



CRL.A.Nos.594 of 2013 & 228 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.12.2022

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

CRL.A.Nos.594 of 2013 & 228 of 2014

- 1.Intelligence Officer,
Narcotic Control Bureau,
Chennai Zonal Unit,
Chennai-90. ... Appellant in Crl.A.No.594 of 2013
- 2.Sivanandan ... Appellant in Crl.A.No.228 of 2014
Versus
- 1.Sivanandam
2.K.Vasantharaja @ Chandramohan @ Raja
3.Sivraj @ Raja ... Respondents
in Crl.A.No.594 of 2013
- 4.State by:
Intelligence Officer,
Narcotics Contral Bureau,
South Zonal Unit,
Chennai.
(NCB F.No.48/1/4/2006-NCB/MDS). ... Respondents
in Crl.A.No.228 of 2014

PRAYER in Crl.A.No.594 of 2013: Criminal Appeal filed under Section 377(2) of Criminal Procedure Code, to set-aside the order of acquittal U/S.8(c) r/w 29 & 28 of N.D.P.S Act against A-1 and to set-aside the order of acquittal U/S.8(c) r/w 21(c), 29 & 28 of N.D.P.S Act against A-2 & A-3 made in CC.No.44/06 dated 26.07.2013 on the file of the 1st Addl. Spl. Court for NDPS Act Cases, Chennai.

PRAYER in Crl.A.No.228 of 2014: Criminal Appeal filed under Section 374(2) of Criminal Procedure Code r/w 36-B of NDPS Act, to set aside the conviction of the appellant in C.C.No.44 of 2006 dated 26.07.2013 by the learned Special



CRL.A.Nos.594 of 2013 & 228 of 2014

Judge, I Additional Special Court under NDPS Act, Chennai – 600 104 by allowing this appeal.

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For Appellant in
Crl.A.No.594 of 2013
and Respondent
in Crl.A.No.228 of 2014 : Mr.N.P.Kumar,
Special Public Prosecutor
for NCB Cases

For Appellant in
Crl.A.No.228 of 2014 and
R1 in Crl.A.No.594 of 2013 : Mr.M.S.Charles

For R2 & R3 in
Crl.A.No.594 of 2013 : Mr.C.Samivel

COMMON JUDGMENT

Crl.A.No.228 of 2014 is filed to set aside the judgment of acquittal, dated 26.07.2013 passed in C.C.No.44 of 2006 by the learned Special Judge, I Additional Special Court under NDPS Act, Chennai.

2.Crl.A.No.594 of 2013 is filed to set-aside the judgment of acquittal against A1 for offence under Sections 8(c) r/w 28 and 8(c) r/w 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 and against A2 & A3 for offence under Sections 8(c) r/w 21(c) and 8(c) r/w 28 and 8(c) r/w 29 of Narcotic Drugs and Psychotropic Substances Act, 1985, vide judgment, dated 26.07.2013 in C.C.No.44 of 2006 passed by the learned Special Judge, I Additional Special



Court under NDPS Act, Chennai.

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3.For the sake of convenience and clarity, the appellant in Crl.A.No.228 of 2014 and the respondents in Crl.A.No.594 of 2013 are referred to as Accused, as per their rank, in the charge sheet.

4.Since both the criminal appeals arise out of C.C.No.44 of 2006, this Court decides to dispose of the same, by way of common judgment.

5.In this case, there are totally six accused, wherein, A2, A5 & A6 are absconding. Hence, the case against A2 was split up and numbered as C.C.No.2 of 2009. Similarly, the case against A5 & A6 was split up and numbered as C.C.No.101 of 2006. As a result, the rank of A1, A3 & A4 are rearranged as A1 to A3 respectively.

6.The gist of the case is as follows:-

(i)On 25.01.2006, PW5/the Intelligence Officer received information that A1 from Sri Lanka with the assistance of A2 another Sri Lankan was to smuggle out 2.5 kgs of heroin from Mumbai to Sri Lanka. PW5 recorded the information, forwarded the same to PW8/the Superintendent of Narcotics



Control Bureau. PW8 authorized PW5 to take action on the basis of the information received. Thereafter, PW5 went to customs area in the Departure Hall at Anna International Airport, Chennai, kept the place under surveillance. A1 came there receiving security clearance and while he was about to board Sri Lanka flight, he was intercepted and, was explained the significance of Section 50 of Narcotic Drugs and Psychotropic Substances Act, 1985 (Hereinafter referred to as 'NDPS Act') and his right to be searched in presence of Judicial Magistrate or Gazetted Officer. A1 preferred to be searched by the Intelligence Officer. The baggage of A1 was retrieved and examined. Suitcase was closely examined after emptying its contents. Beneath the bottom of the suitcase, a packet was found concealed in between the bottom and top planks. The packet was cut and opened and a pinch of substance was taken and tested with field kit, which turned positive indicating the contraband was heroin. The packet contained 2.7 kgs of heroin which was seized under mahazar in presence of independent witnesses. Two samples, each weighing 5 grams were collected and marked as S1 and S2. The remaining contraband was packed and sealed. Indian Currency and Sri Lankan Currency recovered from A1. Thereafter, summon was issued to A1 under Section 67 of the NDPS Act. The statement of A1 was recorded by PW3. A1 admitted about the possession and smuggling of contraband and disclosed the particulars about the other accused having



conspiracy with A1.

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(ii) On the basis of information provided by A1, search warrant was issued to carry out search at room No.216, RMC Travellers INN Private Limited. PW4 carried out the search after following the procedures prescribed along with PW6 & PW7. In the said address, three persons were found in the room, they are Sundar @ Sundarraja (absconding accused), A2-K.Vasantharaja @ Chandramohan @ Raja and A3-Sivaraj @ Raja. The said persons were informed about the Section 50 of the NDPS Act with respect to the search. All the accused preferred the officer of the Narcotics Control Bureau to conduct search. During search, an amount of Rs.1,10,000/- (Rupees one lakh and ten thousand only) was recovered from A2 and cellphones and other documents were recovered from the accused. Thereafter, Sundar @ Sundarraja (absconding accused), A2-K.Vasantharaja @ Chandramohan @ Raja and A3-Sivaraj @ Raja were summoned to the Narcotics Control Bureau office under Section 67 of the NDPS Act and each of them gave voluntary statement confirming their involvement in the offence. All the four accused were arrested, contraband seized under mahazar were all produced before the learned Magistrate and samples sent to the chemical analysis.



(iii) In this case, PW1 is the Chemical Analyst, who analysed the samples received from the Court, submitted a report confirming that the samples are Diacetylmorphine (heroin). PW2 is the Scientific Assistant, Forensic Science Department, Chennai, who conducted quantitative analysis, submitted a report that the contraband seized contained 19.27% of Diacetylmorphine. PW3, a Intelligence Officer who recorded the statement of A1. PW4 is another Intelligence Officer, who conducted search at room No.216, RMC Travellers INN Private Limited and arrested Sundar @ Sundarraja (absconding accused), A2-K.Vasantharaja @ Chandramohan @ Raja and A3-Sivaraj @ Raja. PW5 is the Intelligence Officer who first received the information and informed PW8. PW6 and PW7 are the Intelligence Officers, who accompanied PW4 to conduct search. PW9 is the Intelligence Officer, NCB, Mumbai who on receipt of letter from the NCB Office, Chennai, visited Hotel Annapoorna and Muzahir Inn and collected documents confirming that one Raja and Nanda had stayed in the hotel. PW10 is the another Intelligence Officer, NCB, Chennai, who sent letter to the Chief Commercial Manager, Southern Railway and a letter to the Air Sahara Airlines. PW10 sent a requisition to the Superintendent, Trivandrum requesting to conduct enquiry with one Meenakshi, mother of Udhaya @ Udhaya Raja. Thereafter, he sent a letter to the Manager, Barathi Telecom, Chennai to ascertain the call particulars of mobile numbers 9994012068 and



also sent a requisition letter to Mumbai BPL Cellular Limited and ascertained the call particulars of mobile phone 9821818203. Then gave a requisition to Aircell, Chennai and ascertained call particulars of mobile phone 9841549576. PW11 is the Intelligence Officer, NCB, Madurai, who was examined on behalf of Aruldoss, former Intelligence Officer belonged to NCB, South Zone since Aruldoss was medically unfit.

(iv) During trial, on the side of the prosecution 11 witnesses examined as PW1 to PW11 and 74 documents marked as Exs.P1 to P74 and 13 Material Objects marked as MO1 to MO13. On the side of the defence, Ex.D1 alone marked.

(v) After full-fledged trial, the trial Court convicted A1 for offence under Section 8(c) r/w 21(c) of NDPS Act and sentenced to undergo 10 years Rigorous Imprisonment and to pay a fine of Rs.1,00,000/-, in default, to undergo six months Rigorous Imprisonment and acquitted A1 for offence under Sections 8(c) r/w 28 and 8(c) r/w 29 of Narcotic Drugs and Psychotropic Substances Act, 1985. Similarly, A2 & A3 were acquitted for offence under Sections 8(c) r/w 21(c) and 8(c) r/w 28 and 8(c) r/w 29 of Narcotic Drugs and Psychotropic Substances Act, 1985, vide judgment, dated 26.07.2013 in



C.C.No.44 of 2006. Aggrieved against the judgment of conviction and sentence, A1 preferred Crl.A.No.228 of 2014. Aggrieved against the judgment of acquittal of A1 to A3, the NCB preferred Crl.A.No.594 of 2013.

7.The learned counsel for the appellant/A1 in Crl.A.No.228 of 2014 and R1 in Crl.A.No.594 of 2013 submitted that A1 is no way connected with the offence as alleged by the prosecution and he has been falsely implicated in this case. The trial Court failed to take into consideration there is not substantial evidence to prove the guilt of A1. The trial Court primarily proceeded on the voluntary statement given by A1 under Section 67 of the NDPS Act and, failed to look into the fact about statement under Section 67 of NDPS Act is retracted by A1 at the earliest point of time. In this case, no independent witnesses examined, during trial, despite the contraband was seized and recovered in a public place i.e., Anna International Airport. The learned counsel further submitted that in this case, one Aruldoss, Intelligence Officer though cited as LW5 to speak about the steps taken to remand A1 and for producing the contraband before the trial Court forwarding samples to the Forensic Laboratory. Strangely, the said Aruldoss not examined on the side of the prosecution citing his health condition. But, no medical records produced to prove Aruldoss was medically unfit to depose before the trial Court.



8. The learned counsel further submitted that the initial chemical analyst report revealed purity cannot be determined for want of some instrument. But whereas the second sample was taken from the Court in the absence of A1 and the second analysis report revealed the contraband will fall under commercial quantity. Hence, A1 sought to send third sample in his presence to another laboratory, but that was not done for the reason that the contraband got solidified as dry paste. Whatever may be the form of contraband, its chemical composition will not change. The NCB officials failed to keep the seized contraband in a proper storage condition, which proves that the chain of custody has not been properly maintained. As a result, serious doubt caused on the genuineness of the chemical analyst report. He further submitted that the mandatory conditions under Sections 42 & 50 of the NDPS Act not complied. In this case, the trial Court, after ful-fledged trial, acquitted A1 for offence under Sections 8(c) r/w 28 & 8(c) r/w 29 of NDPS Act and also acquitted A2 and A3 for offence under Sections 8(c) r/w 21(c) and 8(c) r/w 28 and 8(c) r/w 29 of NDPS Act. While this being so, the trial Court ought to have given some benefit to A1 insofar as offence under Section 8(c) r/w 21(c) of the NDPS Act and, acquitted him from all charges.



9.The learned counsel further submitted that A1 is inside the prison from 25.01.2006 from the stage of investigation and trial, which is recorded by the trial Court in its judgment. Now, A1 has undergone the sentence of imprisonment imposed and he is released from prison on 25.01.2016. Hence, he prayed this Court to dispose the appeal as infructuous.

10.The learned Special Public Prosecutor for NCB Cases appearing for the appellant in Crl.A.No.594 of 2013 and respondent in Crl.A.No.228 of 2014 made his submissions are as follows:-

(i)The Special Public Prosecutor for NCB Cases submitted that the learned trial Judge after coming to conclusion that the prosecution has proved the guilt of A1 beyond all reasonable doubt and convicted him for offence under Section 8(c) r/w 21(c) of NDPS Act and acquitting for offence under Sections 8(c) r/w 28 and 8(c) r/w 29 of NDPS and further acquitted A2 & A3 for offence under Sections 8(c) r/w 21(c) and 8(c) r/w 28 and 8(c) r/w 29 of NDPS Act is against the evidence, documents and materials. In this case, on receipt of information on 25.01.2006, PW5 went to customs area in the Departure Hall at Anna International Airport, Chennai, kept under surveillance. When A1 came there after security clearance, he was intercepted, his baggage was retrieved, searched thoroughly. Beneath the bottom of the suitcase, a packet was found



concealed in between the bottom and top planks. The packet was cut open and a pinch of substance was taken and tested with the field kit, which turned positive confirming the contraband is heroin. Thereafter, summon under Section 67 of the NDPS Act was served to A1, who received the same, appeared before the NCB official, gave voluntary statement (Ex.P5), which was recorded by PW3. A1 admitted the possession and smuggling of contraband and further disclosed the role played by the other accused. PW4 was deputed to conduct search at room No.216, RMC Travellers INN Private Limited, where A2 and A3 were staying. PW4 along with PW6 and PW7 conducted search, seized the articles including cash of Rs.1,10,000/-, visiting cards, mobile phone and another cash of Rs.95,000/-. All the accused were served with summons under Section 67 of NDPS Act and they appeared before the NCB officials gave voluntary statement (Exs.P32 & P67). Thereafter, all four accused produced for remand and seized articles were sent for chemical analysis.

(ii)PW1 is the Chemical Analyst, who gave report confirming the samples are Diacetylmorphine (heroin). PW2 is the Scientific Assistant, Forensic Science Department, Chennai, who conducted quantitative analysis and submitted a report stating the seized contraband contained 19.27% of Diacetylmorphine. From the confession statements and call detail particulars of



mobile phone seized from the accused, it is confirmed that the accused were in constant touch with each other. They travelled to Mumbai, bought the contraband, then returned to Chennai, from where it was about to be smuggled out to Sri Lanka. At that time, it was intercepted and contraband was seized.

(iii) On the evidence and materials and defence taken by the accused, A1 was convicted for possession of commercial quantity and, was acquitted for the charge of attempt to export the contraband. Despite sufficient evidence available to show that the other accused/A2 & A3 also conspired, actively taken part in procuring contraband, the trial Court acquitted A2 and A3 from all charges. PW9 is the Intelligence Officer, NCB, Mumbai who on receipt of letter from the NCB Office, Chennai, visited Hotel Annapoorna and Muzahir Inn and collected documents confirming that one Raja and Nanda stayed in the hotel. PW10, Intelligence Officer, NCB, Chennai sent letter to the Chief Commercial Manager, Southern Railway and to the Air Sahara Airlines. PW10 sent requisition to the Superintendent, Trivandrum requesting to conduct enquiry with one Meenakshi, mother of Udhaya @ Udhaya Raja. Thus, the evidence collected by NCB officials clearly proved the sequence of events. A1 to A3 gave voluntary statement disclosing their active connivance and participation in obtaining contraband. As per Section 67 of the NDPS Act, the statement given



to NCB officials are admissible. The trial Court ought to have convicted A1 to A3 for the attempt to export the contraband, as well as conspiracy. Hence, he prayed for setting aside the judgment of acquittal passed against A1 for offence under Sections 8(c) r/w 28 and 8(c) r/w 29 of NDPS Act and against A2 & A3 for offence under Sections 8(c) r/w 21(c) and 8(c) r/w 28 and 8(c) r/w 29 of NDPS Act.

11.This Court considered the rival submissions and perused the materials available on record.

12.As regards A1 is concerned, he has been in confinement for 8½ years as on date of the judgment i.e., 26.07.2013. From A1, a brown colour trolley suitcase (MO12) and a white colour polythene cloth packet containing heroin (MO10) seized. This is after the voluntary statement of A1 (Ex.P5). The seized contraband from A1 tested positive as Diacetylmorphine (heroin) and the chemical analyst reports (Exs.P1 & P2) of PW1 & PW2 confirmed the same. In this case, A1 was apprehended at Anna International Airport, Chennai after his security clearance and while about to board Sri Lanka flight. On his admission, his baggage was retrieved, examined and the contraband seized. The contraband was seized in a restricted area, where the entry to all is restricted.



Only the passengers with valid passport, airline ticket and visa are allowed in the restricted area. Though A1 denied his voluntary statement (Ex.P5), he has not denied his presence in the airport in the restricted area with security clearance to board a flight to Sri Lanka. A1's passport (Ex.P16), air ticket (Ex.P17), Boarding Pass (Ex.P18) and luggage and claim tag (Exs.P19 & P20) confirmed that A1 is a checked in passenger on 25.01.2006. The summon under Section 67 of NDPS Act (Ex.P22) and his statement (Ex.P5) corroborated and confirmed the same. Though the statement (Ex.P5), as a whole, might not be admissible, the recovery is based on A1's disclosure. A1's other contention with regard to the mixture of narcotic drugs with other neutral substance and quantity of the neutral substances not taken into consideration, are no more available in view of the authoritative pronouncement of the Hon'ble Apex Court in the case of “*Hira Singh and another Versus Union of India and another reported 2020 SCC OnLine 382*”. Since A1's disclosure leads to recovery and seizure of contraband, the contention of A1 the trial Court solely relied upon the inadmissible statement under Section 67 of NDPS Act is not proper. Hence, the conviction and sentence delivered by the trial Court against A1, dated 26.07.2013 are hereby confirmed.

13.It is now reported that A1 already undergone the period of



imprisonment and a report from Mr.K.Selva Kumar, Grade I Warden No.20, Central Prison, Puzhal, Chennai produced to that effect, wherein it is confirmed that A1 already undergone the period of imprisonment and released from the prison on 25.01.2016. ***Hence, Crl.A.No.228 of 2014 is dismissed as infructuous.***

14.As regards acquittal of A1 for offence under Sections 8(c) r/w 28 and 8(c) r/w 29 of NDPS Act and acquittal of A2 & A3 for offence under Sections 8(c) r/w 21(c) and 8(c) r/w 28 and 8(c) r/w 29 of NDPS Act, are concerned, from the statements of A2 and A3 under Section 67 of NDPS Act, no incriminating material was recovered by NCB officials. The passport, airline ticket, suitcase, Indian and Sri Lankan currencies and mobile phone are the items seized from A2 and A3 at No.216, RMC Travellers INN Private Limited. The specific case of A2 and A3 is that the mahazars and the voluntary statements recorded by PW4 are in English language, but A2 and A3 not conversant with English language, PW4 does not know Tamil language. While that being so, Section 50 of NDPS Act compliance is not accepted. Added to it, PW6 & PW7, the Intelligence Officers have not spoken anything with regard to compliance of Section 50 of the NDPS Act. Thus, in this case, there is clear violation of Section 50 of NDPS Act as regards A2 and A3.



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15. Further, the Hon'ble Apex court in the case of “***Tofan Singh Versus State of Tamil Nadu reported in (2021) 4 SCC 1***” had held that '*the powers conferred on officers empowered under Section 53 of NDPS Act are such that they meet the test of being police officers for the purpose of Section 25 of the Indian Evidence Act. Officers empowered under Section 53 of the NDPS Act are invested with all the powers of investigation and power to file police report in respect of NDPS Act offence. Any statement made to such officer during the course of an enquiry or investigation thus can qualify as a confessional statement. Section 67 would have to be read down so as to conform to fundamental rights, and any such “confessional statement” under Section 67 would not be admissible in evidence to convict the accused.*'

16. The confession alone is not sufficient to infer the guilt in the absence of recovery of contraband from A2 & A3. Thus, Section 67 of the NDPS Act to be read down so as to conform to fundamental rights and any such confession statement under Section 67 of the NDPS Act would not be admissible in evidence to convict the accused. Therefore, no evidence has been let in by the prosecution to prove the conspiracy allegedly hatched by A2 & A3 with other



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17.In the light of the above discussion, the judgment of acquittal against A1 for offence under Sections 8(c) r/w 28 and 8(c) r/w 29 of NDPS Act and against A2 & A3 for offence under Sections 8(c) r/w 21(c) and 8(c) r/w 28 and 8(c) r/w 29 of NDPS Act, dated 26.07.2013 in C.C.No.44 of 2006 passed by the learned Special Judge, I Additional Special Court under NDPS Act, Chennai, is confirmed. ***Accordingly, Crl.A.No.594 of 2013 stands dismissed.***

22.12.2022

Speaking Order/Non Speaking Order

Index : Yes/No

Internet : Yes/No

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To

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

2.The Public Prosecutor,
High Court, Madras.



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M.NIRMAL KUMAR, J.

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