

IN THE HIGH COURT OF JUDICIATURE AT MADRAS

Reserved on : 21.02.2020

Pronounced on : 10. 03.2020

CORAM :

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Crl.A.No.317 of 2019

Ashok Kumar ... Appellant /
Accused

VS.

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

... Respondent /
Complainant

Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, against the conviction and sentence passed by the learned Special Judge, II Additional Special Court under NDPS Act, Chennai-104, in C.C.No.39 of 2009 dated 08.04.2019.

For Appellant : Mr.G.Ravikumar

For Respondent : Mr.N.P.Kumar
Special Public Prosecutor
for NCB cases.

JUDGMENT

R.PONGIAPPAN, J.

This appeal under Section 374(2) of the Code of Criminal Procedure (in short, be called as "Cr.P.C.") has been filed arising out of the judgment dated 08.04.2019 passed by the learned Special Judge, II Additional Special Court under NDPS Act, Chennai-104, in Calendar Case Trial No.39 of 2009, convicting the appellant for the charge under Section 8(c) r/w 21(c) of the Narcotic Drugs and Psychotropic Substance Act (hereinafter referred to as "NDPS Act") and sentenced to undergo 30 years rigorous imprisonment alongwith fine of Rs.3,00,000/- and in default to suffer 2 years rigorous imprisonment in addition.

2. As per prosecution allegation, on the date of incident i.e. 23.01.2009, the Intelligent Officer, NCB, Chennai, Thiru.R.Muralidharan [PW2], has received information about the trafficking of 44 Kgs of Heroin in Tata Sumo vehicle bearing Regn.No.TN22 B 9597 by one person viz. Ashok Kumar, who is running a guest house in the name and style of M/s.Singing Fish Guest House. He recorded the information and submitted the same to the Superintendent and on instruction given by the Superintendent, went to M/s.Singing Fish Guest House and gave summons under Section 67, enquired Ashok Kumar and recorded his statement. Further, he executed the non-bailable warrant, intimated the execution of arrest to his father through phonogram and prepared a remand report. As per the order of the Court, lodged the said Ashok Kumar in the Central Prison.

3. During the financial investigation, PW2 went to Bank of Maharashtra, Thiruvannamiyur Branch along with PW1 and submitted a letter [Ex.P16] to PW4, C.S.Natarajan, who is the then Senior Branch Manager, Bank of Maharashtra. On receipt of the letter, PW4, furnished written details for the letter submitted under Ex.P16. The particulars furnished by PW4 was marked as Ex.P17. Subsequently, on 31.01.2009, PW2-Muralidharan submitted one another letter [Ex.P18] to the Deputy Manager-Miss.A.Radha. In response to the letter dated 31.01.2009, PW4 sent a reply on 24.02.2019 under Ex.P19. Consequently, on 27.02.2009 at about 11.30 hrs, alongwith Deputy Manager Miss.A.Radha, PW6-S.Saravana Kumar, PW5-K.Varadharajan and one R.Prakash, who was a room boy in M/s.Singing Fish Guest House, Locker having serial No.B1, was opened and found the contraband [M.O.4]. On examination, it was found that the contraband found in the locker, which belongs to accused is the Heroin under NDPS Act. It was further found out that the contraband was weighing about 1.140Kgs. After conducting all formalities, the offence was registered. In the investigation done, as per the provisions of NDPS Act, the prosecution found that the accused committed the offence, however, challan was filed in the competent Court, wherein charges under Section 8(c) r/w 29, 21(c) and 28 of NDPS Act, were framed against the accused who abjured the guilt and took the defence of false implication.

4. The trial Court after recording the evidence of the witnesses, said the charges framed have been proved beyond reasonable doubt, therefore, convicted the appellant under Section 8(c) r/w 21(c) of the NDPS Act, by the impugned judgment. The Session Court while sentencing the accused observed that the appellant is the second time convict, therefore, as per Section 31 of the NDPS Act, punished him further to the extent one half period of the maximum term of sentence, i.e adding sentence of 10 years in the maximum sentence and awarded the sentence of 30 years along with an

amount of fine of Rs.3,00,000/- and in default 2 years rigorous imprisonment.

5. The learned counsel appearing on behalf of the appellant submits that accused is in custody from the date of incident i.e. 23.01.2009 to till date and he has served the actual sentence of more than 11 years. In such circumstances, the appellant do not wish to challenge the findings of conviction on merit and on the point of sentence enhanced being previous convict with the aid of Section 31 of the NDPS Act, without framing charge in view of the provisions as contained under Section 211(7) of the Cr.P.C., and without following the procedure prescribed, he would contend that the sentence awarded to appellant is unsustainable. He would specifically contend that without framing the charge under Section 31 of the NDPS Act and following the procedure, the sentence as directed adding one half time of the maximum term of the sentence is contrary to law. Therefore, he prayed that on considering the aforesaid, the appeal may be allowed in part, releasing the appellant from the jail.

6. On the other hand, learned Special Public Prosecutor for NCB cases, though opposed the prayer but looking to the provisions of Section 31 of the NDPS Act and Section 211(7) of the Cr.P.C., urged that this Court may consider the provisions of law and pass appropriate order.

7. On considering the rival submissions made by the learned counsel appearing on either side, and on perusal of the records, we are of the view that the finding of conviction for the charge under Section 8(c) r/w 21(c) of the NDPS Act is based on legal evidence and in accordance to law. At this stage, learned counsel for the appellant has not pressed this appeal on merit, therefore, this appeal challenging the findings of conviction under 8(c) r/w 21(c) of the NDPS Act, is dismissed and those findings are affirmed.

8. Now to advert the argument that the trial Court while passing the sentence with the aid of Section 31 of the NDPS Act for 30 years without following the procedure, the record of trial is perused, by which it reveals, the Court relied upon the previous case i.e. C.C.No.27 of 2003, in which, it is mentioned that previous also similar offence was registered against the accused in which he was convicted. In fact, the copy of the judgment of the said case is not brought on record to afford an opportunity to the accused. The case records do not disclose that any appeal against the said judgment was filed by the appellant and what was its fate.

9. Mainly on the basis that the recovery, which connected this case, is subsequent to the said offence, the trial Court has concluded that the present appellant is the second convict. To decide all the factual contention, it was incumbent on the Court to frame the charge under Section 31 of the NDPS Act, showing all details of the previous conviction, and afford an opportunity to the accused to defend himself and decide whether he is previously convicted for the similar offence. After such finding of previous conviction, different sentence, for a subsequent offence may be passed. In this regard, Section 211 of the Cr.P.C. is relevant, however, it would be fruitful to reproduce Section 211(7) of the Cr.P.C, which reads as thus :-

"211(7) - If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence, the fact, date and place of the previous conviction shall be stated in the charge; and if such statement has been omitted, the Court may add it at any time before sentence is passed."

10. On perusal of the aforesaid, if the sentence of the accused is required to be enhanced due to his previous conviction or to give him punishment of different kind for subsequent offence and to prove previous conviction which may affect the punishment, the charge shall be framed stating the date and place of previous offence and the detail of conviction, though such charge may be added at any time before sentence is passed.

11. Section 298 of the Cr.P.C. prescribe a procedure to prove the previous conviction or acquittal. The said provision is also relevant, however, reproduced as thus :-

"298. Previous conviction or acquittal how proved
- In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force -

(a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was held, to be a copy of the sentence or order, or

(b) In case of a conviction, either by a certificate signed by the officer in charge of the jail

in which the punishment or any part thereof was undergone, or by production of the warrant of commitment under which the punishment was suffered, together with, in each of such cases evidence as to the identity of the accused person with the person so convicted or acquitted."

12. Bare perusal of the aforesaid, in addition to any other mode provided by any law for the time being in force in any inquiry, trial or other proceeding, a previous conviction or acquittal may be proved by way of extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was held on producing a copy thereof or otherwise either by certificate signed by the officer in charge of the jail in which the punishment or any part thereof or by production of the warrant of commitment under which the punishment was suffered.

13. In each of the said cases evidence as to the identity of the accused person with the person so convicted or acquitted must be brought on record. It is relevant to point out here that akin to the provisions contained under Section 31 of the NDPS Act, Section 75 of the IPC also prescribe altogether pari materia provision in case the accused committed an offence punishable under Chapter XII or Chapter XVII of the IPC.

14. In the said context, applying the abovesaid provisions contemplated in Cr.P.C and other laws, it is necessary for the trial Court to frame a separate charge in respect to the first conviction after mentioning the date, time and place of such offence, before convicting the accused with enhanced punishment.

15. In this case, the said procedure is not followed and by merely mentioning the earlier case, registered and pending against the appellant, the trial Court convicted him. Further set off is also allowed from the date on which the accused was arrested in the earlier case.

16. Therefore, awarding punishment under Section 31 of NDPS Act, is purely erroneous in law and unsustainable. In otherwise, offence under Section 8(c) of the NDPS Act, carries the punishment which reads as follows:

"21(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be

less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees”

17. Therefore, on culling out the entire circumstances, we are of the considered opinion that awarding the punishment of 30 years, alongwith fine of Rs.3,00,000/- is not in accordance with the offence committed by the appellant. Therefore, the appeal has to be allowed and sentence is necessarily to be modified.

18. In the said circumstances, we are of the considered opinion that for the offence committed by the appellant, sentencing him to undergo 10 years rigorous imprisonment alongwith fine of Rs.1,00,000/- in default to undergo further period of 1 year rigorous imprisonment, is the appropriate punishment and we order accordingly.

19. In the result, the Criminal Appeal is allowed and the sentence imposed by the the learned Special Judge, II Additional Special Court under NDPS Act, Chennai-104, in C.C.No.39 of 2009 dated 08.04.2019, is modified as stated above. Fine amount, if any paid by the appellant/accused, is directed to be adjusted and the excess amount, if any, is directed to be refunded. Further, as per the evidence of PW1, the appellant was arrested for this case only on 04.03.2009 and therefore, set off is ordered from the said date, under Section 428 Cr.P.C.

20. Since it is stated that pending the criminal appeal, the appellant is in jail, and he has completed ten years of imprisonment, the Superintendent of Central Prison-I, Puzhal, Chennai, is directed to verify the period of detention that the appellant/accused has already undergone and if, he has completed the term now imposed, he is directed to be released forthwith, unless he is required in connection with any other case.

Sd/-
Assistant Registrar

// True Copy//

Sub Assistant Registrar

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To

1. The Special Judge,
II Additional Special Court under NDPS Act,
Chennai-104.
2. The Public Prosecutor,
High Court, Madras.
3. The Intelligence Officer,
Narcotics Control Bureau,
South Zonal Unit,
Chennai - 90.
4. The Superintendent,
Central Prison, Puzhal, Chennai.

+2cc to Mr.G.Ravikumar, Advocate, SR.No.21055.

Judgment in
Criminal Appeal No.317 of 2019

SS(CO)
CSR: 12.03.2020