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IN THE HIGH COURT OF JUDICATURE AT MADRAS

[Judgment RESERVED ON : 30.09.2021]

[Judgment PRONOUNCED ON : 21.10.2021]

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

Crl.A.No.4 of 2017

Mohammed Rikas @ Rikaz

...Appellant/Accused

.. Vs ..

State by:

The Intelligence Officer,
NCB-South Zone Unit,
Chennai.

(F.No.48/1/15/2011-NCB/MDS)

...Respondent/Complainant

PRAYER: Petition filed under Section 374 (2) of Cr.P.C, to set aside the conviction of the appellant in C.C.No.17 of 2012 dated 03.11.2016 by the learned Special Judge, II Additional Special Court under NDPS Act, Chennai - 600 104.

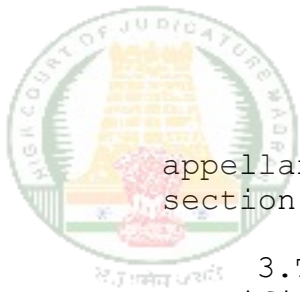
For Petitioner : Ms.Mamta Pandey

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

JUDGMENT

The convicted first accused is the appellant herein.

2. This Criminal Appeal is filed against the judgment of the learned Special Judge, II Additional Special Court under NDPS Act, Chennai dated 03.11.2016 made in C.C.No.17 of 2012 convicting the appellant and sentenced to undergo rigorous imprisonment for a period of 10 years each and to pay a fine of Rs.1 lakh each for the offences under Section 8(c) r/w.21 (c) and 8(c) r/w.28 of NDPS Act and in default to undergo rigorous imprisonment for 6 months each and the substantial sentence shall run concurrently and the period already undergone by the



appellant from 16.10.2011 to 03.11.2016 shall be set off under section 428 Cr.P.C.

3. The case of the prosecution is that on 15.10.2011 on specific information, first accused Mohammed Rikas was intercepted in the Airport and on search the prosecution recovered two parcels containing 1.007 kgs and 1.028 kgs. On summons the said Mohammad Rikas appeared in the office and his voluntary statement was recorded. P.W.1 received another information on 18.11.2011 regarding the arrival of second accused Raja to Central Prison, Puzhal and he was also apprehended by the team of officials and on summons Raja gave a voluntary statement. Both the accused confessed to their guilt and they were remanded to judicial custody. After filing final report, one Ravikumar mentioned in the information was included as accused as per the orders passed in CrI.M.P.No.431 of 2014 dated 28.03.2014 and the said Ravikumar admitted his involvement in this case in the voluntary statement given in another case.

4. The learned Special Public Prosecutor submitted that in this case the prosecution had proved the due compliance of Sections 42(1), 42(2) and Section 50 of the NDPS Act.

5. The prosecution failed to comply with the mandatory provisions of 42(1), 42(2), 50 and 57 of NDPS Act and further argued that no independent witnesses were examined to prove the guilt of the accused and there are several contradictions between the witnesses.

6. To prove the charges prosecution examined as P.W.s 1 to 7 and Exs.P1 to P77 were marked. On the defence side, D.W.1 examined and Ex.D1 is marked and the material objects M.O.1 to M.O.13 were marked.

7. After trial, the learned Special Sessions Judge (NDPS Court) has convicted A1 as stated supra and A2 and A3 were acquitted and other two accused, case has been split against them.

8. Heard Ms.Mamta Pandey, learned counsel appearing for the appellant and Mr.N.P.Kumar, learned Special Public Prosecutor appearing for the respondent.

9. It is the case of the prosecution that on 15.10.2011, on prior intelligence, the sleuths of Narcotic Control Bureau intercepted the petitioner herein at the Anna International Airport when the petitioner was bound for Colombo and searched his luggage from where they recovered 2.035 kgs. of heroin. The petitioner, a Sri Lankan, was enquired and his statement under Section 67 of the NDPS Act was recorded. Samples from the seized



contraband were drawn and were sent for chemical examination. The petitioner was arrested and was remanded to judicial custody. The chemical examination report showed that the substance answered positive for the presence of Diacetylmorphine heroin. Investigation was conducted and complaint was filed against five accused, of whom, two accused were shown as absconding accused.

10. It is the case of the prosecution in the complaint that all the five accused had conspired to traffic heroin from India to Sri Lanka, pursuant to which, the contraband was acquired and was handed over to the petitioner herein for onward transportation to Colombo. The complaint was taken on file as C.C.No.17 of 2012 by the Special Court for NDPS Act cases, Chennai. Charges were framed against the five accused and they pleaded not guilty. The prosecution examined 7 witnesses, marked 77 exhibits and 13 material objects. The accused were questioned under Section 313 Cr.P.C. and they denied the same. On behalf of the accused, Dr.E.Kathiravan, Civil Assistant Surgeon, Central Prison Hospital, Central Prison, Chennai, was examined as D.W.1 and health screening report of the accused was marked as Ex.D1.

11. The trial Court, after considering the evidence on record, convicted and sentenced the petitioner herein, but, acquitted the other accused. The petitioner has been sentenced to undergo 10 years Rigorous Imprisonment and fine of Rs.1 lakh, in default to undergo 6 months Rigorous Imprisonment by judgment dated 03.11.2016, challenging which, the petitioner had filed the present appeal.

12. After making submissions for a while, the learned counsel for the appellant contended that she is not challenging the order of conviction and the sentence as prayed therefor.

13. Further contended that she is confining her argument only in respect of fine alone. The sentence of 10 years Rigorous Imprisonment was awarded in C.C.No.17 of 2012 is going to expire on 16.10.2021 and fine amount of Rs.1 lakh each, for two charges namely 8c read with 21 (c) and 8c read with 28 of N.D.P.S Act in default, to undergo 6 months Rigorous Imprisonment each and relied upon the decision of the Supreme Court in (i) 2017 Vol.II SCC 243 [Santhilal v.State of M.P] and ii) 2017 (1) Drugs Cases (Narcotics) 264 [Avtar Singh alias Tari and another vs. Narcotics Control Bureau] and this Court in CrI.A.Nos.161 and 281 of 2014, dated 07.03.2013 passed by this Court.

14. In the above cited decision, the Hon'ble Supreme Court has held as under:-

(2007) 11 Supreme Court Cases 243 [Shantilal v.State of M.P] where-under, under similar circumstances, the Hon'ble Supreme



Court reduced the Rigorous Imprisonment of three years to Rigorous Imprisonment of six months. The relevant observation of the Hon'ble Supreme Court, in the case, cited supra, reads thus:-

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"9. We are mindful and conscious that the present case is under the NDPS Act. Section 18 quoted above provides penalty for certain offences in relation to opium poppy and opium. Minimum fine contemplated by the said provision is rupees one lakh (fine which shall not be less than one lakh rupees). It is also true that the appellant has been ordered to undergo substantive sentence of rigorous imprisonment for ten years which is minimum. It is equally true that maximum sentence imposable on the appellant is twenty years. The learned counsel for the State again is right in submitting that clause (b) of sub-section (1) of Section 30, Crpc authorizes the Court to award imprisonment in default of payment of fine to one fourth term of imprisonment which the Court is competent to inflict as punishment for the offence. But considering the circumstances placed before us on behalf of the appellant-accused that he is very poor; he is merely a carrier; he has to maintain his family; it was his first offence; because of his poverty, he could not pay the heavy amount of fine (rupees only lakh) and if he is ordered to remain in jail even after the period of substantive sentence is over only because of his inability to pay fine, serious prejudice will be caused not only to him, but also to his family members who are innocent. We are, therefore, of the view that though an amount of payment of fine of rupees one lakh which is minimum as specified in Section 18 of the Act cannot be reduced in view of the legislative mandate, ends of justice would be met if we retain that part of the direction, but order that in default of payment of fine of rupees one lakh, the appellant shall undergo rigorous imprisonment for six months instead of three years as ordered by the trial Court and confirmed by the High Court."

15. In Crl.A.Nos.161 and 281 of 2014, this Court has followed the judgment of Apex Court and considering the question:-

2. When the mandatory minimum amount of the fine as specified in Section 18 of the NDPS Act, 1985, cannot be reduced in view of the legislative



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mandate, whether the award of imprisonment in default of payment of fine can be reduced on account of inability of the accused to pay fine, [despite a decadal substantive term of imprisonment having been suffered,] is the issue raised in these two appeals.

Thereafter, reduced the default period of 6 months for 15 days.

16. This Court in CrI.A.No.561 of 2010 and 57 of 2012 dated 24.07.2013 has also reduced default sentence of one year Rigorous Imprisonment to 15 days of Rigorous Imprisonment.

17. I have gone through the records to find out whether same rational can be applied in this case also.

18. As submitted by the learned counsel for the appellant, the appellant has served the substantial term of the imprisonment of 10 years by 16.10.2021 and he is unable to pay a fine of Rs.1 lakh each. He has being incarceration and it will not be possible for him to comply with direction imposing fine of such amount that could have padi it even before the start of the sentence.

19. The learned Special Public Prosecutor stated that the person is srilankan and unable to ascertain the financial capacity.

20. Admittedly, for the non appearance of the advocate on record, legal aid counsel was appointed by an order dated 28.09.2019 and he was conducting the case till the present counsel appeared today. Hence, taking note of the fact that keeping in view of the facts and circumstances of the case and a fact that the appellant was only a career has not involved in any other case and no adverse remark and behaviour during imprisonment the financial position of the appellant as discussed supra goes to show that he was represented by Legal-Aid-Counsel till this case is taken up for final disposal, I am inclined to grant relief on similar facts and circumstances passed by this Court in the above referred decision wherein the ratio laid down by the Supreme Court has been followed.

21. Accordingly, this Criminal Appeal is partly allowed and the conviction recorded and sentence imposed on the appellant on the each of the sections charges to undergo Rigorous Imprisonment for 10 years is confirmed and the order of payment of fine of Rs.1 lakh each is also upheld.

22. For the reasons recorded supra, the order that in default of payment of fine, the appellant shall undergo Rigorous



Imprisonment for 6 months is reduced to Rigorous Imprisonment for a period of 15 days on each Court to that limited extent only.

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Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

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To

- 1.The Special Judge,
II Additional Special Court under NDPS Act,
Chennai - 600 104.
- 2.The Intelligence Officer,
NCB-South Zone Unit,
Chennai.
- 3.The Superintendent,
Central Prison,
Puzhal, Chennai.
- 4.The Secretary,
Legal Service Authority,
High Court, Madras-104.
- 5.The Public Prosecutor,
High Court, Madras.
- 6.The Section Officer,
Criminal Section (Records)
High Court,
Madras-104.

Cr1.A.No.4 of 2017

EV (CO)
PR (10/11/2021)