



Crl.A.(MD).No.308 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Dated :21.12.2023

CORAM

THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

Crl.A.(MD).No.308 of 2021
and
Crl.M.P.(MD).No.8478 of 2022

Ronald Sateesdh @ Anand

... Petitioner

Vs.

State Rep by
The Intelligence Officer
Narcotics Control Bureau,
Regional Intelligence Unit,
Trivandrum.
(NCB, O.R.No.1/08/NCB/RIUY/TVM)

... Respondent

PRAYER: Criminal Appeal filed under Section 374 of Cr.P.C., to call for the records in C.C.No.128 of 2010, on the file of the learned II Additional Special Court for NDPS Act Cases, Madurai and set aside the Judgment dated 08.07.2021.

For Appellant :Mr.M.Jegadhees Pandian

For Respondent :Mr.Arul Vadivel @ Sekar Senior Counsel for
:Special Public Prosecutor for NCB



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JUDGMENT

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This Criminal Appeal has been filed against the judgment of conviction and sentence imposed on the appellant for the alleged offences punishable under Sections 8(c) r/w 21(c) of the NDPS Act to undergo rigorous imprisonment of 10 years and to pay a fine of Rs.1,00,000/- in default to undergo rigorous imprisonment for one year vide Judgment in C.C.No.128 of 2010 dated 08.07.2021 by the learned II Additional Special Judge for NDPS Act Cases, Madurai.

2. Brief Facts of the Case:

On 06.08.2008, one Mr.Gunabalan, Superintendent, NCB, South Zonal Unit, Chennai had received a secret information that one Umar Gul, a Srilankan National is indulging in Drug Trafficking between India and Srilanka with the help of one Dayaram resident of Mandasur, Madhya Pradesh and he carried 1 Kg of Heroin and he travelled from Chennai to Kanyakumari by bus. Based on that, the respondent NCB team, after following the procedure prescribed in the NDPS Act, nabbed the said Dayaram at Kanyakumari bus stand at 18.45 hours along with 1 Kg of Heroin. The said Dayaram's mobile phone was seized and his statement under Section 67 of the NDPS Act, was recorded and he disclosed that



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he purchased the contraband from A2 and A3. On the basis of his confession, the respondent found out the mobile number of the A2 and A3 and collected the CDR report under Ex.P24 and Ex.P29 respectively and filed a complaint after completing the investigation by showing A2 and A3 as absconding accused. The learned trial Judge took the case on file in C.C.No.196 of 2009. In view of the abscondence of A2 and A3, the case was split up as Spl.S.C.No.228 of 2010 against accused Nos.2 and 3 namely the appellant and the third accused. The learned Special Judge conducted the trial against A1 and convicted him in C.C.No.196 of 2009. Thereafter, the appellant was secured and the learned Special Judge conducted the trial against this appellant in Spl.C.C.No.128 of 2010. The learned trial Judge framed the charge under Section 8(c) r/w 21(c) of the NDPS Act and also Section 28, 29 of the NDPS Act.

3. To prove the case against the appellant, the prosecution examined only one witness namely P.W.1 and exhibited Ex.P1 to Ex.P44 and marked M.O.1 to M.O.13. The learned trial Judge convicted the appellant under Section 8(c) r/w 21(c) and acquitted Sections 28 and 29 of the NDPS Act and imposed the sentence as stated above by the impugned judgment dated 08.07.2021. Challenging the same, the appellant filed this appeal before this



4. The learned counsel for the appellant submitted that the learned trial Judge convicted the appellant without any concrete evidence against the appellant to convict him under Section 8(c) r/w 21(c) of the NDPS Act. The conviction under Section 8(c) r/w 21(c) is not maintainable on the ground that the contraband was never recovered from the appellant. According to the prosecution the appellant's phone number is 9047216924. A1's Phone numbers are 9754850446 and 9745451268. The appellant made frequent calls to A1 at the material point of time. Therefore, his involvement in the case is clearly proved. The learned trial Judge also accepted the said case of the prosecution. But the learned trial Judge failed to consider that the prosecution never proved the ownership of the A2 over the phone No.9047216924. Without any material to prove the fact that the above phone number belonged to the appellant, he was convicted only on the basis of the call details marked under Ex.P30. The learned trial Judge erroneously convicted the appellant. The learned trial Judge heavily relied on the statement recorded under Section 67 of the NDPS Act by the respondent to convict the appellant. The said approach is not legally correct in view of the law laid down by the Hon'ble Supreme Court in the case of ***Thofan***



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Singh vs. State of Tamil Nadu reported in **2021 (4) SCC 1**. The learned counsel for the appellant further submitted that the said call details is not admissible in view of the absence of the 65 B certificate. The learned counsel for the appellant further submitted that the confession statement of A1 under Ex.P.33, is not admissible against the appellant in the present trial as per the law laid down by the Hon'ble Supreme Court reported in 2004 (11) SCC 316, 2020 (5) SCC 118. Therefore, the learned counsel for the appellant seeks acquittal.

5. Per contra, the learned Special Public Prosecutor NCB submitted that the appellant made 9 calls to A1 on 05.09.2008, the same was clearly proved through Ex.P.30. There was no explanation on the side of the appellant during the course of the 313 Cr.P.C., proceedings. The learned Special Public Prosecutor submitted that when A1 clearly stated in his statement recorded under Section 67 of the NDPS Act, that he purchased the contraband from A2 and A3, the conviction on the basis of the said statement is in accordance with law. Therefore on the basis of the said material circumstances, the learned trial Judge correctly convicted the appellant. He relied the Judgment of the Hon'ble Supreme Court reported in **2015 (6) SCC 222, 2020 SCC online 826**, and also he relied the legal maxim “*Quit Facit Per Alium Facit Per Se*”.



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6. This Court considered the rival submission made by the learned counsel appearing on either side and perused the materials available on record and the impugned judgment and also the precedents relied upon by them.

7. In this case, now the only question that arise is whether the conviction and sentence imposed against the appellant can be sustained on the basis of the material adduced by the prosecution, to prove the charge under Section 8 (c) r/w 21(c) of the NDPS Act?

8. The learned trial Judge framed three charges against the appellant. The first charge is under Section 29(1) of the NDPS Act, that the appellant, A1 and other absconding accused conspired together to illegally transport 1 Kg of Heroin in violation of the provision of the NDPS Act. Further, he framed the third charge under Section 28 of the NDPS Act, that the appellant and other absconding accused financed the first accused to illegally transport the contraband to Srilanka. The learned trial Judge also framed the charge against the appellant under Sections 8(c) r/w 21(c) of the NDPS act and r/w 34 of IPC. The learned trial Judge acquitted the appellant under Sections 28 and 29 of the NDPS Act. But the learned trial Judge convicted the appellant under sections



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8(c) and 21(c) of the NDPS Act. To convict the appellant under the said section he relied on the confession statement of A1 marked under Ex.P.33 from whom the contraband was recovered.

9. It is well settled principle in the case of the joint trial, confession of the co-accused is admissible under Section 30 of the Indian Evidence Act. If there is no joint trial, the confession of the co-accused is not at all admissible in evidence and therefore the same cannot be taken as evidence against the other accused and the same was fortified by the Hon'ble Supreme Court judgment reported in 2020 (5) SCC 118 in the case of ***Raja Alias Ayyappan Vs. State of Tamil Nadu***, 2004 (11) SCC 612 in the case of ***Hardeep Singh Sohal and others Vs. State of Punjab through CBI*** and 2018 (8) SCC 271 in the case of ***Surinder Kumar Khanna Vs. Intelligence Officer Directorate of Revenue Intelligence***.

10. Even the said confession of the co-accused is not admissible to convict the appellant under the charge of conspiracy. But the learned trial Judge acquitted the accused under the said charge. Therefore, the said statement of the co-accused(A1) recorded under Section 67 of the NDPS Act, is not a material



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evidence to convict the appellant under Section 8(c) r/w 21(c) of the NDPS Act.

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It is relevant to extract the judgment of the Honble Supreme Court:

Dipakbhai Jagdishchandra Patel v. State of Gujarat, (2019) 16 SCC 547

54. Proceeding on the basis that it is a confession by a co-accused and still proceeding further that there is a joint trial of the accused and that they are accused of the same offences (ignoring the fact that other accused are absconding and the appellant appears to be proceeded against on his own) and having found that there is no recovery from the residence of the appellant of the counterfeit notes and that there is no other material on the basis of which even a strong suspicion could be aroused, we would find that the mandate of the law requires us to free the appellant from being proceeded against. Accordingly, we allow the appeal and the petition filed under Section 482 CrPC. The order impugned passed by the Sessions Judge framing the charge against the appellant will stand set aside and the appellant will stand discharged.

11. The learned trial Judge relied the CDR report under Ex.P30 to connect the accused with A1. According to the prosecution the appellant's phone number is 9047216924. A1's Phone numbers are 9754850446 and 9745451268. Through the said phone number, the appellant made frequent calls to A1. The prosecution



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never adduced any evidence to prove that the phone No.9047216924 belonged to the appellant. Further, they never recovered phone from the appellant. Apart from that the said CDR report was filed without certificate under Section 65(b). Nodal officer was also not examined. Even the said telephonic conversation is only relating to the proof of the conspiracy. But the learned trial Judge acquitted the accused under the conspiracy charge.

12. The learned trial Judge relied the statement recorded under Section 67 to convict the appellant under Section 8 (c) r/w 21 (c) of the NDPS Act. The said document is inadmissible as per the law laid down by the Hon'ble Supreme Court in 2021 (4) SCC 1, the relevant portion of the judgment is as follows:

Tofan Singh v. State of T.N., (2021) 4 SCC 1

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 them 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



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statement in the trial of an offence under the NDPS Act.

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13. As per Section 8(c) r/w 21(c) of the NDPS Act, the possession of the contraband is to be established by the prosecution beyond reasonable doubt. In this case, the appellant was not present at the scene of occurrence and also no recovery was made from him. In the said circumstances, presumption under Section 54 and the 35 of the NDPS Act does not arise. Therefore, the learned trial Judge erroneously convicted the appellant under Section 8(c) r/w 21(c) of the NDPS Act, without any legal evidence.

14. In result, the judgment passed by the learned trial Judge in C.C.No.128 of 2010 dated 08.07.2021 is hereby set aside. Accordingly, this Criminal Appeal is allowed. Hence, the trial Court is hereby directed to release the appellant forthwith, unless his presence is required in any other case. Consequently, connected Criminal Miscellaneous Petition is closed.

21.12.2023

NCC : Yes/No
Index : Yes/No
Internet : Yes/No
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To

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- 1.The II Additional Special Court for NDPS Act Cases,
Madurai
2. The Superintendent Prison,
Central Prison, Madurai.



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K.K.RAMAKRISHNAN, J.

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