decision of the Delhi High Court in a case in **Sunil Kumar v. State** reported in **2000 (1) Crimes 73** wherein it is held as follows:

"3. The question thus is as to whether in the face of the judgment of acquittal the petitioner should still be permitted to undergo the ordeal of a trial. In **Sat Kumar v. State of Haryana (AIR 1974 SC 294)**, it was held that there is no rule of law that if the Court acquits some of the accused on the evidence of a witness raising doubt with regard to them the other accused against whom there is absolute certainty about his complicity in the crime based on the remaining credible part of evidence of that witness must be acquitted. (See also **Har Prasad v. State of Madhya Pradesh (AIR 1971 SC 1450)**,



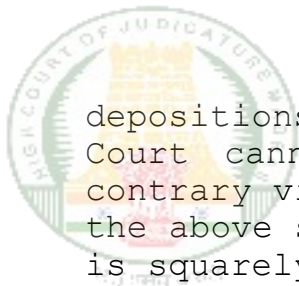
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Makan Jivan v. State of Gujarat (AIR 1971 SC 1797) Mohd. Moin Uddin V. State of Maharashtra (1971 S.C.C. (Cri.) 617). But where the evidence against all the accused persons is inseparable and indivisible and if some of the accused persons have been acquitted, the remaining accused persons cannot be treated differently on the basis of the same evidence.

4. On perusal of the Judgment of acquittal dated 19.01.1998 it appears that the deceased Balwan Singh met with a homicidal death owing to burn injuries sustained by him has not been disputed by the accused persons. The evidence against the accused persons mainly consists of the evidence of the eye-witnesses, namely, Karan Singh (PW2) and Smt. Asha Rani(PW-5) (Wife of the deceased Balwan Singh) besides the dying declaration (Ex.PW-13/a) of the deceased Balwan Singh. Both the said witnesses have not supported the prosecution case and so they have been declared hostile by the prosecution. Eliminating the evidence of the said eye-witnesses, there remains the dying declaration (Ex.PW.13/A) of the deceased Balwan Singh, which has been disbelieved by the learned Addl. Sessions Judge. It would, therefore, appear that the accused persons, namely, Jangli Tyagi, Balbir Singh, Anil Kumar Tyagi and Sushil Kumar Tyagi were acquitted on the ground of insufficiency of evidence. Thus, the evidence adduced in the case against all the accused persons is inseparable and indivisible and that being so the petitioner cannot be treated differently on the basis of the said evidence. In this view of the matter, there is no prospect of the case ending in conviction against the petitioner and the valuable time of the Court would be wasted for holding trial only for the purpose of formally completing the procedure to pronounce the conclusion on a future date. If the Court is almost certain that the trial only would be an exercise in futility or sheer wastage of time, it is advisable to truncate or ship the proceedings at the stage of Section 227 if the Code itself."

11. Further, this Court and various High Courts repeatedly held that the acquittal of the other co-accused, after considering the

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depositions and holding their evidence to be unreliable, the trial Court cannot re-assess their depositions once again and take a contrary view. Therefore, this Court is of the considered view that the above settled proposition of law laid down in the above decision is squarely applicable to the case on hand.

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12. In the present case, except the petitioner, other accused viz., A2 to A5 have been tried for the charges and acquitted in Crl.A(MD)No.120 to 122 of 2014, by this Court by the judgment, dated 31.07.2015, disbelieving the case of the prosecution holding that the prosecution has failed to prove the charges beyond reasonable doubt. The petitioner being A6 is also standing on the same footing like the other accused persons. Under these circumstances, no useful purpose would be served to make the petitioner to undergo the ordeal of imprisonment.

13. In view of the above discussion, this criminal original petition is allowed and the proceedings in C.C.No.125 of 2012 pending on the file of the Principal Special Court for EC & NDPS Act Cases, Madurai, is quashed. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar()

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Sub Assistant Registrar(CS)

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To

1. The file of the Principal Special Court
for EC & NDPS Act Cases, Madurai
2. The Intelligence Officer,
Narcotics Control Bureau,
Regional Intelligence Unity,
Trivandrum.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

+1CC TO MR.C.ARUL VADIVEL @ SEKAR, Advocate Sr. No.90028
+2CC TO MR.G.ANBU SARAVANAN, Advocate Sr. No. 90038

CRL.O.P(MD)No.10757 of 2018
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