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Crl.A.No.786 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 17.10.2024

Pronounced on : 06.01.2025

CORAM : JUSTICE N.SESHASAYEE

Crl.A.No.786 of 2018

Izuoba Augustine Chibuike

.... Appellant / Sole Accused

Vs

Intelligence Officer
Narcotic Control Bureau (NCB)
Chennai Zonal Unit
Chennai.

.... Respondent / Complainant

Prayer : Criminal Appeal filed under Section 374(2) Cr.P.C., praying to set aside the judgment dated 01.11.2018 made in C.C.No.62/2015 in R.R.No.6/2015 in NCBF.No.48/1/4/2015 passed by the learned I Additional Special Court for exclusive trial of cases under NDPS Act, Chennai and set the accused at liberty.

For Appellant : Mr.R.C.Paul Kanagaraj

For Respondent : Mr.N.P.Kumar
Special Public Prosecutor [NCB cases]



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JUDGMENT

1. This appeal is preferred by the sole accused in C.C. No. 62 of 2015 on the file of the I Additional Special Court for Exclusive Trial of Cases under NDPS Act challenging his conviction and sentence for offences under Section 8(c) r/w. 21(c) and 28 of the NDPS Act. He was sentenced to undergo 10 years rigorous imprisonment and to pay a fine of Rs. 1,00,000/-for each count of conviction and in default to undergo 1 year rigorous imprisonment for each of the offences. And, both sentences were directed to run concurrently.

2.The case of the prosecution runs as below:

- a) On 20.05.2015, at about 5 p.m. in the evening, Subash Chandra Sinha, Intelligence Officer, Narcotics Control Bureau (IO/PW1) received an information (Ex.P1) that one Izuoba Augustine Chibuike (Augustine/accused), a Nigerian national, was trafficking cocaine between Bangalore and Chennai; that he was peddling the same among users in Chennai city; that he was selling cocaine in small packets of 1 gram for Rs. 3,500/- to Rs. 4,000/- per packet in different places in Chennai; and that he was staying at 1st floor of 23/84, 5th



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Cross Street, Ramakrishna Nagar, Ernavur, Chennai-57.

- b) On the same day, a search warrant (Ex. P2) was issued and the I.O. and his team reached the spot at around 9:45 p.m., conducted a search in the first floor of his residence in the presence of P.W.4 and P.W.5, two independent witnesses for the event.
- c) Augustine admitted that he was in possession of cocaine and he brought out a red and black colour Delsey bag from his room. From this bag was taken out a transparent packet containing an off white colour powder, the powder was tested by the I.O. and it proved positive for cocaine.
- d) The powder weighed 190 g in net. From it, two samples of 5 g each were drawn and placed in two separate polythene covers. And, after observing the necessary packaging and sealing procedure, the samples were marked as S1 and S2. The remaining 180 g was subject to the same procedure and was marked as P1.
- e) Apart from cocaine, the following materials were seized from the room and bag of the accused:
- A Nigerian passport issued in favour of the accused (Ex. P6)
 - International vaccination certificate of Prophylaxis issued in



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favour of the accused (Ex. P7)

- Jahan Travels Boarding Pass/Cash Receipt dated 18.05.2015 (Ex. P8)
- Three plastic adhesive tapes, two of black colour and one of red colour
- Indian Currency of Rs.1,50,000/- with denomination Rs.500x300
- One electronic pocket scale
- Red and black colour Delsey bag
- The plastic packet in which the off white powdery substance was found

f) The test memo (Ex.P4) and seizure mahazar (Ex. P3) were immediately prepared in the same spot and the same was signed by the I.O, the accused, and the two independent witnesses (PW4 and PW5).

Further, they also signed on all the seized materials.

g) On 21.05.2015, the accused was issued with summons (Ex. P5) to appear before the NCB office, Chennai. On the said date, the accused gave his statement (Ex. P9) under Section 67 of the NDPS Act



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wherein he admitted that he used to buy the drug from Marian Brighton, a Nigerian lady from Bangalore and used to sell the drugs so purchased in Chennai for Rs. 3,000/- per gram, and that he purchased the drug seized by the I.O. from the same lady on 19.05.2020. He also handed over the phone with which he used to contact her (MO. III).

- h) On the same day, at 12 p.m., he was taken to the Judicial Magistrate, Ambattur who remanded him to judicial custody and he was lodged in Central Prison, Puzhal, Chennai on the same day.
- i) On 22.05.2015, the test memo (Ex. P4) along with the samples of the seized contrabands in S1 were sent to the Joint Director, Customs House Laboratory, Chennai for qualitative analysis.
- j) In June 2015, PW6 replaced PW1 as the I.O.
- k) On 30.06.2015, the Assistant Chemical Examiner of Custom House Laboratory, Chennai (PW3) vide Lab Report No. 780 (Ex. P22) has confirmed the presence of Cocaine Hydrochloride, a narcotic drug covered under NDPS Act, in the seized contrabrand and the test report (Ex. P27) was issued by the Government Scientific Expert.
- l) After the completion of the investigation, the IO, NCB, Chennai had



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filed the complaint before the learned Principal Special Judge, constituted for the trial of cases under EC and NDPS Act, Chennai for taking cognizance and this case was taken cognizance by him and made over to the Court of I Additional Special Judge for Exclusive Trial of Cases under NDPS Act for trial. After hearing both sides, the trial court framed charges under Section 8(c) r/w. 21(c), 25, 28 and 29 of the NDPS Act against the accused.

3. During the trial, the prosecution examined PW1 to PW6 and marked Ex. P1 to Ex. P34 and MO. I to MO. V. The accused, on the other hand, neither examined any witnesses nor marked any document.

4. On appreciating the evidence before it, the trial court found the accused person guilty of the offences under Section 8(c) r/w. Sec. 21(c) and 28 of the NDPS Act and chose to acquit him of the charges under Section 8(c) r/w. Sec. 25 and 29. The line of reasoning of the trial court is that:

- a) The testimony of the Assistant Chemical Examiner of Custom House Laboratory (PW3) and the Lab Report No. 780 (Ex. P22) marked through her have confirmed the presence of Cocaine Hydrochloride, a



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narcotic drug covered under Section 2(v)(c) and (d) of the NDPS Act in the contrabands seized from the accused. The same falling within serial number 27 or 239 of the Notification Specifying Small Quantity and Commercial Quantity, it comes under the category of narcotic drug covered under the NDPS Act.

b) The PW1, PW4 and PW5, in their respective testimonies, have unambiguously and unanimously stated that the accused was in possession of 190 g of cocaine and as to how the concealment of the said contrabrand was revealed and made open to all by the accused himself. Further, Ex. P3 discloses that the accused on his volition admitted that he was in possession of cocaine and he brought out a red and black colour Delsey bag from his room which contained a transparent packet with off white colour powder, that was later verified to be cocaine. Further, the accused in his statement (Ex. P9) under Section 67 of the NDPS Act admitted that he was in possession of 190g of cocaine. Though a retraction petition had been filed by the accused, the same was filed belatedly and could have been possibly filed upon legal tutor. This shows that the accused was in conscious



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possession of the drug.

- c) Since the prosecution has established that the accused was in possession of 190 g of cocaine, it has established the offence under Section 21(c) of the NDPS Act.
- d) Though none of the purchasers of cocaine from the accused were examined, the Court can make a presumption under Section 106 of the Evidence Act that the accused possessed such large quantity of cocaine only for the purpose of sale especially when the defence has not tendered any evidence to show that the accused held license from the government for holding such commercial quantities of cocaine.

5. Arguing for the appellant, the learned counsel for the appellant submitted that:

- a) The prosecution suppressed the presence of one Osazemwnda Cynthia, an African lady, at the seizure spot. The non-disclosure of this vital aspect would render the very conviction of the accused disputable.
- b) PW4 suppressed the fact that the appellant was not his tenant and the tenancy stood in the name of one Kinsley.
- c) PW1, an officer without any communication skills in English, has



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deposed that he understood the explanation offered by the accused at the spot.

- d) Prosecution has failed to explain the difference between cocaine and cocaine hydrochloride. The cross-examination of PW3 reveals that she was not even aware of the chemical composition of cocaine, and her report is silent on the method used to arrive at the conclusion that the contabrand seized was cocaine hydrochloride. Therefore, her testimony and her report's credibility are disputable.
- e) Since the information in Ex. P1 was taken down in writing, a copy thereof must have been sent to the immediate superior of PW1 within 72 hours as per the mandate of Section 42(2) of the NDPS Act. However, this was not complied with and the trial Court has ignored this fact while rendering the judgment.
- f) The statement of the accused under Section 67 was obtained under threat and intimidation by the IO.

6. Per contra, the learned prosecutor submitted that it is not who the tenant of PW4 was that matters, but who all lived in the apartment at the time when the



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search was conducted on 20.05.2015. What is significant is that the accused was present and he possessed the narcotic substance in question. Secondly, even though there was an attempt to retract the confession recorded under Section 67 of the Act, what is not disputed is the seizure of cocaine made from accused. Here, the testimonies of the independent witnesses have not be discredited.

7. This Court carefully weighed the rival submissions and is impressed with the submissions of the learned prosecutor. If the submissions of the counsel for the appellant are carefully scanned for their merit, they essentially roam far distantly away from the fact in issue, namely whether the appellant was in possession of cocaine. As rightly argued by the prosecutor, when the fact in issue is whether the appellant was in possession of cocaine, who were with him in the apartment, or who actually was the tenant of the apartment are irrelevant facts. So far as the confession under Sec. 67 is concerned, even though it has been held inadmissible as per the ratio in ***Tofan Singh Vs State of Tamil Nadu*** [(2021) 4 SCC 1], the fact remains that the seizure made under Ex. P3 has been adequately established by PW4 and PW5 and their testimonies have not been discredited by the defence.



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8. In view of the same, this Court dismisses this appeal and confirms the judgment of the I Additional Special Court for Exclusive Trial of Cases under NDPS Act in C.C. 62 of 2015 dated 01.11.2018. However, so far as the default sentence is concerned, since it falls within the discretion of the Court, the Court is inclined to relieve the appellant of the same. Therefore, the default sentence attached to the non-payment of fine alone is dropped.

06.01.2025

Index : Yes / No

Speaking order / Non-speaking order

Neutral Citation : Yes / No

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To:

1. The I Additional Special Court for Exclusive Trial
of cases under NDPS Act, Chennai.

2. The Public Prosecutor
High Court, Madras.



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N.SESHASAYEE.J.,

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Pre-delivery Judgment in
Crl.A.No.768 of 2018

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