

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.09.2021

PRONOUNCED ON : 28.06.2022

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.Nos.18 and 245 of 2019

1. K.Bala
2. Thameem Anwar
3. Mohammad Zahir

... Appellants/A1 to A3 in  
Crl.A.18/2019

B.V.Jeevankumar

... Appellant/A4 in  
Crl.A.No.245/2019

Vs.

State represented by  
The Intelligence Officer,  
Narcotic Control Buerau  
Chennai Zonal Unit,  
Chennai - 77.

...Respondent in both the appeals

Prayer in both the Appeals: These Criminal Appeals filed under Section 374(2) of Code of Criminal Procedure seeking to set aside the judgment of conviction and sentence passed by the learned I Additional Special Judge for NDPS Act, Chennai, in C.C.No.28 of 2016 dated 06.12.2018.

For Appellants : Mr.B.Kumar, Senior Counsel and  
Mr.R.Vijayakumar - Crl.A.No.18/19

Mr.G.Murugendran - Crl.A.245/19

For Respondent : Mr.N.P.Kumar,  
Special Public Prosecutor  
for NCB cases - in both the Appeals

COMMON JUDGMENT

These criminal appeals have been filed against the judgment of conviction passed by the learned I Additional Special Judge for NDPS Act, Chennai, in C.C.No.28 of 2016 dated 06.12.2018.

2 The respondent police registered a case against all the accused for the offence punishable under Sections 8(c) r/w 29, 8(c) r/w 22(c) & 8(c) r/w 28 and against the accused 2 to 4 for the offence under Section 8(c) r/w 27(A) of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter, referred to as "NDPS ACT"). The learned Special Judge taken cognizance of the complaint in C.C.No.28 of 2016 and after completing formalities, since found prima facie case against the appellants, framed charges for the offence under Sections 8(c) r/w 29, 22(c) and 28 of NDPS Act, 1985, against A1 and Section 8(c) r/w 29, 22(c), 27A and 28 of NDPS Act, against A2 to A4.

3 Before the trial Court, in order to prove the case of the prosecution, as many as 8 witnesses were examined as P.W.1 to P.W.8, 69 documents were marked as Ex.P1 to Ex.P69, besides 8 material objects were exhibited as M.O.1 to M.O.8. After completing examination of prosecution witnesses, when incriminating circumstances culled out from the evidence of prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C, they denied the same as false and pleaded not guilty. On the side of the defence, no oral and documentary evidence was let in.

4 After completion of trial, hearing arguments advanced on either side and after perusal of the records, the trial Court found A1 guilty for the offence punishable under Sections 8(c) r/w Section 29(1), 22(c) and 28 of NDPS Act, 1985 and found A2 to A4 guilty for the offence punishable under Sections 8(c) r/w 29(1) and 28 of NDPS Act. Therefore, the learned trial Judge convicted and sentenced all the appellants to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- each for each of the offences, in default, to undergo rigorous imprisonment for a further period of one year for each default.

5 Aggrieved against the judgment of conviction and sentence passed by the trial Court, the appellants have preferred these criminal appeals before this Court.

6 Case of the prosecution is that when Jayamaran, Intelligence Officer, who was examined as P.W.1, was on duty in NCB, Chennai, on 21.12.2015 at about 19.20 hours, received information that one Jeevan of Nellore, who makes Methamphetamine, has already supplied around 5 Kgs of Methamphetamine to his counterparts namely Thameem Anwar and Mohammed Zahir (Oomakka Zahir @ Zahir) in Chennai, who are indulging in trafficking of Methamphetamine between Chennai and Tuticorin along with their carrier K.Bala, who is the resident of Ennore, and the Bala has collected the Methamphetamine and is about to leave for Tuticorin around 20.30 hours tonight through

Vivegam Travels bus from Koyambedu Omni Bus stand and if surveillance is mounted at Koyambedu omni bus stand, the above said persons may be identified and the contraband may be seized.

6.1 Based on the information and after discussion with the Superintendent, NCB, Chennai, constituted a team with the officers of NCB, led by P.W.1 and the team reached at Vivegam Travels Office. P.W.1 introduced himself and the team members to the staff of Vivegam Travels and revealed the information received by him and requested them to stand as witness for the search and seizure, for which they also accepted. P.W.1 and the team along with the witnesses, were watching the platform, where the bus to Tuticorin was parked and after a few minutes a person matching the description of A1 carrying blue and black backpack came for boarding the bus. The officers along with the witnesses approached the said person and enquired about his identity after introducing themselves by showing their I.D. Cards, for which, he replied that his name is Bala and resided in Ennore, Chennai. Thereafter, the Intelligence Officer, revealed the information received by him to the said Bala and asked him as to whether he is in possession of any narcotic drugs, for which, he replied in affirmative and stated that he was having about 5 Kgs of drugs in the bag carried by him. The said Bala A1 was taken to Vivegam Travels Office, since the platform was crowd and the Intelligence Officer explained A1 about his right under Section 50 of NDPS Act, the right of A1 to be searched before the Magistrate or a Gazatted Officer, but, the appellant declined to exercise his rights and stated that the Officer present themselves can search him. A1 opened the said Blue & Black color backpack, took out a bulk black polythene parcel along with some used cloths and handed over to the Intelligence Officer. The Intelligence Officer opened the polythene cover, took out a pinch of white colored crystal from the parcel and tested with the field detection kit brought by him, which answered positive for the presence of Methamphetamine, a psychotropic substance, covered under NDPS Act.

6.2 The contraband was found to weigh 5.150 kgs in net, P.W.1 drew 2 samples about 5 grams each from the contraband and put them in two separate transparent polythene packets, heat sealed and again put in two separate brown coloured envelopes, pasted and wax sealed with NCB seal and marked the same as S1 and S2, remaining 5.140 kgs was wrap sealed with transparent cellophane tape and kept the same in brown colour carton box sealed with NCB seal and marked as P1. The packing materials used for concealing the contraband were kept in the same backpack, tied with red and white cloth tape, wax sealed with NCB seal and marked as P2. The Indian currency of Rs.2,900/- recovered from A1 was heat sealed and kept in a brown colour envelope and marked as P3.

6.3 Thereafter, describing the above, the Intelligence Officer prepared a detailed mahazar and test memo in triplicate on the spot by using the lap-top. In all the seized properties, samples and all the pages of mahazar, the independent witnesses, A1 and the Intelligence Officer had appended their signatures. Further, A1 was summoned under Section 67 of NDPS Act and given voluntary statement that the seized contraband was handed over to him by Thameem anwar and Mohamed Zahir, who were arrayed as A2 and A3. Thereafter, A2 and A3 were summoned and their statements were recorded under Section 67 of NDPS Act, in which A2 stated that he along with A3 purchased the contraband from B.V.Jeevan Kumar, who was arrayed as A4. Mohamed Zahir A3 also reiterated the same in his statement recorded under Section 67 of NDPS Act. Based on the admission made by A1 to A4 in the voluntary statements under Section 67 of NDPS Act and the incriminating materials, they were produced before the Magistrate and were remanded to judicial custody.

7 The case was taken on file in C.C.No.28 of 2016. The learned Special Judge, I Additional Special Court for Exclusive trial of Cases under NDPS Act, Chennai, which was ended in conviction and agrieved over the conviction and sentence, A1 to A3 have filed the criminal appeal in CrI.A.No.18 of 2019 and A4 has filed the criminal appeal in CrI.A.No.245 of 2019.

8 The learned counsel appearing for the appellants/A1 to A4 in both the appeals would submit that there are violations of mandatory provisions under Section 57 of NDPS Act. There was delay in sending the samples for evaluation and seizure was not effected from A2 and A3 and the trial Court ought not to have convicted the appellants under Section 8(c) r/w Section 28 and 29 of NDPS Act, especially, when the trial Court disbelieved the evidence of the prosecution witness as far the offence under Sections 22(c) and 27A are concerned. The learned counsel would further submit that the statement recorded under Section 67 of NDPS Act is not admissible in evidence. Now the proposition law has been changed by the decisions of the Hon'ble Supreme Court, wherein it was held that the statement recorded by the NCB officials under Section 67 of the NDPS Act is not admissible evidence and it is equivalenced to the statement recorded by the police officials under Section 161 of Cr.P.C. This case fully rest upon the confession statement recorded under Section 67 of the NDPS Act from the appellants by the NCB officials and therefore, conviction rendered by the trial Court is liable to be set aside.

8.1 The learned counsel appearing for the appellant would further submit that there are contradictions between the evidence of the prosecution witnesses and the documents marked by the prosecution. The appellants were not properly informed

about their 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. There is no document to show that arrest of the accused was informed to their relative and thereby prosecution has failed to follow the guidelines of the Hon'ble Supreme Court.

8.2 P.W.1, the Seizure Officer, prosecution has failed to examine any independent witness to prove the case of the prosecution. P.W.5, the Driver of the Car, in which A4 said to have reached Chennai, did not identify A4 during evidence and Ex.P66, photocopy of A4 was not marked through P.W.5. Further, it is alleged by the prosecution that A4 stayed at Hotel Royal Regency, periamet on 19<sup>th</sup> and 20<sup>th</sup> of December 2015, but to prove the same, the prosecution did not examine any staff from the said Hotel and the CCTV footage was also not produced by the prosecution. It is to be noted that prosecution has cited one Sathishkumar as witness to speak about the bills, invoices and ID proof, but, he was not examined during trial. The Special Court has failed to consider all the above facts, which are fatal to the case of the prosecution and convicted the appellants erroneously. Hence the judgment of conviction and sentence passed by the trial Court is liable to set aside and the appellants/accused are entitled for acquittal.

9 Mr.N.P.Kumar, learned Special Public Prosecutor for NCB cases 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 information, reduced the same into writing and obtained necessary permission from his immediate superior/P.W.2 and proceeded to the place of occurrence with team. They identified the accused and on enquiry, the appellant/accused informed that he was having about 5 Kgs of drugs in the bag carried by him and subsequently seizure was effected before the independent witnesses P.W.4 staff of Vivegam Travels and prepared seizure Mahazar, which was marked as Ex.P2. Further, A1 voluntarily informed that the seized contraband was handed over to him by Thameem Anwar and Mohamed Zahir, who were arrayed as A2 and A3. On enquiry, A2 voluntarily informed that he purchased the drugs from one B.V.Jeevankumar, who was arrayed as A4. Ex.P40 is the Chemical Analysis Report, which, proved the fact that the recovered contraband is Methamphetamine, a psychotropic substance, covered under NDPS Act.

9.1 Based upon the seizure and the statements, the appellants/A1 to A4 were arrested through Arrest Memos Ex.P20 to 22 and Ex.P27 and the same were duly informed to their parents over telephone and through Exs.P28 to 31. Therefore, all the

mandatory provision of the NDPS Act have been scrupulously followed by the prosecution. P.W.4 had categorically deposed and also spoken about the compliance of the mandatory provisions of the NDPS Act. In this case, convictions have not been recorded solely based on the confession statements recorded under Section 67 of the NDPS Act, but, there are other materials available to prove the guilt of the appellants/A1 to A7. P.W.4, the staff of Vivegam Travels, in which, A1 was about to board, has clearly stated that P.W.1 approached him and sought assistance to identify A1 and after identification, on enquiry, A1 informed that he was in possession of drugs and the same was handed over by A2 and A3. P.W.3, the Assistant Chemical Examiner has also clearly stated that the samples received for test are tested positive for presence of Methamphetamine and her report was marked as Ex.P40. Therefore, there are other materials to prove that the appellants indulged in trafficking of Methamphetamine. Hence trial Court had rightly appreciated the evidence of prosecution side witnesses and convicted the appellants, which does not warrants any interference of this Court.

10 Heard the rival submissions made by the learned counsel appearing for the appellants and the learned Special Public Prosecutor for NCB Cases and perused the original records and the judgment of the Trial Court.

11 This Court, being the appellate Court and the final Court of fact finding, has to necessarily re-appreciate the entire evidence and give its independent findings and accordingly this Court re-appreciated the entire evidence on record and gives its independent findings as follows.

12 In order to substantiate the charges, on the side of the prosecution, 8 witnesses were examined, 69 documents were marked and 8 material objects were exhibited. Out of eight witnesses, P.W.1 is the Intelligence Officer, NCB, received the information on 21.12.2015 and after completing formalities, informed the same to his immediate superior P.W.2. P.W.1 along with the team went to Vivegam Travels and approached P.W.4, staff of the said Travels, and P.W.4 deposed about the identification of A1 and seizure of contraband. P.W.4 clearly deposed that on enquiry, A1 had voluntarily admitted the possession of contraband and stated that the contraband was handed over by A2 and A3. A2, on enquiry, revealed that he purchased the contraband from A4. P.W.5, is the Driver of the Car, in which, A4 reached Chennai, has even though, during evidence, has not identified A4, but, in the statement recorded under Section 67 of NDPS Act, he has clearly identified A4 and spoken about the handing over of the cover containing the contraband to A2 and A3.

13 P.W.3, the Assistant Chemical Examiner, has spoken about the samples received, which subsequently, tested positive for presence of Methamphetamine and her report was also marked as Ex.P40.

14 It is the contention of the learned counsel appearing for the appellants that prosecution had violated the mandatory provisions as contemplated under the NDPS Act and in this case, conviction of the appellants were solely based on the statements recorded under Section 67 of NDPS Act, which, as per the decisions of the Hon'ble High Court is not admissible in evidence. It is further contended that P.W.4 and P.W.5 did not support the case of the prosecution and P.W.5 did not identify A5.

15 On a perusal of the records, it reveals that the appellants were duly informed about the right of the accused No.1 to be searched either before the Magistrate or before the Gazetted Officer through search notice, but, he told that it was not necessary to take him either before the Magistrate or before the Gazetted Officer and instead the Officer himself could make personal search. P.W.4 has clearly spoken about the compliance of the mandatory provisions under the NDPS Act. Therefore there is no violations as contended by the learned counsel appearing for the appellants. Prosecution has proved through Ex.P67 that A4 stayed in the Royal Regency Hotel during the relevant period and P.W.5, the Driver of the Car, has clearly stated that he dropped A4 in the said Hotel. P.W.5 could not identify A4, while he was in witness box, since the occurrence was in the year 2015 and he was examined in the year 2017. Being a Driver, P.W.5 might have met so many customers between the years 2015 and 2017 and therefore, he could not have remembered identity of A4. P.W.4 clearly narrated the identification of A4 and witnessed the seizure and other procedures contemplated under the NDPS Act. In this case, apart from the confession statements recorded under Section 67 of the NDPS Act, there are enough materials available to hold the appellants accused guilty for the offence under the NDPS Act. Further seizure was proved and A1 without any valid license, was in possession of the contraband and he clearly identified A2 and A3. A2 also identified A4, from whom he purchased the Drugs. From the evidence of P.Ws.1 to 5 and the documents marked by the prosecution, it is clear that prosecution has proved the compliance of the mandatory provisions of under the NDPS Act and guilty of the appellants/A1 to A4.

16 In this case, from the documents available, it is very clear that mandatory provision of Section 50 of the NDPS Act had been duly complied with and there was no violation at all. A combined reading of the evidence of P.Ws.1 to 5 and Exs.2, 5 to

8,13, 16, 20 to 22, 24, 27, 40, 43, 45, 51, 55 and 67, prosecution has proved its case beyond all reasonable doubt. Therefore, the trial Court gone into all these aspects and found the appellants/A1 to A4 guilty. From the documentary evidences, this Court, as a first appellate Court, after re-appreciating entire materials, find A1 guilty for the offence punishable under Section 8(c) r/w Section 29(1), 22(c) and 28 of NDPS Act, 1985 and 2 to A4 guilty for the offence punishable under Section 8(c) r/w 29(1) and 28 of NDPS Act.

17 In the result, these criminal appeals stand dismissed, judgment of conviction and sentence passed by the learned I Additional Special Judge for NDPS Act, Chennai, in C.C.No.28 of 2016 dated 06.12.2018 is hereby confirmed. Trial Court is directed to secure the appellants to undergo remaining period of imprisonment, if any.

Sd/-  
Deputy Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To

1. The I Additional Special Judge for NDPS Act, Chennai.
2. The Intelligence Officer, Narcotic Control Buerau, Chennai Zonal Unit, Chennai - 77.
3. The Superintendent Central Prison No.1, Puzhal, Chennai.
4. The Superintendent Central Prison, vellore.
5. The Special Public Prosecutor for NDPS cases, High Court, Madras - 104.

COPY TO  
The Section Officer,  
Criminal Section,  
High Court, Madras-104.

+3cc to Mr.G.Murugendran, Advocate, S.R.No.40014

Crl.A.Nos.18 and 245 of 2019

NR(CO)  
CT/18/07/2022