

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 19.11.2020

Pronounced on : 22.12.2020

CORAM

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Crl.A.Nos.457, 461 & 157 of 2017

Crl.A.No.457 of 2017

Rameshwar ...Appellant/Accused-1

Vs.

The State Rep. By
Intelligence Officer,
Directorate of Revenue Intelligence,
Chennai Zonal Unit,
Chennai - 600 017 ...Respondent/Complainant
(F.No.U/11/48/15/2012 DRI)
Crl.A.No.461 of 2017

1. Badreelal
2. Munnibai
3. Rekha ...Appellants/Accused 2 to 4

Vs.

The State Rep. By
Intelligence Officer,
Directorate of Revenue Intelligence,
Chennai Zonal Unit,
Chennai - 600 017 ...Respondent//Complainant
(F.No.U/11/48/15/2012 DRI)
Crl.A.No.157 of 2017

Manivanan @ Ruban @ Subash ...Appellant/5 Accused

Vs.

The State Rep. By
Intelligence Officer,
Directorate of Revenue Intelligence,
Chennai Zonal Unit,
Chennai - 600 017 ...Respondent/Complainant
(F.No.U/11/48/15/2012 DRI)

COMMON PRAYER: Criminal Appeals filed under Section 374(2) of the Code of Criminal Procedure, against the judgment of

conviction and sentence passed by the learned Special Judge, I Additional Special Court under NDPS Act, Chennai, in C.C.No.42 of 2012 dated 04.02.2017.

For Appellants : Mr.M.S.Charles
in all appeals

For Respondent : Mr.N.P.Kumar
in all appeals Special Public Prosecutor

C O M M O N J U D G M E N T

The appellant in Crl.A.No.457 of 2017, viz., Rameshwar, is arrayed as Accused No.1 in C.C.No.42 of 2012, on the file of the learned Special Judge, I Additional Special Court under NDPS Act, Chennai.

2. Similarly, the appellants in Crl.A.Nos.461 of 2017 viz., Badreelal, Munnibai and Rekha, are arrayed as Accused Nos.2 to 4 and the appellant in Crl.A.No.157 of 2017, viz., Manivannan @ Ruban @ Subash, is arrayed as Accused No.5, in the above referred Calendar Case.

3. Since all these three appeals are arising out of the judgment dated 04.02.2017, rendered in C.C.No.42 of 2012, on the file of the learned Special Judge, I Additional Special Court under NDPS Act, Chennai, they are taken up together, heard and disposed of by a common judgment. For sake of convenience, hereinafter, the appellants are addressed as per their rank in C.C.No.42 of 2012.

4. Before the trial Court, the Accused Nos.1 and 5, stood charged for the offence under Section 8(c) r/w Sections 29, 21(c) and 28 of the NDPS Act. Similarly, the Accused Nos.2 to 4, stood charged for the offence under Section 8(c) r/w Sections 29 and 21(c) of the NDPS Act.

5. By judgment dated 04.02.2017, the learned Special Judge, I Additional Special Court under NDPS Act, Chennai, convicted the Accused Nos.1 and 5 and sentenced them to undergo 10 years of rigorous imprisonment each and to pay a fine of Rs.1,00,000/-, each for the offence under Section 8(c) r/w Section 29, 21(c) and 28 of NDPS Act, in default to undergo 6 months rigorous imprisonment each.

6. Further, Accused Nos.2 to 4, were convicted and sentenced to undergo 10 years of rigorous imprisonment each and to pay a fine of Rs.1,00,000/-, each for the offence under Section 8(c) r/w Sections 21(c) and 29 of NDPS Act, in default to undergo 6 months rigorous imprisonment each. The trial Court further

ordered to set off the sentence already undergone by the accused, under Section 428 of Cr.P.C.

7. Challenging the said conviction and sentence, all the accused are before this Court, by filing the present Criminal Appeals.

8. The case of the prosecution, in brief, is as follows:

(i) On 10.05.2012, around 3.30pm, the respondent received a specific information [Ex.P1] to the effect that Accused No.1, along with Accused Nos.2 to 4 are indulging in trafficking of Narcotic Drugs and they are carrying about 6 Kgs of heroin concealed in the false bottom of the hand bags and that they are travelling in Berth Nos.50, 51, 52 and 53 of S-11 coach of Tamil Nadu Express, reaching Chennai on 11.05.2012 and that Accused No.5 of Chennai would be coming to Walltax Road, near Central Railway Station to collect the contraband from Accused No.1

(ii) Based on the said information, the officers of the respondent went to Platform No.4 of Central Railway station on 11.05.2012, along with independent witnesses and identified the Accused Nos.1 to 4. On enquiry, Accused Nos.1 to 4 admitted that each one of them are having 1.5 kgs of heroin in the false bottom of their bags. As the said Platform No.4, is inadequate to conduct the Mahazar proceedings, they were taken to RPF office at Chennai Central Railway Station, along with the independent witnesses and on the way to RPF office, on enquiry, it was confirmed by Accused No.1 that Accused No.5, is waiting in his car in Walltax Road, to receive the contraband. On knowing the same, a team of officers were sent to secure the Accused No.5 and the officers identified the Accused No.5 and brought to the RPF office and thereafter, Accused No.5 was identified by Accused No.1 before the independent witnesses.

(iii) PW2-Thiru.M.Chenchuraman, along with other officers at the time of Mahazar proceedings dated 11.05.2012 [Ex.P51], seized 6.630kgs of heroin from four bags carried by Accused Nos.1 to 4. The cash and other documents were also seized from them under the cover of Mahazar.

(iv) After the Mahazar proceedings, summons were served on the Accused Nos.1 to 5 and all of them gave their voluntary statement about their involvement and about the earlier trafficking of heroin and the transport and handing over to Accused No.5. On the basis of the seized heroin and the voluntary statements of Accused Nos.1 to 5, they were arrested and remanded to judicial custody. The seized property and seized materials were produced before the Remanding Magistrate and to that effect the learned Magistrate made an endorsement in the remand report.

(v) As per the orders passed by the Remanding Magistrate, the property was taken and produced before the Special Court for NDPS Act cases, Chennai, immediately, after the files received from the Remanding Court, on 24.05.2012.

(vi) On receipt of the case properties, the Presiding Officer of the NDPS Court on 24.05.2012 sent the samples (S1, S3, S5 and S7) to the Laboratory on the same day itself through the Principal Special Court for NDPS Act cases and the remaining seized properties and samples were returned to the department, to be kept in safe custody. The Court sent the samples along with a covering letter and a Test Memo to the Customs Labs to test the samples and for furnishing the report to the Special Court.

(vii) The Customs Lab received the samples and made an endorsement stating that the seals were intact and received from Thiru.Mohamed Ibrahim, Investigation Officer, DRI, on 24.05.2012 itself and to that effect the Chemical Examiner, made an endorsement in the Court letter, which is marked as Ex.P66. Further, after completing the formalities, in respect to the testing of samples by the Office of the Joint Director, Central Revenues Laboratory, Customs House, Chennai, the remnant samples and report were sent to the Principal Sessions Judge, Special Court under EC & NDPS, Chennai. In the report [Ex.39] dated 24.09.2012 sent from the Laboratory, it is stated that the samples forwarded to the Lab is with percentage of Diacetyl Morphine (heroin) with the percentage.

(viii) The report and remnant samples were received on 24.09.2012 and submitted to the Court on 25.09.2012 itself. After completing the investigation, the complaint was filed before the Special Court for NDPS Act Cases and the same is marked as Ex.P86.

9. Based on the above materials, the trial Court framed the charges as above. All the accused denied the same and opted for trial. In order to prove the case, on the side of the prosecution, as many as 14 witnesses were examined as PW1 to PW14 and 86 documents were marked as Ex.P1 to Ex.P86, besides 20 Material Objects viz., M.O.1 to M.O.20.

(i) Out of the said witnesses, PW1-Thiru.S.Vijayakumar, is working as Intelligence Officer in Revenue Intelligence Division. He has stated that on 10.05.2012 at about 3.15pm, when at the time he was in his office, he received an information, in respect to the transportation of heroin in Tamil Nadu Express by the Accused Nos.1 to 4. On receipt of the said information, he recorded the same and after putting his

signature, he handed over the same to one Thiru.A.Selvarajan [PW12], Senior Intelligence Officer, DRI. In the said information, PW12, made an endorsement. The copy of the information received from PW1 was marked as Ex.P1. He has further stated about the search made in the room, wherein Accused No.5 was staying. According to him, Ex.P3 to Ex.P24 were seized from the room, wherein Accused No.5 was staying, under the cover of Mahazar, Ex.P2. More than that, from the same place he recovered M.O.1 to M.O.7. Further in his presence, Accused No.5, gave a statement under Ex.P26.

(ii) PW2-Thiru.Chenchuraman, is working as a Superintendent of Customs Cochin. During the relevant point of time, he was working as Intelligence Officer, DRI in Chennai. He has stated that during the time of occurrence, based on the information given to him by PW12 on 10.05.2012, he and other officers assembled in DRI office on 11.05.2012 at 5.00am and reached the Central Railway Station at 6.00am. They arranged two witnesses viz. Thiru.M.Alagarsamy and Thiru.Sandeep Parashar [PW10], who were working as Inspector and Sub-Inspector of Police, respectively in RPF, Central Railway Station. He has further stated that after the arrival of Tamilnadu Express, they intercepted Accused Nos.1 to 4 and informed the information received to them and on such it was identified that all Accused Nos.1 to 4, possessed 1.5kgs of heroin in their bags. According to him, the envelop and the travel bags used to conceal and transport the heroin were seized and marked as M.O.8 to M.O.15. Further, all the contraband along with the bags were recovered in his presence.

(iii) Further in his presence, Accused No.1, identified Accused No.5. Similarly, Accused No.5 also identified Accused No.1. They prepared representative samples of 15gms each in two sets drawn from P1 to P4 and the same were marked as S1 to S8. Further Election ID Card, PAN Card, Driving License and Indian currency of Rs.1,00,060/- are all recovered from the accused. In this regard, he prepared the Mahazar [Ex.P51].

(iv) In the team formed for securing the accused, PW3-Thiru.P.Sajan Rao Shinde, Intelligence Officer, DRI, Chennai, is one of the member. According to him, seizure of the contraband and the car bearing Regn.No.TN22 AW 2555 owned by Accused No.5, are all taken place in his presence. Further, he is also present during the time of preparing the Mahazar.

(v) PW4-Thiru.R.Santhanakrishnan, Senior Intelligence Officer, DRI, Chennai and PW5-Thiru.Srinivasan, Intelligence Officer, DRI, Chennai, are also the members of the same team. They have spoken about the search made in the room, wherein the

Accused No.5 was staying. Both of them attested as witnesses in the mahazar prepared by Thiru.Vijayakumar, PW1.

(vi) PW6-Tmt.Selvathirumagal, is the Chemical Examiner. She speaks about the receipt of samples from the Court and about the examination of samples. According to her, the samples forwarded for chemical examination are all narcotics under the NDPS Act.

(vii) PW7-Tmt.C.Sulochana, is the Appraiser working in DRI, Chennai. She has spoken about securing of Accused Nos.1 to 4 and about the statement given by them.

(viii) PW8-Thiru.V.Balaji, is working as Intelligence Officer, in DRI, Chennai. He is also one of the member in the team, formed by PW1 for securing the accused and for securing the contraband. He gave evidence, similar to the evidence given by PW7.

(ix) PW9-Thiru.N.Muruganandam is the Senior Intelligence Officer in DRI, Chennai. He speaks about the search made in the room, wherein Accused No.5 was staying.

(x) PW10-Thiru.Sandeep Parashar, the then Sub Inspector of Police, RPF Central Railway Station. He has stated that on 11.05.2012, he himself and one Thiru.Alagarswamy, who is the Inspector of Police, were nominated to be witnesses for the proceedings at Central Railway Station, conducted by DRI under the NDPS Act. He narrated the incident in respect to the securing of the accused and also about the seizure of heroin from the accused.

(xi) PW11-Thiru.P.Rajaganapathy, is also the Intelligence Officer working in the same office wherein PW1 and PW2 are working. He has stated that during the time of seizing the contraband, the same was found in the bottom of bags, which were carried by the Accused Nos.1 to 4. He has also narrated the recovery of contraband in similar to that of PW2

(xii) PW12, Thiru.A.Selvarajan, is also one of the Senior Intelligence Officer in DRI, Chennai. He has received the printed information from PW1 and thereafter, he has also rushed to the Central Railway Station.

(xiii) PW13-Thiru.S.Vasantha Raja, is working as Inspector in 'Q'-Branch, Chennai. According to him, he accompanied the other officers for searching the room, wherein Accused No.5 was staying.

(xiv) PW14-Thiru.Mohammed Ibrahim, is also an Intelligence Officer, DRI, Chennai. He has stated that during the relevant

point of time, he produced the case properties before the NDPS Court, as per the directions of the Remanding Magistrate, E.O.2, along with the Test Memo under Ex.P65. He only collected the statements from the officers who are all participated in the search and after completing investigation, based on the scrutiny of the documents and statements, he filed the complaint against the accused.

10. When the above incriminating materials were put to the accused, under Section 313 Cr.P.C., they denied the same as false. However, in order to prove their case, they neither produced any witness on their side nor marked any documents.

11. Having considered the materials placed before him, and after considering the rival submissions made by the learned counsel appearing on either side, the learned Special Judge, I Additional Special Court under the NDPS Act, came to the conclusion that all the accused are found guilty under the provisions of the NDPS Act and sentenced the appellants, as stated supra. Aggrieved over the said conviction and sentence, all the appellants are before this Court, with these appeals.

12. I have heard Mr.M.S.Charles, the learned counsel appearing for the appellants/accused and also Mr.N.P.Kumar, learned Special Public Prosecutor appearing for the State.

13. The first and foremost contention raised by the counsel appearing for the appellants is that being the fact that NDPS Act is a very stringent Act, which curtails the personal liberty of a person by barring the right of bail and if punished, the person has to undergo the minimum sentence of 10 years, strict proof is required to prove the charges levelled against the accused. Further the evidence of the complainant and other witnesses, requires deep scrutiny and if the evidence of the complainant is slightly unbelievable, the benefit must be given to the accused.

14. After appreciating as above, learned counsel appearing for the appellants/accused further added that in the present case, it is an admitted fact that the contraband alleged to be seized from the Accused Nos.1 to 4 are all by PW2-Thiru.M.Chenchuraman. But the Mahazar prepared for seizing the contraband, was not shown and marked through the seizing officer. On the other hand, the same has been marked by PW8, which gives rise to a genuine doubt on the case of the prosecution.

15. On considering the said submission with the relevant records, PW11-Thiru.Rajaganapathy, admits in his evidence that

the entire seizure Mahazar was done by PW2. Further, the seal has also been affixed only by the said witness in the seized contraband. PW2 has also stated that after sealing the contraband, the seized contraband was handed over to Thiru.N.Muruganandam [PW9] for remanding purpose. The said evidence has also been supported through the evidence of PW7-Tmt.Sulochana.

16. It is true though the said crucial document has been prepared by PW2, the said document i.e., Mahazar has not been marked through PW2, instead of that, the same has been marked through PW8 as Ex.P51. In this regard, PW8 has stated in his cross examination that though the seizure was effected by PW2, in the said Mahazar, he has affixed his signature. The said evidence proves that PW8, is also a party to the document. Therefore, it cannot be said, marking the Mahazar through PW8, in no way affects the character and evidential value of Ex.P51. Therefore, the said contention raised by the learned counsel appearing for the appellants, is not at all relevant to consider the case of the accused.

17. Yet another submission made by the learned counsel appearing for the appellants/accused is that as per the case of the prosecution, the contraband has been recovered from the accused on 11.05.2012 and thereafter, the same has been produced before the Court concerned on 24.05.2012 vide Ex.P65. In the meantime, in respect of the custody, the prosecution has not stated under whose custody the said contraband was available between 11.05.2012 and 24.05.2012. Further, the prosecution has failed to prove the reason for non production of the contraband before the NDPS Court immediately after the seizure.

18. Further, the learned counsel for the appellants/accused added that during the time of initial remand on 12.05.2012, neither Form-91 nor Form-95, has been produced before the Remanding Magistrate for showing that the seized case properties were returned back to be produced before the Special Court under NDPS Act. According to him, these are the reasons that would falsify the case of the prosecution. In this regard, he relied on the decision in State of Rajasthan Vs. Tara Singh, reported on 2011 (11) SCC 559 wherein, at paragraph No.5, our Hon'ble Apex Court has held as follows:

"We find, however, that the second aspect on which the High Court has opined calls for no interference. As per the prosecution story the samples had been removed from the Malkhana on the 26th of February, 1998, and should have been received in the laboratory the very next day. The High Court has, accordingly observed that the prosecution had not been able to show as to in whose possession the samples had

remained from 26th February, 1998 to 9th March, 1998. The High Court has also disbelieved the evidence of P.W. 6 and P.W.9, the former being the Malkhana incharge and the latter being the Constable, who had taken the samples to the Laboratory to the effect that the samples had been taken out on the 9th of March, 1998 and not on the 26th February, 1998. The Court has also found that in the absence of any reliable evidence with regard to the authenticity of the letter dated 26th February, 1998 it had to be found that the samples had remained in some unknown custody from the 26th February, 1998 to 9th March, 1998."

19. Further, the learned counsel for the appellants/accused relied on yet another judgment in Valsala Vs. State of Kerala, reported in 1993 Supp (3) SCC 665, wherein our Hon'ble Apex Court has held in paragraph No.4 as follows:

"4. We have seen the report of the Chemical Examiner and there no doubt it is mentioned that one sealed parcel was received containing a powder and it was analysed to be Brown Sugar. But from the records it is clear and it is also noted by both the courts below that the seized article was produced in the court only on 14.1.88 i.e. after a period of more than three months and there is no evidence whatsoever at all to show with whom the seized article was lying and even assuming that it was in the custody of P.W.6, the Officer-in-charge of the Police Station who seized it, there is again nothing to show whether it was sealed and kept there. The learned Counsel for the State no doubt argued that the provisions of Section 55 of the Act are not mandatory but only directory. We need not go into this legal question in this case. Suffice it to say that the article seized appears to have been not kept in proper custody and proper form so that the court can be sure that what was seized only was sent to the Chemical Examiner. There is a big gap and an important missing link. In the mahazar Ex.P.2 which is immediately said to have been prepared, there is nothing mentioned as to under whose custody it was kept after seizure. Unfortunately for the prosecution even P.W.6 does not say that he continued to keep it in his custody under seal till it was produced in the court on 14.1.88. The evidence given by P.W.6 Police Sub-Inspector, who seized the article is absolutely silent as to what he did with the seized article till it was produced in the court. As a matter of fact he did not produce it in the court. P.W.3, A.S.I. is supposed to have produced the same in the court. But P.W.3 does not say anything about this. It is only P.W.7. the Circle

Inspector who comes into the picture at a later date, who admitted in the cross-examination that the seized article was sent by P.W.3 (A.S.I.) to the court and P.W.7 in his cross-examination further admitted that he did not even see if the recovered material object was sealed but still he claims that he made the necessary application for sending the material object for chemical examination and it is only through P.W.7 that the Chemical Examiner's Report is marked. P.W.7 further admitted that he did not even know when it reached the court. We are constrained to say that the investigation in this case has been perfunctory and on important aspects the evidence of the concerned officers is highly discrepant and unconvincing and does not throw much light. Therefore the evidence adduced is wholly insufficient to conclude that what was seized from the appellant alone was sent to the Chemical Examiner. Though this is purely a question of fact but this is an important link. Both the courts below have not examined this aspect in a proper perspective. No doubt the trafficking in narcotic drugs is a menace to the society but in the absence of satisfactory proof, the courts cannot convict."

20. It is apparent as per the above referred decisions, if the prosecution has not shown a proper explanation in respect to the delay in production of contraband before the Court, the same would be the ground for acquitting the accused.

21. In this regard, the learned Special Public Prosecutor appearing for the State would contend that in the present case, immediately, after the recovery, the samples and the contraband were all produced before the Remanding Magistrate. But, the Remanding Magistrate, with the direction to produce the same before the NDPS Court, returned the same after making an endorsement. Thereafter, all the materials recovered were kept in the safe custody. Therefore, the delay in producing the material objects before the Court is only due to the Court administration, for which the respondent is no way liable.

22. In this regard, on considering the said submissions with the relevant records, PW2 has categorically stated that he seized the contraband and thereafter, as per the report prepared under Section 57 of the NDPS Act, he handed over all the seized properties to the remanding officer for further proceedings. To substantiate the said evidence, the report prepared under Section 57 of the NDPS Act, was marked before the trial Court as Ex.P33.

23. Now, on going through the said document it seems that the said document has been prepared on 11.05.2012 at about 13.30 hours. The copy of the same has been submitted to the Senior Intelligence Officer, DRI, Chennai. Further, the said Thiru.A.Selvarajan [PW12], Senior Intelligence Officer, DRI, Chennai, has made an endorsement for receiving the seized property.

24. Subsequently, in respect to the further action, PW9-Thiru.Muruganandam, has stated in his evidence that after the receipt of the documents and the accused, as per the direction given by his superior officers, he has produced the seized materials and the accused, before the Remanding Magistrate. As per the orders passed by the Remanding Magistrate, all the accused were remanded in Puzhal jail. In respect to the property, as per the directions given by the Magistrate, in order to produce the same before the NDPS Court, he received the same. In support of his evidence, remand report prepared by the PW9 was marked as Ex.P61.

25. Now, on going through the Annexure-II of the remand report which have been marked as Ex.P61, it was mentioned by the remanding Magistrate that all the properties, except Sl.No.14 produced at 6.50am, are returned for producing the same before the regular NDPS Court, Chennai. Thereafter, the same was received by Thiru.R.Srinivasan [PW5] after giving an acknowledgement. Therefore, it cannot be said that the properties recovered, were not immediately produced before the Magistrate. Only after returning of the property by the Remanding Magistrate, the same was kept in the custody of the respondent till 24.05.2012.

26. In this regard, PW9 has further stated that as per the direction of the Court, he received the properties from the Remanding Magistrate and handed over the same, for further proceedings. Further, in respect to the custody of the contraband, from 12.05.2012 to 24.05.2012, nothing was suggested before the prosecution witnesses by the accused as there was a tampering of the contraband. Therefore, in the absence of any denial on the side of the accused, it is presumed that accused himself admitted the custody of the contraband with the respondent police.

27. In this regard, in the judgment of Paulmeli & Another Vs. State of Tamil Nadu Tr. Insp. Of Police, reported in 2014 (13) SCC 90, our Hon'ble Apex Court, has held as follows:

"It is a settled legal proposition that in case the question is not put to the witness in cross-examination

who could furnish explanation on a particular issue, the correctness or legality of the said fact/issue could not be raised. (Vide: Atluri Brahmanandam (D), Thr. LRs. v. Anne Sai Bapuji, AIR 2011 SC 545; and Laxmibai (dead) Thr. L.Rs. & Anr. v. Bhagwantbuva (dead) Thr. L.Rs. & Ors., AIR 2013 SC 1204)."

28. More than that, in respect to the storage of contraband materials, in the judgment in Union of India Vs. Mohanlal and Another, reported in CDJ 2016 SC 081, in paragraph No.15 our Hon'ble Apex Court has held as follows:

"15. The Narcotic Drugs and Psychotropic Substances Act, 1985 does not make any special provision regulating storage of the contraband substances. All that Section 55 of the Act envisages is that the officer in charge of a Police Station shall take charge of and keep in safe custody the seized article pending orders of the Magistrate concerned."

29. Further, after observing as above, our Hon'ble Apex Court gave so many directions, in respect to the storage of property. Since the direction given by our Hon'ble Apex Court is in the year 2016, it is impossible to follow the said instructions in this case, since the alleged occurrence has happened in the year of 2012.

30. Therefore, it was concluded that in the present case, immediately after the seizure, the contraband has been produced before the Remanding Magistrate and thereafter only as per the directions given by the Remanding Magistrate, the contraband was in the custody of police officers. Only after knowing the fact that the documents have reached the NDPS Court from the Remanding Court, the contraband has been produced before the trial Court. Hence, it cannot be said that the contraband has not been immediately produced before the Special Court for NDPS Cases. Even assuming there is a delay, the same is due to the Court Administration. सत्यमेव जयते

31. It is the case of the appellants that the possession of contraband now stated by the prosecution, has not attracted for Accused Nos.3 and 4, for the reason that there is no direct evidence to state that Accused Nos.3 and 4 has accepted to carry the contraband given by the Accused No.1. In this regard, he further added that Accused Nos.3 and 4 are the daughter and wife of Accused No.2 and the Accused No.2, being the sole breadwinner of the family, they cannot go against their father's / husband's words. They are nothing but mere servants of Accused Nos.1 and 2, who have no control over the substance. The test can be determined that during their travel, Accused Nos.3 and 4 cannot act independently against the wish and will of Accused Nos.1 and

2 and therefore, Accused Nos.3 and 4 cannot be held guilty for the possession of the contraband.

32. In this regard, he relied on the judgment in Ram Singh Vs. Central Bureau of Narcotics, reported in 2011 Cri. L.J. 3579, wherein, our Hon'ble Apex Court has held as follows:

"15. Now we proceed to consider the last question, i.e, whether the appellant can be held guilty for being in possession or involved in selling the opium so as to attract the mischief of Section 8/18 of the Act. In sum and substance the confession of the appellant is that he was working in the hotel for the last two months and brought the opium from the house of the hotel-owner to the hotel, where it was being sold in tablets to the truck-drivers. In the confession appellant has not stated or for that matter none of the witnesses have deposed that he was involved in selling the opium-tablets. Therefore, the appellant cannot be held guilty for selling opium. Whether in the state of evidence appellant can be held guilty for possessing the opium only on the ground that he brought the opium from the house of the owner to the hotel is another question which requires adjudication. It is trite that to hold a person guilty, possession has to be conscious. Control over the goods is one of the tests to ascertain conscious possession so also the title. Once an article is found in possession of an accused it could be presumed that he was in conscious possession. Possession is a polymorphous term which carries different meaning in different context and circumstances and, therefore, it is difficult to lay down a completely logical and precise definition uniformly applicable to all situations with reference to all the statutes. A servant of a hotel, in our opinion, cannot be said to be in possession of contraband belonging to his master unless it is proved that it was left in his custody over which he had absolute control. Applying the aforesaid principle when we consider the facts of the present case it is difficult to hold that opium was in possession of the appellant."

33. Now on considering the said submission with the relevant records, it is true only upon the Section 67 Statement, recorded from the accused, respondent police, filed a final report against Accused Nos.3 and 4.

34. However, by following the Tofan Singh's case [Tofan Singh Vs. State of Tamil Nadu [Crl.A.No.152 of 2013 etc, dated 29.10.2020]], now the law is settled that the statement

recorded under Section 67 of the NDPS Act, cannot be used as a confession statement in the trial of offence under the NDPS Act.

35. In response to the said submission, learned Special Public Prosecutor would submit that before the trial Court, PWs.2, 3 and 7 to 12, have categorically stated in their evidence that Accused Nos.1 to 4 individually admitted that they are carrying 1.5kgs of heroin, in the false bottom of their individual bags. From this, it is clear that Accused Nos.3 and 4, knowingly concealed the seized contraband. Furthermore, in the statement, they have stated that in April 2012 they carried contraband and handed over to Accused No.5. Accordingly, Section 35 and 54 of NDPS Act, attracts and therefore, the submission made by the appellants is not having much force.

36. Now on considering the said rival submissions for answering the query now raised by the appellants' counsel, it is necessary and useful to see the following judgments of our Hon'ble Apex Court.

(i) In *Madan Lal and another Vs. State of H.P.*, reported in 2003 (7) SCC 465, at paragraph Nos. 22, 23 and 24, our Hon'ble Apex Court, has held as follows:

"22. The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors.* (AIR 1980 SC 52), to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

23. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

24. As noted in *Gunwantlal v. The State of M.P.* (AIR 1972 SC 1756) possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control."

(ii) In *Dharampal Singh Vs. State of Punjab*, reported in 2010 (9) SCC 608, at paragraph Nos. 13, 14 and 15, our Hon'ble Apex Court, has held as follows:

"13. It needs no emphasis that the expression "possession" is not capable of precise and completely logical definition of universal

application in context of all the statutes. "Possession" is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18 of the Act once possession is established the accused, who claims that it was not a conscious possession has to establish it because it is within his special knowledge. 14. Section 54 of the Act raises presumption from possession of illicit articles. It reads as follows :

"54. Presumption from possession of illicit articles. - In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of -

(a) any narcotic drug or psychotropic substance or controlled substance;

(b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily."

15. From a plain reading of the aforesaid it is evident that it creates a legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the appellants have not been able to account for satisfactorily the possession of opium."

37. Therefore, it is clear that once the possession is proved, the person who claims that it was not conscious possession has to establish it and Section 54 of NDPS Act, where also presumption is available to be drawn from the possession of illicit articles, in this case, Accused Nos.3 and 4 have stated at the time of enquiry in the Railway platform that they are carrying 1.5kgs of heroin in false bottom of their baggage. From that it is very clear that the Accused Nos.3 and 4 are carrying the contraband with the knowledge. Hence, the submission made by the learned counsel for the appellants/accused, is not relevant to hold that Accused Nos.3 and 4, are not in actual possession.

38. The another submission made by the learned counsel appearing for the appellants/accused is that in the test memo and other documents, which have been produced by the respondent, the seal of the DRI is affixed. Usually the seal of the DRI would be in the possession of the senior officers and therefore, affixing the seal of DRI during the time of preparing the test memo and other documents shows that the story put forth by the prosecution, is false in nature.

39. It is true, usually the DRI seal would be in possession of the senior officers in the intelligence office. In this regard, PW2-Thiru.Chenchuraman, has clearly stated in his cross examination that the Senior Intelligence Officer Thiru.A.Selvarajan [PW12] brought the DRI Seal to the spot. Therefore, in this aspect also the submission made by the learned counsel for the appellants/accused, is not having any force.

40. Finally, the learned counsel appearing for the appellants/accused submitted that as per the case of the prosecution, though the information about the Accused No.5 is seen in Ex.P1, no separate team is formulated to apprehend Accused No.5 based on Ex.P1 and whereas, as per the version of PW3, only on the information given by Accused No.1, the respondent came to know that Accused No.5, is also involved in this offence. But in respect of the information given by the Accused No.1, the same has not been reduced in writing nor forwarded to the immediate superior officer as formulated under Section 42 of the NDPS Act and therefore, violation of Section 42 of NDPS Act in respect to Accused No.5, is sufficient to hold that Accused No.5, is falsely implicated in this case.

41. Now, on considering the said submission with the relevant records, it is the case, the evidence given by the respondent side witnesses are all clear that in the residence of Accused No.5, the officers of the DRI seized Rs.3 Lakhs,

Srilankan currency, 5 mobile phones, and 8 SIM cards and other documents. Further the officers seized e-tickets to Sri Lanka, Electronic scale, sealer and plastic covers. From this, it is proved that he is in the habit of smuggling heroin from Chennai to Srilanka and that from his possession a sum of Rs.1,00,060/- and three cellphones were recovered. In respect to the said recovery, during the time of questioning under Section 313 of Cr.P.C., Accused No.5, has not given any explanation. More than that, the respondent police apprehended the Accused No.5 only in the railway station which is a public place. Now in the said circumstances, only Section 43 of NDPS Act would be applicable in respect to the search made on the Accused No.5.

42. More than that, the statement given by Accused Nos.1 to 5 reveals that one week before 11.05.2012, Accused No.5 asked Accused No.1 to bring contraband to Chennai and on 09.05.2012, Accused No.1, informed that they are arriving on 11.05.2012. From this it is proved that Accused No.5, is the main person smuggling the contraband.

43. Further, Section 30 of NDPS Act, is not applicable for Accused No.5, as it is not a preparation by Accused No.5. He with the cash arrived at the Central Railway Station to receive the contraband and he had already booked the ticket to go out of India with the contraband. Hence, Section 30 of NDPS Act, is also not applicable and only Sections 21 (c), 28 and 29, are applicable. Therefore, all the points raised by the learned counsel for the appellants, are not at all sufficient to hold that the appellants are innocent and therefore, I am of the considered opinion that the prosecution has proved its case beyond reasonable doubt in respect to the charges framed against the accused.

44. In the result, all the three Criminal Appeals are dismissed. The judgment of conviction and sentence imposed upon the appellants/accused by the learned Special Judge, I Additional Special Court under NDPS Act, Chennai, in C.C.No.42 of 2012 dated 04.02.2017, is confirmed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Special Judge,
I Additional Special Court under NDPS Act,
Chennai

2. Intelligence Officer,
Directorate of Revenue Intelligence,
Chennai Zonal Unit,
Chennai - 600 017
3. The Superintendent,
Central Prison, Puzhal, Chennai.
4. The Public Prosecutor,
High Court, Madras.+lcc to Mr.*, Advocate, S.R.No.
+4ccs to Mr.M.S.Charles, Advocate, S.R.No.42722

Pre-delivery Common Judgment in
Crl.A.Nos.457, 461 & 157 of 2017

rsi(CO)
rv(27/01/2021)



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