



Crl A No.105 of 2015

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**DATED: 05.04.2023**

**CORAM:**

**THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH**

**Criminal Appeal No.105 of 2015**

Intelligence Officer,  
Narcotic Control Bureau,  
Chennai Zonal Unit,  
Chennai - 90.

.. Appellant / Complainant

**Vs.**

1.M.Syed Ibrahim

2.Jabeer Khan & Jaffer

3.Santhus Khan

.. Respondent / Accused

Prayer :- Criminal Appeal filed under section 372 (2) of Code of Criminal Procedure, to set aside the order of acquittal of A1 u/s.8(c), 8(c), 8(c) r/w.27A, 28 & 29 of N.D.P.S. Act and A2 u/s.8(c) r/w.28 & 29 and acquitted A3 u/s.8(c) r/w. 21 ©, 28 & 29 of N.D.P.S. Act and to enhance the sentence of imprisonment and enhance the fine amount imposed on the Accused A1 & A2 u/s.21(b) of N.D.P.S.



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Act and to set aside the order of acquittal of A3 u/s.21(c), 28 & 29  
of N.D.P.S. Act.

For Appellant : Mr.N.P.Kumar  
For Respondent : Mr.J.Asokan (for R1 & R2)  
Mr.A.Thiyagarajan (for R3)  
Legal aid counsel

### JUDGMENT

This Criminal appeal has been filed by the Narcotic Control Bureau (NCB) against the judgement and order passed by the Special Judge, I Additional Special Court under NDPS Act, Chennai in CC No.176 of 2005 dated 05.11.2013, seeking for enhancement of sentence against A1 and A2 and for setting aside the acquittal given in favour of A3.

2. The case of the prosecution is that on a specific information received on 12.04.2005, the officers belonging to NCB, reached the Central Railway Station on 13.04.2005 at about 00.15 hours. They proceeded to platform No.6 and waited there till Ahilyanagri express reached the platform at around 1.20 a.m. A1 and A2 were traveling in S2 and S3 coaches respectively. The officers



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approached them and introduced themselves and conveyed the information that was received by them and explained to them the right available to them under Section 50 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter called as the “NDPS Act”) to conduct the search in the presence of the Gazetted Officer or a Magistrate. They did not want to avail the said benefit and accordingly, a carton box was recovered from A2, which was found to contain heroin, a Narcotic Drug. A1 is said to have admitted the possession of heroin.

3. The NCB proceeded to take a small quantity of the heroin and it was tested with their test kit and it was informed that the contraband that was seized was heroin. According to the prosecution, the total weight of the heroine was 510 grams.

4. Apart from the seizure of the Narcotic Drug, a sum of Rs.13,300/- was recovered from A1 besides 700 US Dollars and 20 Maldivian Rupiya. A sum of Rs.900/- was also recovered from A2. All



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these were recovered under seizure mahazar.

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5. The summons were served to A1 and A2 under Section 67 of the NDPS Act and both the accused persons gave voluntary statements. The samples that were collected were also sent to the Court to be forwarded to the Forensic Science Lab for getting the chemical examination report. A1 and A2 were also arrested and remanded to judicial custody.

6. A complaint was filed on 06.10.2005 and the same was taken cognizance by the Court below under Section 36 (A) (d) of the NDPS Act. On the appearance of the accused persons, the copies were served on them under Section 208 of Cr.PC. The Court below found that there were sufficient materials to frame charges against accused persons. Accordingly, insofar as A1 is concerned, charges under Section 8(c) r/w 29, 21C, 27A and 28 of the NDPS Act were framed. Insofar as A2 is concerned, the charges were framed under Section 8(c) r/w. Section 29, 21(c) and 28 of the NDPS Act. In the



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meantime, based on the confession of A1 and A2, A3 was also roped in as an accused and insofar as A3 is concerned, charges were framed for offence under Section 8(C) r/w Section 29, 21(c) and 28 of the NDPS Act. When these charges were put to the accused persons, they denied the same and pleaded not guilty.

7. The prosecution examined PW1 to PW8 and marked P1 to P43 and identified and marked MO1 to MO6. The incriminating evidence that was collected during the course of trial was put to the accused persons, when they were questioned under Section 313 (1) (b) of Cr.PC and they denied the same as false.

8. The Trial Court on considering the facts and circumstances of the case and on appreciation of the oral and documentary evidence came to a conclusion that the prosecution has proved the case beyond reasonable doubts as against A1 and A2 for offence under Section 8(c) r/w Section 21(b) of NDPS Act and accordingly, convicted and sentenced them to undergo two years



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rigorous imprisonment and to pay a fine of Rs.7500/- and in default to undergo one month rigorous imprisonment. Insofar as other charges are concerned, A1 and A2 were acquitted. Insofar as A3 is concerned, he was acquitted from all charges. Aggrieved by the same, the Department has filed this Criminal Appeal.

9. Heard Mr.N.P.Kumar, learned counsel for the petitioner and Mr.J.Asokan, learned counsel for respondents 1 and 2 and Mr.A.Thiyagarajan, learned Legal aid counsel for 3<sup>rd</sup> respondent.

10. This Court has carefully considered the submissions made on either side and also perused the materials available on record.

11. The case of the prosecution is that A1 and A2 were apprehended and they found in possession of 510 grams of heroin, which was recovered from them. The complaint was filed as against five accused persons and the case was split up and it was proceeded as against the respondents, who were arrayed as A1 to A3. The case



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was split up insofar as the other two accused persons are concerned.

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12. The Court below on appreciation of the evidence of PW2 came to a categorical conclusion that A1 and A2 had carried the contraband and it was seized from them at the time of their arrest. Hence, it was found that they were in possession of Narcotic Drugs.

13. PW1 is the chemical analyst and he has filed a report which was marked as Ex.P4. The Court below was not satisfied with the said report and hence, the contraband was sent for analysis by the Central Laboratory and Ex.P45 report was filed before the Court. It was found that the contraband seized was not pure heroin. Accordingly, the Court below rejected the report of PW1. Ultimately, the Court below acted upon the report of the Central Forensic Science Laboratory wherein it was found that the sample contained Caffeine, Acetaminophen and Morphine (3.94% W/W).

14. The Court below analyzed the evidence of PW3, who



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recorded the statement of the accused persons under Section 67 of the NDPS Act on the directions given by PW5. The Court below on going through the statements that were given by the accused persons found that the statements of A1 and A2 by themselves are not sufficient to prove their guilt for offence under Section 8 (c) r/w Section 29, 27(A) and 28 of the NDPS Act. Similarly, the Court below found that the statements recorded under Section 67 of the NDPS Act was not sufficient to sustain any of the charges that were framed against A3, based on confession. Accordingly, A3 was acquitted from all charges and A1 and A2 were convicted only for the offence under Section 8(c) r/w 21(b) of the NDPS Act.

15. In the considered view of this Court, the Trial Court has appreciated the evidence and has come to a conclusion. The view that has been taken by the Trial Court is a possible view and it cannot be held to be perverse. This Court sitting in Appeal, cannot interfere where it is found that the view taken by the Trial Court is a possible view. The law on this issue is now too well settled.



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16. Insofar as A3 is concerned, the entire charges were framed against him only based on the statement that was recorded under Section 67 of the NDPS Act. In other words, he has been roped in the case only based on the confession made before the concerned officer belonging to NCB. The Apex Court in ***[Tofan Singh Vs. State of Tamil Nadu]*** reported in 2021 4 SCC 1, framed the following questions for consideration.

*"1. Whether an officer "empowered under Section 42 of the NDPS Act" and/or "the officer empowered under Section 53 of the NDPS Act" are "police officers" and therefore statements recorded by such officers would be hit by Section 25 of the Evidence Act; and*

*2. What is the extent, nature, purpose and scope of the power conferred under Section 67 of the NDPS Act available to and exercisable by an officer under Section 42 thereof, and whether power under Section 67 is a power to record confession capable of being used as substantive evidence to convict an accused?"*



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17. The above questions were answered by the Apex Court in the following manner :-

*158. We answer the reference by stating:*

*158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are "police officers" within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to the would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.*

*158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.*

18. It is clear from the above that a statement recorded under Section 67 of the NDPS Act cannot be used as a confession statement and it will be barred under Section 25 of the Evidence Act and it cannot be made as the sole ground to convict an accused under the NDPS Act. Insofar as the A3 is concerned, the above dictum will squarely apply and the acquittal of A3 from all charges does not require the interference of this Court.



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19. Insofar as A1 and A2 are concerned, it has been established beyond reasonable doubts that they were in possession of the Narcotic Drug. The Trial Court has found that A1 and A2 were in possession of 20 grams of the contraband morphine. This is an in between quantity which is punishable under Section 8(c) r/w 21 (b) of the NDPS Act. The said provision provides for a punishment of Rigorous Imprisonment for a term which may extend to 10 years and also fine which may extend to Rs.1,00,000/-.

20. The Trial Court had sentenced A1 and A2 to two years Rigorous Imprisonment and to pay a fine of Rs.7500/- and in default to undergo one month Rigorous Imprisonment. Considering the nature of the contraband involved, this Court finds that the punishment is at a lower side. In view of the same, this Court is inclined to enhance the sentence insofar as A1 and A2 are concerned for offense under Section 8(c) r/w Section 21(b) of the NDPS Act. It was brought to the notice of this Court that A1 and A2 were arrested



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and remanded to Judicial Custody on 13.04.2005. They were ultimately released on bail only on 08.11.2010 and by then, they had already undergone imprisonment for a period of five years and four months. This fact can also be taken into consideration for the purpose of enhancing the period of imprisonment. Accordingly, the period of imprisonment is enhanced to five years rigorous imprisonment and to pay a fine amount of Rs.25,000/- and in default to undergo four months Rigorous imprisonment. Since A1 and A2 have already undergone this sentence including the default sentence, the same is taken into consideration and recorded.

21. In the light of the above discussion, this Criminal Appeal is allowed in part to the extent indicated herein above. This Court places its appreciation to Mr.A.Thiyagarajan, who was requested by this Court to be the legal aid counsel to appear on behalf of A3 and he assisted the Court effectively.

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Internet : Yes/No

Index : Yes / No

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N.ANAND VENKATESH.,J

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The Special Judge, I Additional Special Court under NDPS Act

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