

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.10.2021

PRONOUNCED ON : 11.01.2022

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

CRL.A.NO.530 OF 2020

Keditwaestse Lizzie Molefe ...Appellant / Sole Accused

Vs.

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

...Respondent / Complainant

The Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure seeking to call for the records pertaining to the file of the learned Principal Special Judge, Principal Special Court under EC & NDPS Act, Chennai - 104, in C.C.No.27 of 2016 and set aside its judgment dated 06.01.2020.

For Appellant : Mr.P.G.Perumal Pandian
Legal Aid Counsel

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

JUDGMENT

This criminal appeal has been filed against the judgment of conviction passed by the learned Principal Special Judge, Principal Special Court under EC & NDPS Act, Chennai - 104, in C.C.No.27 of 2016 dated 06.01.2020.

2. The respondent police registered a case against the appellant for the offence punishable under Sections 8(c) r/w 29, 8(c) r/w 23 & 8(c) r/w 21(c) 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.27 of 2016 and after completing formalities, since found prima facie case against the appellant, framed charges for the offence under Sections 8(c) r/w 29, 8(c) r/w 23 & 8(c) r/w 21(c) of NDPS Act, 1985.

3. Before the trial Court, in order to prove the case of the prosecution, as many as 6 witnesses were examined as P.W.1 to P.W.6, 47 documents were marked as Ex.P1 to Ex.P47, besides 5 material objects were exhibited as M.O.1 to M.O.5. After completing examination of prosecution witnesses, incriminating circumstances culled out from the evidence of prosecution witnesses were put before the accused by questioning under Section 313 Cr.P.C, she 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 the appellant guilty for the offence punishable under Section 8(c) r/w Section 21(c) & Section 23(c) of NDPS Act, 1985 and hence convicted and sentenced the appellant to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- for each of the offences, in default, to undergo rigorous imprisonment for a further period of six months each.

5. Aggrieved against the judgment of conviction, the appellant has preferred the present criminal appeal before this Court.

6. Case of the prosecution is that when Tmt.Parimala, Intelligence Officer, who was examined as P.W.1, was on duty in NCB, Chennai, on 13.11.2015 at about 6.00 p.m., received information through office telephone that Keditlwaetse Lizzie Molefe of African had swallowed 800 grams of Cocaine in 80 capsules, arriving at Chennai from Abudhabi through Etihad Airlines on 14.11.2015 at 3.40 a.m. P.W.1, soon after receiving the information, reduced the same into writing and submitted to the Superintendent, the immediate superior, who was examined as P.W.3 and as per the direction, the officers went to the Airport and approached Baisil Jose and Vinit Mathew George, Officers who were working in Etihad Airlines Enterprises introduced themselves and revealed the information and at around 4.15 a.m. approached Lizzie Molefe through the passport and on enquiry, she admitted that she swallowed 800 grams of Cocaine in 80 capsules.

6.1 Thereafter, Section 50 was explained to the appellant, the right of appellant to be searched before the Magistrate or a Gazatted Officer, but, the appellant declined to exercise her rights and she complained pain in the stomach and requested for medical aid since she was carrying many capsules containing cocaine and her request was marked as Ex.P.2. P.W.1 prepared Mahazar on the spot and same was given to the accused and the appellant/accused was taken to Royapettah Government Hospital, where X-Ray and CT Scan was taken, in which it was found 85

small tables and one big capsule containing white colour powder. On test, the recovered white colour powder answered positive for cocaine, which totally weighed 990 grams and two samples weighed about 5 grams each and the seized contraband was marked as P1 to P3.

6.2 On 16.11.2015, the appellant/accused was discharged from the Hospital and after preparing Mahazar and recording confession statement of the accused, the appellant/accused was arrested through Ex.P16 copy of the Arrest Memo. The arrest of the appellant was duly informed to her father through Ex.P17, Copy of intimation letter of arrest of the appellant. Thereafter the case was taken on file in C.C.No.27 of 2016, which was ended in conviction.

7. The learned counsel appearing for the appellant/accused would submit that there are violations of mandatory provisions under Sections 42, 50 & 57 of NDPS Act. 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 appellant by the NCB officials and therefore, conviction rendered by the trial Court is liable to be set aside.

7.1 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 appellant was not properly informed about the 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 his relative and thereby prosecution has failed to follow the guidelines of the Hon'ble Supreme Court.

7.1 Even though, the place of occurrence is a busy place as admitted by P.W.1, the Seizure Officer, prosecution has failed to examine any independent witness. The Special Court has failed to consider all the above facts, which are fatal to the case of the prosecution and convicted the appellant. Hence the judgment of conviction and sentence passed by the trial Court is liable to set aside and the appellant/accused is entitled for acquittal.

8. 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.3 and proceeded to the place of occurrence. She identified the accused and on enquiry, the appellant/accused voluntarily informed that she swallowed 80 capsules containing cocaine and complained stomach pain and requests medical aid. Her request was marked as Ex.P2, in which she has clearly narrated the compliance of Section 50 of NDPS Act. She was admitted in the Roayapettah Government Hospital, where X-Ray and CT Scan were taken and subsequently 80 capsules were removed and the same are marked as P1 to P3. The Chemical Examiner, who had examined as P.W.2, had given a report Ex.P26, which reveals that the contraband seized from the accused is cocaine, which is prohibited and comes under Narcotic Drug and Psychotropic Substances.

8.1 Based upon the seizure and the statements, the appellant/accused was arrested through Ex.P16 Arrest Memo and the same was duly informed to her parents over telephone and through Ex.P17. Therefore, all the mandatory provision of the NDPS Act have been scrupulously followed by the prosecution. had categorically deposed and they have also spoken about the compliance of the mandatory provisions of the NDPS Act. In this case, conviction has not been recorded solely based on the confession statement recorded under Section 67 of the NDPS Act, but, there are other materials available to prove the guilt of the appellant/accused. P.W.4, the Airport Operations Officer, Etihad Airways, has clearly stated that P.W.1 approached him and sought assistance to identify the appellant and after identification, on enquiry, the appellant voluntarily informed that she swallowed 80 capsules and need medical aid immediately and she was taken to the Hospital. Medical records also clearly show that the 80 capsules were removed from the stomach of the accused, which are tested positive for cocaine. P.W.2, the Chemical Examiner has also clearly stated that the samples received for test are tested positive for presence of cocaine and his report was marked as Ex.P26. Therefore, there are other materials to prove that the appellant concealed the capsules, which contain cocaine and she was caught hold by P.W.1. Hence trial Court had rightly appreciated the evidence of prosecution side witnesses and convicted the appellant, which does not warrants any interference of this Court.

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

10. 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.

11. In order to substantiate the charges, on the side of the prosecution, 6 witnesses were examined, 47 documents were marked and 5 material objects were exhibited. Out of six witnesses, P.W.1 is the Intelligence Officer, NCB, who received the information on 13.11.2015 and after completing formalities informed the same to her immediate superior P.W.3 and proceed and approached P.W.4, who deposed about the identification of the appellant and seizure of contraband. P.W.4 clearly deposed that on enquiry, the appellant had voluntarily admitted the possession of contraband and complained stomach pain, since she swallowed large quantity of capsules, which contains cocaine, and requested for medical aid. Ex.P2 is the request of the appellant/accused, which clearly proves the compliance of Section 50 of NDPS Act.

12. Subsequently, P.W.5, who was the Special Sub Inspector of Police, Royapettah Hospital Out Post, has clearly deposed that when he was on duty, the accused was brought by P.W.1 and he spoken about the removal of contraband from the stomach of the accused, which corroborated with the evidence of P.W.1.

13. P.W.2, the Chemical Examiner, has spoken about the samples received, which subsequently, tested positive for presence of cocaine and his report was also marked as Ex.P26.

14. It is seen that the main contention raised by the learned counsel for the appellant is that prosecution had violated the mandatory provisions as contemplated under the NDPS Act and in this case, conviction of the appellant was solely based on the statement recorded under Section 67 of NDPS Act, which, as per the decisions of the Hon'ble High Court is not admissible in evidence.

15. On a perusal of the records, it reveals that the appellant was duly informed about her right 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 her either before the Magistrate or before the Gazetted Officer and instead the Officer himself could make personal search. The appellant further voluntarily told that she was having stomach pain, since she swallowed a large number of capsules containing cocaine and she asked for medical aid. Ex.P2 is the request of the appellant, which was written in her own handwriting. Therefore, apart from the confession statement

recorded under Section 67 of the NDPS Act, there are enough materials available to hold the appellant accused guilty for the offence under the NDPS Act. From the evidence of P.Ws.1, 2 & 5 and Exs.P2, P3, P5, P16, P17, P26 and the material objects , the seized contraband, it is clear that prosecution has proved the compliance of the mandatory provisions of under the NDPS Act and guilty of the appellant/accused.

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, 2, 4 & 5 and Exs.P2, P3, P5, P16 & P17, P26, prosecution has proved its case beyond all reasonable doubt. Therefore, the trial Court gone into all these aspects and found the appellant/accused guilty. From the documentary evidences, this Court, as a first appellate Court, after re-appreciating entire materials, found the appellant guilty of offence under Section 8(c) r/w Section 21(c) & Section 23(c) of NDPS Act, 1985.

17. In the result, the criminal appeal stands dismissed, judgment of conviction and sentence by the learned Principal Special Judge, Principal Special Court under EC & NDPS Act, Chennai - 104, in C.C.No.27 of 2016 dated 06.01.2020 is hereby confirmed. Trial Court is directed to secure the appellant to undergo remaining period of imprisonment, if any.

18. The learned Legal Aid Counsel, who argued the appeal on behalf of the appellant is entitled for his remuneration as per rules.

Sd/-
Assistant Registrar(CS-II)

// True Copy //

Sub Assistant Registrar

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To

- 1.The Principal Special Judge,
Principal Special Court under EC & NDPS Act,
Chennai - 104.
- 2.The Intelligence Officer,
Narcotic Control Buerau
Chennai Zonal Unit,
Chennai - 77.

3.The Special Public Prosecutor,
High Court of Madras
(NCB Cases)

Copy To

1.The Secretary,
High Court Legal Services Committee,
Chennai - 104.

2.The Superintendent of Prison,
Special Prison for Women,
Puzhal, Chennai.

3.The Section Officer,
Criminal Section,
High Court of Madras.

Crl.A.No.530 of 2020

NMI(CO
RVM(27/01/2022)